

Australian National Standards for
Working with Interpreters in Courts
and Tribunals

Public Consultation Draft June 2016

Legal Aid NSW Submission to the
Judicial Council on Cultural Diversity

August 2016

323 Castlereagh Street
Haymarket NSW 2000
DX5 Sydney

Legal Aid 
NEW SOUTH WALES

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, assistance and representation, through a large in-house legal practice and private practitioners.

Legal Aid NSW also funds a number of services provided by non-government organisations, including 34 Community Legal Centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW appreciates the opportunity to provide feedback on the Consultation Draft of the Australian National Standards for Working with Interpreters in Courts and Tribunals (the Standards).

Should you require any further information or wish to discuss this submission, please contact: Pam King, Manager Planning and Business Reporting, Strategic Policy and Planning on 02 9219 5065 or pam.king@legalaid.nsw.gov.au.

Introduction

Legal Aid NSW lawyers regularly work with interpreters in providing in criminal, family and civil legal services.

We support the proposed Minimum Standards, Model Rules, Model Practice Note, and the goals of the Judicial Council on Cultural Diversity.

We offer the following specific comments.

Standards for Courts - Minimum Standards

We offer the following specific comments:

Minimum Standard 3 – Engagement of Interpreters to ensure procedural fairness

3.1

- “... in all types of matters” should be added to ensure the court considers civil and family law cases, as well as criminal cases, in their budget.

Minimum Standard 4 – Provision of information to the public about the availability of interpreters

4.1

- So that Auslan is not overlooked, the wording should be amended to, “Basic information about interpreters in the legal system, *in spoken and signed* languages commonly used by court users ...”
- The information should be presented in simple English (which is plainer than plain English).

4.3

- The form should be presented in simple English and placed in a prominent location on the website so that people with low English literacy do not have difficulty finding this information.
- The form should include an opportunity to express which interpreter(s) they do not want. This is particularly important for smaller communities, where privacy, confidentiality and impartiality can be significant issues.

Minimum Standard 6 – Court budget for interpreters

6.1

- “Courts should have dedicated budget allocations for all matter types ...”

This should include the provision of a budget for interpreters for people with proceedings in the court/tribunal who receive advice from duty lawyers at the court/tribunal.

Legal Aid NSW is aware of an example when a Principal Member of the old SSAT (now NCAT) refused to pay for interpreters for clients who saw our lawyers in the clinics there.

Minimum Standard 7 – Coordinating the engagement of interpreters

7.2

- Legal Aid NSW supports this initiative. However, we note that there are not yet sufficient pools of competent interpreters for the courts. Courts should provide detailed information about the lack of competent interpreters to NAATI and institutions providing interpreting education so that the dearth of professional interpreters can be addressed.

Suggested addition to Minimum Standard 7

Legal Aid NSW suggests an addition to Minimum standard 7, as 7.5, to the following effect:

- A protocol should be established in relation to communication between interpreters, the court and court users about notification that a court ordered interpreter is available for the proceedings.

There have been cases where interpreters have notified the court of their arrival but Legal Aid NSW lawyers have not been able to locate them and consequently have adjourned matters. The ability to contact court ordered interpreters during court hours would be very useful.

Minimum Standard – Support for interpreters

8.1

- Interpreting is a much more demanding job than most people realise. Appropriate working conditions for interpreters will allow them to perform their duties to the best of their ability.

The Model Practice Note practice note should also deal with practical matters such as working time, including providing for regular breaks during proceedings (for example, a 10 minute break every hour), and the number of interpreters required for longer sessions, as well as provide for where the interpreter stands in the court room during the proceedings, which is crucial for sign language interpreters.

8.4

- Currently an interpreter for the defendant in a criminal trial must sit in or near the dock. Similarly, an interpreter for a person other than the defendant must sit next to that person. A table for the interpreter is desirable but may not be feasible in most courtrooms.

8.5

And other Minimum Standards on briefing interpreters - 16.2 (Judicial officers), 16.3 (Time to familiarise), 23.2 (Legal Practitioners) and 23.3 (Time to familiarise)

- Legal Aid NSW supports strongly support providing interpreters with the context of assignments and briefing materials because this preparation allows the interpreter to perform their duties to the best of their ability.

However, Legal Aid NSW notes that the vast majority of legal practitioners are reluctant to brief the interpreter on the nature of the case before the proceedings commence because of concerns about confidentiality and litigation strategy. Providing education to legal practitioners on briefing interpreters will be essential to effective implementation of the Minimum Standards.

8.6

- Providing regular breaks for interpreters during proceedings is strongly supported. Interpreting in a criminal trial is a responsibility which places significant demands on interpreters.

8.7

- Many interpreters experience vicarious trauma from their work. This minimum standard is strongly supported.

8.8

- Legal Aid NSW supports the implementation of a feedback mechanism for the provision of two way feedback on interpreting performance and associated matters. However, this could potentially be costly and cumbersome, given those best placed to assess interpreting performance are other interpreters who are at similar or higher levels of competence.

Legal Aid NSW notes that interpreting performance can be challenged by the interpreter of the opposing party as part of litigation rather than on grounds of providing feedback.

8.9

- In addition to reporting to NAATI when unable to secure the services of an interpreter, courts should also report to institutions providing interpreting education.

Minimum Standard 9 – Assessing the need for an interpreter

9.2

And other Minimum Standards on assessing the need for an interpreter 14.2 (Judicial officers) and 20.2 (Legal Practitioners)

- Often there is an assumption that fluency in day-to-day conversational English also means fluency in communicating in legal contexts. We endorse the proposed four-part test is for the determining the need for an interpreter at Appendix 4 of the Public Consultation Draft.

