WHERE TO NEXT? BUILDING A CULTURE[1]

Introduction

Thank you for inviting me to speak to you today.

I am reasonably confident that everyone in this room has at least heard of the *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (to which I will refer as "the Recommended Standards"). First introduced in 2017, a second edition was published in 2022. A convenient summary of the extent of the formal adoption of the Recommended Standards may be found in an article by the Hon Justice Melissa Perry of the Federal Court of Australia which appeared in the February 2023 issue of *The Australian Law Journal*.[2]

The inspiration for my remarks to you this afternoon is my sense that the process of adopting and implementing the Recommended Standards has come to a critical point. It seems to me that unless that process is reinvigorated, there is a real risk that much good work may be lost, and the entirely understandable aspirations of the interpreting (and translating) profession may not be achieved.

With great respect, and a willingness to do whatever I can to help, I would like to use this opportunity to challenge you to reflect on, and I hope to act, on what I suggest is the next essential step. That step is to create a body whose mission includes building a culture in our courts and tribunals which ensures that adherence to the Recommended Standards becomes an integral and unremarkable part of the administration of justice in Australia. I say "includes" because I am sure it could and should do other things in the interests of interpreting and translation professionals.

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[1] An address by the Hon Justice François Kunc, a judge of the Supreme Court of New South Wales, to the 36th National Conference of the Australian Institute of Interpreters and Translators Inc (AUSIT), University of New South Wales, Sydney, 24 November 2023.

[2] M Perry, "The Recommended National Standards for Working with Interpreters: Enhancing access to justice in courts and tribunals" (2023) 97 ALJ 121.

After saying something about the perspective which I bring to the discussion, I will make three points. First, I will demonstrate that what might be called a culture of interpreting has deep historical roots in the civilisation which has given birth to Australian legal and cultural tradition. Second, I will argue that while much has been achieved with the Recommended Standards, there is still a long way to go. Third, I will outline for your consideration what I suggest may be a means to ensure the promise of the Recommended Standards is fulfilled.

A personal note

I have always been intrigued by what scientists call the observer effect: that in some situations the observer can have an impact on the phenomenon being studied. By way of attempting to expose whatever my position as an observer of your work may bring to the present analysis, I hope you will excuse me if I begin on a personal note.

I am a first generation Australian. I am sure I am not the only one in the room. My parents were stateless post-WWII migrants to Australia. As best I can tell, they came here because that is where they had the chance to be sent, rather than by any specific choice on their part. For people like them anywhere like Canada, the United States, Australia or New Zealand was acceptable, as long as it wasn't Europe (or in my mother's case, forced repatriation to the USSR). My parents met in Sydney many years after they had come here.

The polities of their birth no longer exist. My father was born in the dying days of WWI and the Austro-Hungarian Empire in what is now the Czech Republic. My mother was an ethnic Russian born near today's Dniepro – then Dnieperpetrovsk in Stalin's USSR - but which today tragically features in our daily news as the eastern Ukraine.

While neither of them spoke English when they arrived, they both certainly spoke it perfectly well by the time I came along. However, we rarely spoke it at home. I am eternally grateful that they insisted I learn their native languages, together with other European languages they had learnt in the circumstances of their lives. To their respective last days, English was not our primary means of communication. Later in life I had the benefit of formal language studies.

At this point I gladly acknowledge what I call Hale's Law. This was Professor Sandra Hale's admonition to me at one of our first meetings when we started drafting the Recommended Standards. She fixed me with a steely Spanish eye, rather like a bullfighter imposing order in the ring, and said: "Just remember that being bilingual doesn't make you an interpreter". Point taken.

However, what I do think I have brought to the journey of the Recommended Standards is a close, personal understanding of the challenges and subtleties of the process of interpretation, as well as the lived experience of functioning in a country whose dominant culture is solidly mono-lingual and very Anglocentric, when one's origins are neither of those things. I intend absolutely no criticism by those descriptions.

Speaking as a judge, I can say that being involved with the drafting and implementation of the Recommended Standards has been as deeply professionally satisfying as it was unexpected. Not only have I had the privilege of working with and befriending leaders of the interpreting profession, but I think it is fair to say that, unusually for any judge, I have been able to play a small part in bringing about real systemic change in the administration of justice.

What I have just described is also quite apart from the benefit I have gained in my own judicial praxis. Many people are surprised when I tell them how often, as an exclusively civil trial judge in a superior court, my cases involve parties and witnesses who require the assistance of an interpreter. For example, most of the trials over which I presided during Covid and the period immediately thereafter, involved all (or nearly all) of the evidence being given in Mandarin. While Mandarin has been the most common, other languages such as Italian, Macedonian, Serbian and Greek have also been heard in my courtroom. I confess I was a little disappointed when a trial involving evidence to be given in Russian settled on the morning of the hearing.

