

EVIDENCE BY INTERPRETER be prepared!

Surprisingly little is written in textbooks about evidence given by persons who do not understand, or imperfectly understand, English.¹ With well over 100,000 migrants arriving each year in Australia to start a new life,² and one in eight Indigenous Australians for whom an Indigenous language is their primary household language,³ we should all be prepared to deal with evidence from those with limited facility in the English language.



Witnesses should be equipped with the skills and knowledge to:

- distinguish between translators and interpreters;
- select an appropriately skilled translator or interpreter;
- interview and elicit evidence in court with the assistance of an interpreter;
- recognise the boundaries of the legally recognised roles of an interpreter;
- insist on the use of appropriately skilled interpreters as an incident of the right to a fair trial;
- challenge as hearsay out-of-court statements if the interpreter strays outside the legally accepted role; and
- use a translator or interpreter as an expert witness to make admissible documents intelligible to the court.

TRANSLATORS VS INTERPRETERS

Translators possess different skills from interpreters, dealing in written text, and converting written documents from one language to another. Interpreters, on the other hand, deal with the spoken word, and facilitate the oral transfer of the meaning of the spoken word from one language into another language.⁴

To facilitate a non-English speaking witness to give evidence in court, you will need an interpreter, but if there are lots of documents involved in the case, you may require an interpreter who is also qualified as a translator.

Different languages have different rules of grammar, and some words and concepts do not have a ready equivalent. Translating and interpreting requires considerable skill and knowledge of both the original language and the target language. Translators and interpreters vary enormously in skill; interpreters perhaps more so than translators. Translators usually have the luxury of time to ensure accuracy and they also know that their work can readily be checked by another translator.

It is in the art of interpreter where the most danger lies. It is often difficult to instantly and accurately transfer the full meaning of everything said in one language into another language, usually without resources, such as dictionaries, which might be used when translating written documents.

Engaging an interpreter with less than appropriate skills can cause problems that have nothing to do with their integrity, but everything to do with their inadequate skill >>

or experience. For example, in a recent criminal case, an interpreter was found to be 'often' inaccurate when acting as interpreter during a police interview with an accused who spoke only Vietnamese.⁵ This inaccuracy extended to materially altering questions put by the police officer, as well as materially altering the answers given by the interviewee.

Judges tend not to make the technical distinction between translators and interpreters. They talk about interpreters 'translating'.⁶ Courts are not interested in an 'interpretation' of facts. The terms 'translating' and 'translation' are perhaps more suited to describe the role the courts recognise for interpreters and translators.

In reality, the degree of impermissible 'interpretation' in an interpreter's work will depend largely upon the skill of the interpreter, and the way in which the interpreter views their role.

NAATI ACCREDITATION

In Australia, the national accreditation body for translators and interpreters, is called the National Accreditation Authority for Translators and Interpreters Ltd (NAATI). 'Do you have NAATI accreditation?' and 'what accreditation do you have?' should be the first questions asked of any translator or interpreter.

Translators and interpreters are separately accredited by NAATI. There are translators who are not accredited to interpret, and interpreters who are not accredited to

translate. Others are accredited to both translate and interpret.

NAATI accreditation may also be one way. For example, a translator may be accredited to translate from English to Vietnamese, but not from Vietnamese to English. Translators will use a NAATI-issued stamp on documents translated by them. A close examination of the stamp will reveal (by its use of arrows) whether the translator is accredited to translate only one way, or two ways.