Minimum Standard - Engaging an interpreter

10.1

- While Legal Aid NSW does not oppose this minimum standard, it cannot be assumed that all professional interpreters are competent to interpret in legal settings. Many professional interpreters acquire NAATI accreditations by testing as opposed to completing an accredited course, and do not have any legal interpreting training. Generally, there is a lack of legal interpreting training.
- Courts should introduce mandatory legal interpreting training for interpreters as a prerequisite to working in courts to ensure legal interpreting standards are maintained. A transitional period would be required to implement this.
- In 2015-16 Legal Aid NSW conducted five training sessions on *Legal words for interpreters* in recognition of the lack of training in this area. Approximately 150 interpreters and service providers attended these sessions.

10.2

- The emphasis on the use of professional interpreters in court proceedings is supported.

10.3 (a) (b) and (c)

- Allowing an interpreter for languages in Tiers B, C and D who is not a Tier A professional interpreters should be an interim, time limited solution. There should be a corresponding effort over that time to increase the number of professionally accredited interpreters. If not, this solution risks perpetuating the status quo, namely a lack of competent interpreters.

Case study 1

Legal Aid NSW often requires the service of Auslan interpreters for deaf clients. However, the pool of professional Auslan interpreters in NSW is small. For this reason, a Legal Aid NSW employee who receives the Community Language Allowance Scheme (CLAS) for Auslan and also happens to be a paraprofessional Auslan interpreter, has often been called upon to interpret legal advice sessions and court mentions.

Case study 2

A committal hearing at the Local Court in Dubbo was scheduled and adjourned several times because a French interpreter was not available. The magistrate then requested that an intern at Legal Aid NSW who spoke French act as an interpreter. Legal Aid NSW pointed out that the request was inappropriate because the intern was not an accredited interpreter, and asked the registry to schedule the hearing using the National Telephone Interpreting Service.

Case study 3

Legal Aid NSW has a significant number of clients who have been refused bail by the police and are in custody for longer periods than necessary because of the lack of interpreters. These languages include but are not limited to Auslan, Lao, Mongolian, Samoan, Sudanese, Thai, Tibetan, Tokelau, Tongan and Turkish.

Suggested additions to Minimum Standard 10

Legal Aid NSW suggests two additions to Minimum standard 10.

The first is to the following effect:

- Courts should engage interpreters in the right languages and dialects. Many languages such as Arabic, Chinese or Swahili have dialects whose speakers cannot understand each other.
- Idiomatic translation that captures nuance is important. Interpreters in legal settings must be fluent in well-known slang as well as more formal language.

The second suggested additions to Minimum standard 10 is to the following effect:

- Courts should endeavour to provide interpreters who are the most appropriate for the client and matter, for instance, female interpreters in domestic violence cases where the applicants are female.

Standards for Courts – Optimal Standards

Optimal Standard 2 – Simultaneous interpreting equipment

2.1

- Simultaneous translation requires significant training and experience. Legal Aid NSW has seen this done successfully on very few occasions by interpreters with what used to be referred to as NAATI level 5 accreditation.
- Simultaneous translation is efficient when the defendant is listening to other witnesses and counsel. However, if the defendant and interpreter are not seated together, the defendant cannot ask for clarification of a point, or repetition.

Optimal Standard 3 – Provision of team interpreting

3.1

- Legal Aid NSW is of the view that the use of team interpreting should become a minimum standard.

Optimal Standard – Provision of professional mentors

4.1

- The acronyms should be stated in full, that is, “Professional mentors are professional interpreters who are members of AUSIT (The Australian Institute of Interpreters and Translators) and ASLIA (Australian Sign Language Interpreters Association) ...”

Standards for Judicial Officers - Minimum Standards

Minimum standards – Plain English

12.1

And other Minimum Standard on Plain English - 24.1 (Legal Practitioners)

- Judicial officers and legal practitioners should also speak at volume that can be easily heard.
- Judicial officers and legal practitioners should avoid slang and figures of speech, such as ‘you’re pulling my leg’ or ‘bald-faced lie’, and metaphoric language.

Minimum Standard 16 – Proceedings with an interpreter

16.6

- Interpreters should also be trained that they can alert and, if necessary, interrupt the court in the circumstances outlined in (a) to (g).

Model Rules

Division 1: Definitions

1.1(1)

- The definition of “accurately” should be clarified that it does not mean ‘word for word’.

Division 8: Court may give directions concerning interpreters

1.18 (m)

The court must ensure that its discretion to make directions concerning “disqualification, removal or withdrawal of an interpreter” on the grounds of accuracy and competency is substantiated by an independent assessment of an interpreter with similar or greater expertise and experience in that language and dialect.

Schedule 1 Court Interpreters' Code of Conduct

4. Duty of accuracy

4(1)

- This section should make it clear that “accurately” does not mean ‘word for word’.

General Comments

Clients with multiple communication barriers

Many Legal Aid NSW clients who require an interpreter also experience other potential barriers to communication such as intellectual disability or mental illness. The National Standards should include the need for judicial officers to ensure that efforts are made to assist an accused who has more than one communication barrier, for example, through regular scheduled breaks and the use of a court support worker.

Deaf people who do not use Auslan

Deaf people from other countries often do not use Auslan.

NAATI provides recognition for deaf interpreters or deaf relay interpreters who assist standard Auslan interpreters in conveying messages to the non-Auslan-user deaf people. Deaf interpreters are native or native-like users of Auslan and understand the complex cultural experience of growing up deaf. They are able to adapt their sign language style to accommodate the broad variety of Auslan users and users of gestural pidgins, or a sign language mixing strategy that may incorporate some features of Auslan.

Courts should be made aware that in circumstances where a deaf person does not use or is not fluent in Auslan, both Auslan interpreters and deaf interpreters may be required.