Some history

The history of interpreting is well beyond the scope of this paper. However, a brief, even random, survey of the story of interpreting can provide a useful context. One interesting feature of that history is that scholars plausibly suggest that a paucity of specific references to interpreters in the sources demonstrates how unremarkable and

integral they were in a world where but a moment's thought demonstrates that relations between races and nations must have involved interpreters. [3]

In the Judaeo-Christian canon, one of the earliest examples I can find, passing over the story of the Tower of Babel, is the encounter between Joseph (who had become an assimilated Egyptian) and his brothers. The book of Genesis records that when his brothers spoke amongst themselves, "they did not know that Joseph understood them, since he spoke with them through an interpreter".[4] In the New Testament, the capacity to be understood in a multiplicity of languages was an integral part of the miracle of Pentecost.[5]

Those who aspired to the highest offices in the Byzantine empire had to be of interpreter standard at least from Latin or some other language into Greek. My favourite title, to which I would gladly aspire, is the Logothete of the Drome, the Drome being the Byzantine postal and interpretation service. The Logothete was its senior official and he came to occupy the position of Prime Minister to the Emperor. I am uncertain whether this is the same position that is sometimes referred to as the Grand Interpreter.

The great voyages of exploration needed interpreters. An example close to home is Tupaia, the Polynesian priest, navigator and interpreter who travelled with James Cook.

Finally, and most pertinently to the present topic, it is important to recall that professional, simultaneous interpretation is generally regarded as having originated with the Nuremberg trials. Again a little closer to home, a recent monumental history of the Tokyo war crimes trials (the chief judge of which was Queensland Chief Justice Sir William Webb) records the presence of "a host of translators…and state-of-the-art headphones for live translation in Japanese and English".[6]

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[3] A fascinating summary may be found in Edouard Roditi,. *Interpreting: Its History in a Nutshell*, Washington D.C., National Resource Center for Translation and Interpretation, Georgetown University, 1982. The Byzantine example I give is derived from "Looking for Interpreter Zero: (15) The First Crusade & the Latin Story" by C Adams to be found on aiic.org.

[4] Gen 42:23 (NRSV)

[5] Acts 2:4

[6] Gary J Bass, *Judgment at Tokyo*, Alfred A Knopf, New York, 2023, p 190.

What this very short list of examples demonstrates is that there has been what I could call a culture of interpreting – an ingrained recognition of its necessity and importance – since the tower of Babel. Like many such things, it is obvious once you think about it. However, I suggest that one of the challenges in this country is the absence of such a culture. While I cannot develop why I say this in any detail today, as a prompt for reflection may I briefly suggest three possible reasons?

First, we are insular – literally an Anglophone island continent. I think that explains so much about Australia, but in this context it means that unlike Europe or Asia we are not as a nation constantly bumping up against other languages and cultures in a day to day way.

To give an example, three weeks ago I was at an international conference in Rome. There were five official languages (all European due to the nature of the organisation) and proceedings were simultaneously translated into each of them. However, most attendees were fluent in one and could work adequately in another one or two. There were some diplomats in the room who were proficient in all five. The polyglot environment felt entirely normal in a way it does not in Australia.

Second, insofar as the non-Indigenous population is concerned, the great Australian multicultural project, whose initial articulation as such I vividly remember under the Whitlam Government in the early 1970s, is in reality a project of assimilation in two generations. I do not suggest that is sinister and I am not saying that is necessarily a bad thing. It is nevertheless certainly my observation and lived reality: from multilingual migrant, to bilingual first generation, to fully absorbed monolingual Anglophone in the next. Again from personal experience, I know of that process being accelerated in migrant families where a deliberate and entirely understandable decision was taken from the day of arrival that "we are Australian now and we (including our Australian born children) will only speak English".

Third, in relation to our Indigenous people, at least two factors may be identified. First, there is the shameful and deliberate eradication of indigenous languages that was an essential part of now discredited policies of so-called protection and assimilation. Second, the vast majority of Australians never encounter an Indigenous person, let alone need interpretation from an Indigenous language into English.

What has been achieved

Given where things were when the Recommended Standards project began several years ago, it should be acknowledged with genuine satisfaction that a great deal has been achieved. Formal progress is set out in Justice Perry's article, to which I referred earlier. I will not take time to repeat here what her Honour sets out with her characteristic thoroughness. However, it should be noted that varying degrees of formal adoption of the Recommended Standards have occurred in a number of jurisdictions.

Here in NSW, Part 31, Division 3 together with Schedule 7A was introduced into the Uniform Civil Procedure Rules in late 2019. In March 2020, this was supplemented in my court by the commencement of Practice Note SC Gen 21, which applies to all civil proceedings in the Supreme Court. The operation of the Rules and Practice Note has already been the subject of judicial consideration.