Four levels of NAATI accreditation reflect degrees of competence and experience. Beware: the fact that an interpreter is accredited by NAATI does not necessarily mean that s/he possesses sufficient skill and experience to interpret for legal purposes. Some interpreters, including those who accept engagements by criminal courts to act as court-appointed interpreters,⁷ still possess an accreditation formerly known as level 2, but known since 1995 as 'paraprofessional interpreter'. The paraprofessional level is below the competence level determined by NAATI to be the minimum required for professional interpreting.⁸

The minimum level of competence deemed by NAATI, to be suitable for professional interpreting or translating, is the accreditation formerly known as level 3, but now known simply as 'interpreter' (or 'professional interpreter') and 'translator' (or 'professional translator'). Higher skill levels are recognised with 'advanced translator/conference interpreter' (formerly level 4) and 'advanced translator

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(senior)/conference interpreter (senior) (formerly level 5).⁹

The nomenclature adopted since 1995 by NAATI has the potential to cause confusion. For example, it is possible for an interpreter accredited only to the paraprofessional standard to claim they are a NAATI-accredited interpreter – despite the fact that they are not accredited to the standard of ‘interpreter’.

When seeking an interpreter for court, it is therefore not sufficient merely to stipulate that the interpreter have NAATI accreditation. You will need to stipulate that they should be accredited to the first professional NAATI level, interpreter, formerly designated Level 3. Some jurisdictions have guidelines requiring the use of interpreters accredited by NAATI to this level.¹⁰

USING AN INTERPRETER TO SPEAK TO A WITNESS OR CLIENT

When a witness gives evidence through an interpreter, the role of the interpreter is merely facilitative. The interpreter is not an active party. It is therefore wrong to ask questions like ‘does he understand what I have been putting to him?’ To do so is to invite the interpreter to give an opinion based on the interpreter’s own understanding of the content of the interrogator’s questions. The answers given by the interpreter should likewise be in the first person, for example, ‘I went to school’, not ‘he says he went to school’.¹¹

Ross QC suggests short, sharp and clear questions, and to look at the witness, not the interpreter.¹² The same advice applies equally when questioning a client or witness through an interpreter in a conference outside of court.

Outside court, the occasion might arise to ask some questions of the interpreter directly. In this situation, a courteous ‘I’m now going to talk with Ms X, your interpreter, for a while’ is in order. The interpreter should convey this to your interviewee. Strictly speaking, direct dialogue between interpreter and lawyer is outside the usual role for an interpreter, and would not normally be employed in court where an interpreter is engaged to interpret rather than give expert evidence. In a conference, however, it may be useful to query whether you should be mindful of any cultural factors or check with the interpreter that s/he is satisfied that they have been able to convey accurately the meaning of various concepts to the interviewee. Some legal concepts may be particularly foreign in some languages and cultures, so it may be worthwhile ensuring that the interpreter knows what those concepts mean and whether there is an equivalent concept in the interviewee’s language.

A witness may understand English sufficiently to satisfactorily function in society, but have some difficulties with its use in legal proceedings because English is a second language. However, even where all parties speak English, misunderstandings regularly occur between counsel and witnesses, requiring questions to be repeated or rephrased. The mere fact that this occurs does not mean that an interpreter is necessarily required: it is a matter of degree.¹³

Whether to ask for an interpreter in court can be a tactical decision requiring some thought. The use of an interpreter may give a witness or accused time to think

about his or her answer while the question is conveyed by the interpreter. It may add suspense to the courtroom drama while the tribunal of fact waits for the answer to be conveyed. But it might also detract from the credit of the witness or accused if it is demonstrated in cross-examination that the interpreter is not required. If, during the course of a trial, an accused did not have all of the evidence interpreted to him or her, then the use of an interpreter to give evidence may create the wrong impression.

THE ROLE OF INTERPRETER IN LEGAL PROCEEDINGS

There are three recognised roles for an interpreter/translator in legal proceedings:

1. To interpret in court;
2. To give evidence as a witness where the interpreter acted as an interpreter when a statement was made out of court by someone; and
3. To give evidence as an expert witness to translate the meaning of written or recorded words in a document or recording in another language in order to make that document or recording intelligible to the court.

Interpreting in court

Interpreters may be used in court to facilitate the giving of oral evidence by a witness in a proceeding.¹⁴ They may also >>



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be employed to interpret the entire proceedings of a trial to an accused in keeping with the right to a fair trial.