So far as I am aware, what has happened in this state represents the most complete formal adoption of the Recommended Standards in Australia. Several other jurisdictions around the country have sought to implement the Recommended Standards by means of practice notes or directives by heads of jurisdiction.

Looking at progress anecdotally, I can say with confidence that in my court room I have seen the benefits of the implementation of the Recommended Standards. I will give three examples.

First, the quality of translated affidavits has improved immeasurably. I suspect that is because of the application of Hale's Law, so that bilingual but linguistically unqualified solicitors are no longer permitted to translate the CALD client's instructions into English.

Second, an insistence on using two interpreters taking 20 minute turns (or as they may agree) has led, in my experience, to better interpretation and more efficient use of court time.

Third, I can tell when interpreters have been briefed. Again, things just go far more efficiently. I shall return to the question of briefing in a moment.

Apart from my personal experience, I am also pleased to report that the advisory committee on the Recommended Standards, on which I continue to serve, has received many positive reports from interpreters of their experience where the Recommended Standards are observed.

However, I must also record that many anecdotal reports of very poor treatment of interpreters continue to find their way to our committee, both formally and informally. That is, to say the least, disappointing and is clear evidence of how much remains to be done.

I will now turn to some examples of what I suggest remains on the "to do" list. They are in no particular order and I am sure do not include everything that many of you would have on a similar list.

The Recommended Standards were primarily drafted for civil matters. A separate version for use in criminal matters, including in relation to the interview of suspects and witnesses, should be produced. That will require input from criminal law specialists.

Much work needs to be done on the training of advocates in examining CALD witnesses. There is an irony in this observation. It is well understood that long, jargon laden questions, multiple propositions in one question and the use of the double negative are all inimical to effective communication with CALD witnesses. The irony is that those bad habits make the efficient and effective leading of evidence from native English speakers just as difficult. In other words, everyone would benefit if the best practice for examining witnesses set out in the Recommended Standards was applied all the time, and not just when an interpreter is required.

Courts and tribunals have been slow to adopt even relatively low cost technical solutions that would improve the working conditions and efficiency of interpreters. I am thinking, for example, of equipment that makes even simultaneous interpretation possible, or at least removes the need for interpreters to sit next to witnesses in the witness box or the dock.

A major issue is the continued resistance to briefing interpreters with information to assist them in preparing to undertake their work. This resistance continues both to surprise and disappoint. Even more troubling are anecdotal reports that some interpreters are losing work when they ask for a briefing. The Recommended

Standards are clear on why even the most basic briefing of an interpreter can enhance the administration of justice. It seems that a lot of education of the profession remains to be done.

While it is not a complete explanation, I cannot help but think this reluctance to briefing is a symptom of the failure to accept interpreters as officers of the court: see Standard 18 of the Recommended Standards. I must acknowledge that this description has met with resistance from courts.

So it is that in my own court a compromise was reached that one of the purposes of Part 31, Division 3 of the UCPR was expressed (UCPR Part 31 r 31.55(b)) as being "to recognise *the special status* of an interpreter in the administration of justice by declaring the duties of an interpreter in relation to the court and the parties to proceedings" (emphasis added). This is then given effect in UCPR Pt 31 r 31.60:

> "(1) An interpreter owes a paramount duty to the court to be impartial and accurate to the best of the person's ability.
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> (2) The duty to the court overrides any duty the person may have to a party (regardless of whether the party engaged the person)."

While I understand the reservations of my colleagues, I must express my respectful but nevertheless strong disagreement. The duties which I have set out are identical in substance to the types of duty owed by legal practitioners, court appointed liquidators, receivers and others who are uncontroversially described as officers of the court.

In my respectful view, interpreters should continue to point to Standard 18 as a source of authority that they are not mere functionaries or supernumeraries, but essential participants in the due administration of justice of no less importance than the lawyers in the room, including the judge. A simple proof of this proposition is that a failure by an interpreter to meet the obligations set out in the Recommended Standards and the Code of Conduct can lead to a miscarriage of justice.

All of this brings me to the largest item of all on the "to do" list. The point I want to make is exemplified by the decision earlier this year of Justice Solomon of the Supreme Court of Western Australia in *Murray v Feast* [2023] WASC 273.

In that case, his Honour set aside Mr Murray's conviction by a magistrate for aggravated common assault. Mr Murray was a Walmajarri man who gave evidence that he spoke Walmajarri, but also Mardok, Manjaderra, and "mixed languages". He gave evidence with the assistance of an interpreter.

An important issue on the appeal was that the magistrate had directed that the interpreter should not interpret English words used by Mr Murray notwithstanding the interpreter attempting to explain that Mr Murray was speaking Aboriginal English or Kriol, so it could not be assumed that when Mr Murray used an English word it meant the same thing in standard Australian English.

In his decision, his Honour set out a detailed analysis of the legal principles in relation to communication difficulties encountered by First Nations people in legal environments and the role of interpretation to ensure a fair trial. His Honour said [footnotes omitted]:

> [171] At the core of the notion of a fair trial stands the dignity and integrity of the individual. That is why the fundamental prescript of the criminal law is that no person shall be convicted of a crime except after a fair trial according to law. To deny the authenticity of a person's distinct linguistic identity or autonomy is to repudiate the authenticity of their cultural and perhaps spiritual essence; it is to impugn their sense of worth and value as a human being. As has been observed in one study of the impact of language on public health outcomes in the Barngarla community, "traditional languages are a key element of Indigenous peoples' identity, cultural expression, autonomy, and spiritual and intellectual sovereignty."
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> [172] The enormity of the offence created by the repression or disparagement of cultural identity and belief may not always be readily apparent. Yet this is not some lofty social principle concocted in the quiet spaces of judicial isolation. The historic impact of this alienation speaks for itself in our society today; in our towns, our courts and most tragically in our prisons. It may be true that the common law did not evolve with an instinctive or organic sensitivity for the ramifications of cultural repression that flowed with the tide of territorial dispossession. But the Judeo-Christian tradition from which the common law in part emanated, was never without the tools to identify and respond to that impact. Its own literature is replete with the tragic necessity to perceive the insult and shame of dispossession. [His Honour here refers to the example of Lamentations Ch 5.] Like many other rights that have incrementally evolved from the deep reservoir of the common law, the issues reflected in this case have gradually emerged from the shadows over recent decades. The law of Australia is well able to accommodate the shifts in our conceptions of fairness that progress with our growing

> appreciation of systemic injustices that plague marginalised members of our society, including many First Nations people."

If I may respectfully say so, it demonstrates how far things have come that a judicial officer should write with such empathy and nuance about the importance of, among other things, linguistic identity and the need to ensure linguistic presence in the court room. At the same time, the largest item on my "to do" list is vividly demonstrated by that part of his Honour's reasons where he considers the Recommended Standards and concludes (at [149]) that in Western Australia "The Standards do not have the force of law; they are not binding on judicial officers; they are aspirational".

So there is the biggest task: to ensure that the Recommended Standards cease to be aspirational and become binding in every court and tribunal. The reason that the Recommended Standards contain model rules and a model practice note is that the drafting committee understood from the outset that the law is a system of rules and that lawyers are creatures of rules. If something is not in the rules, it will not be done. If you will excuse a classical flourish, in the absence of becoming binding rules, the Recommended Standards will languish as shades in the bureaucratic Hades to which such worthy documents are condemned, to be referred to perhaps only by Minos, Rhadamanthus and Aeacus, the ancient judges of the underworld.

Where to next?

This brings me to my third, and final, point. To borrow from Tolstoy: Так что же нам делать? What then must we do?

To my observation, and I would be delighted to hear to the contrary, the process of implementing the Recommended Standards is stalling, if not already stalled. I suggest there are three reasons for this.

First, it has always been understood that the Recommended Standards had to deal with the large variety of courts and tribunals which exist in Australia. While there are basic principles and practices which should be universal, one size could and should never fit all. I readily accept, for example, that the pressures and constraints on a local court mean that some things we might take for granted in a superior court are just not practicable, even with the best will in the world. Nevertheless, I am certain that in every court and tribunal aspiration can become achievement.

Second, interpreters are sole practitioners. There is a useful analogy here with the position of most solicitors and certainly barristers, many doctors and even judges.

Third, and in large part due to the point I have just made, there is no one really driving the process of implementation in each court and tribunal. That is not to diminish the role of designated champions where they exist, but I do not understand their role to be prime drivers, rather than supporters, of change. There are also undoubtedly many well disposed stakeholders and interest groups, but there is none of which I am aware that performs a central, continuous, leadership role of pressing for the implantation of the Recommended Standards by rule changes or practice notes. Nor is there such an entity which can receive complaints and concerns from interpreters about how they have been treated or where there have been departures from the standards which will then take up the issue with the court or tribunal concerned. Looking at the very big picture, there is no entity dedicated to creating the kind of interpreting culture about which I have spoken earlier.

So I conclude with this challenge, which I can assure you comes from a place of respect, admiration and a desire to assist where possible. I contend that the ball is now very much in your court. It is really for you as the interpreting and translating profession to create such a body which can take control of the process in your interest. It may be a retooled Ausit or NAATI or a completely new national entity. I acknowledge that, among other things, serious questions about funding would need to be addressed.

However, there are precedents in other professions, including an extracurial association of judges. While I may have some ideas which we can discuss over refreshments, you know your profession far better than I do, and I very much look forward to hearing your thoughts and ideas, including setting me straight where I have erred in my analysis.

Thank you again for the privilege of being invited to speak and for your courteous attention.