A trial will be unfair not only if an interpreter is not provided, but also if the interpreter lacks the skill to translate accurately the questions asked by counsel and the answers given by the accused.¹⁵

The use of an insufficiently skilled interpreter does not merely deprive an accused of a fair trial as a matter of legal theory: unresponsive, incoherent or inconsistent answers may be taken for lack of candour when they may in fact be due to incompetent interpretation.¹⁶ The lack of an appropriately skilled interpreter may be viewed not only as creating the conditions for an unfair trial, but as reflecting on the accused's fitness for trial.¹⁷

Accuracy and precision are the keys. NAATI accreditation is not determinative, as there are many languages for which there is no accreditation, including most Indigenous languages. Factors to which a court may have regard include: the responsiveness of answers, the coherence of answers, evident confusion in exchanges between the interpreter and the court, and the timeliness of complaint about the adequacy of the interpreter.¹⁸

The right to an interpreter in criminal proceedings may extend to the right to have written material, including witness statements, translated.¹⁹

Evidence of statements made out of court through an interpreter

If A gives an account to B who passes that account onto C, then B's account is hearsay and inadmissible. This is essentially what occurs when a conversation takes place with the help of an interpreter (in this example, B is the interpreter). The evidence of what was said by A can, however, be admitted in one of two ways.

First, the interpreter can be called to give direct evidence of the meaning of what was said by A. This requires the interpreter to remember what was said. Contemporaneous notes may be used if made by the interpreter.²⁰

Second, C can give evidence of what the interpreter said that A said under the principle established in *Gaio v The Queen*.²¹

Gaio v The Queen dealt with a confession made in an indigenous language of Papua New Guinea to a patrol officer with the assistance of an interpreter. The High Court held that evidence of the confession was admissible if it was proved that the interpreter fully and faithfully translated into English the accused's answers to questions asked by the patrol officer at the time of the interview.

The majority of the court viewed the exchange as one communication between the patrol officer and the accused with the assistance of the interpreter, rather than breaking it down into communications between the patrol officer and the interpreter on one hand and the interpreter and the accused on the other. The interpreter's role in that communication was described as that of a 'translating machine'.²² An earlier theory – that interpreters acted as agent for one or both parties to the conversation – was not accepted.

The admission of evidence under the principle in *Gaio v The Queen* requires that interpreters view their role consistently with acting as a 'translating machine', so that the full meaning of everything said by one party is transferred into the other language for the other party and vice versa, without any addition or subtraction.

It is not as simple as substituting a word in one language for the equivalent word in another language, but rather the conveying of every idea or concept from one language accurately into the other.²³

If interpreters view their role in a way that is incompatible with acting as a 'translating machine', the English interpretation given by the interpreter and heard by the English participant to the conversation will not be admissible.²⁴ Exchanges between the interpreter and the person interviewed that do not appear to be interpreted into English may be a sign that the interpreter is not acting in conformity with this role.

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Use of translators as expert witnesses to make admissible documents intelligible

In the criminal law context, routinely recording interviews with suspects has the benefit for the prosecution that if the interpreter does not act as a 'translating machine', then the recording of the exchanges between the interpreter and suspect in another language can be used instead of the English exchanges that may contain hearsay. The conversation can be made intelligible for the court by the use of a translator acting as an expert witness.

It is important to ensure that the expert translator is appropriately qualified and accredited as a translator.

The expert should first be asked to listen to the tape and transcribe what s/he hears on the tape on to paper in the original language. Different people can hear the same thing differently. Recording what the expert hears in the original language enables the accuracy of the final product of the expert's translation to be checked by another translator. The written transcript in the original language should then be accurately translated into English.

As an aside, it is possible that the translation that results may identify so marked a variance from the interview being conducted in English by police officers that the whole interview should be excluded from evidence.²⁵

The same principles apply to all proceedings. Any document containing another language – whether it be written words, or a recording of an oral conversation – may be made intelligible by expert evidence if it is otherwise admissible.²⁶ This should be done by the interpreter giving oral evidence in court. A written translation may be admitted where the translation is lengthy, in which case juries may be permitted to have the written transcript in the jury room.²⁷

CONCLUSION

The need to use interpreters and translators in legal proceedings presents unique challenges. A sound understanding of the role of interpreters and translators in legal proceedings is fundamental to dealing with those challenges. ■

Notes: **1** For example, J D Heydon, *Cross on Evidence, Seventh Edition*, LexisNexis, Chatswood, 2004, devotes only four paragraphs to a discussion of the legal principles. One of the most distinguished advocacy texts ignores the subject altogether: J L Glissan, *Advocacy in Practice*, LexisNexis, Chatswood, 2005. **2** Australian Bureau of Statistics, *Year Book Australia, 2008*, <http://www.abs.gov.au/ausstats/abs@.nsf/0/EF8DA58E2C7A1E47CA2573D200110282?opendocument> (accessed 18 May 2009). **3** Department of Foreign Affairs and Trade, http://www.dfat.gov.au/facts/Indigenous_languages.html (accessed 18 May 2009) quoting figures from the 2006 census. **4** National Accreditation Authority for Translators and Interpreters Ltd. (NAATI), *Concise Guide for Working with Translators and Interpreters in Australia.*, NAATI, ACT, 2003, p2. **5** *R v Tran* [2009] QDC 82. **6** In *Gaio v The Queen*, (1960) 104 CLR 419, at p431, Kitto J speaks of the interpreter acting as a 'translating machine'. **7** Certainly the writer's experience in the Queensland District Court. **8** See note 4, p3. **9** *Ibid*, p5. **10** See, for example, AAT General Practice Direction, para 4; Supreme Court of Queensland Equal Treatment Benchbook para 6.2.1. **11** *De La Espriella-Velasco v The Queen* [2006] WASCA 31 at [71]. **12** David Ross, *Advocacy*, Cambridge University Press, Port Melbourne, 2005, p33. Ross points to the cross-examination in

Chong & Toh v R (1989) 40 A Crim R 22 at 41 as being an example to follow. **13** *Johnson* (1987) 25 A Crim R 433 at 440. But compare *Adamopoulos v Olympic Airways SA* [1991] 25 NSWLR 75 at 77-8 per Kirby P. **14** Conceivably a translator might be used to translate the evidence-in-chief of a witness where there are directions for evidence to be given by way of affidavits. **15** *Mohammed Ahmed Saraya* (1993) 70 A Crim R 515. **16** *Kathiresan v Minister for Immigration and Multicultural Affairs*, unreported, FCA, 4 March 1998, per Gray J, quoted in *De La Espriella-Velasco v The Queen* [2006] WASCA 3 at [49]. **17** *Ngatayi v The Queen* (1980) 147 CLR 1 at 7. **18** *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6. **19** *R v Rostom* [2007] SASC 210 (Gray, Sulan and White JJ). **20** *R v Attard* (1958) 43 Cr App R 90. **21** (1960) 104 CLR 419. **22** Per Kitto J at p431. **23** *De La Espriella-Velasco v The Queen* [2006] WASCA 31 per Roberts-Smith JA; Pullin JA agreeing at [75]. **24** The situation arose in *R v Tran* [2009] QDC 82, but the Crown withdrew reliance on the interpreter's English answers when it obtained a more highly qualified expert to translate, as an expert witness, the Vietnamese sounds on the interview tape. **25** See *R v Swaffield* (1998) 192 CLR 159. An exclusionary argument failed in *R v Tran* [2009] QDC 82, although the court found that steps would need to be taken to avoid unfairness and danger of misuse. The court suggested the use of an accurate transcript, which had the misleading parts (conducted in English) either excised or colour-coded, together with appropriate warnings for the jury. **26** *Butera v Director of Public Prosecutions for Victoria* (1987) 164 CLR 180 at 188. **27** *Ibid*, at 190-91.

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