

## CULTURE AND THE COURT INTERPRETER

An examination of current literature on dealing with potential intercultural miscommunication in the criminal court.

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*“People think the interpreter is just there for the person who doesn’t speak English... Maybe it’s the defendant, maybe it’s a witness. But people forget the interpreter is there for the benefit of everyone. So the lawyers can do their job. So judges and juries can make good decisions.”*  
– Patricia Michelsen-King (Beitsch, 2016).

## Introduction

In New Zealand, interpreters provide ‘vital services for nearly 10,000 hearings a year in more than 150 languages’ (Ministry of Justice chief operating officer, Carl Crafer according to Nichols, 2021). Despite this, the Ministry of Justice Guidelines for Interpreters (Ministry of Justice, 2021) (‘MOJ Guidelines’) provide very limited guidance on how court interpreters are expected to approach issues related to potential intercultural miscommunication.

In this paper, I use the phrase ‘potential intercultural miscommunication’ to mean the possibility of otherwise unrecognised interpersonal misunderstandings occurring, due to differing customs, norms, and behaviours. This paper aims to examine the potential for such undetected intercultural miscommunications to occur in the criminal court, the impact they can have and what obligations, if any, should be placed on court interpreters and judges when such issues arise.

## Background

The question on whether and if interpreters should be advising on cultural matters is one with no clear answer. Many interpreters see providing cultural guidance as being outside the scope of their roles and a line that ethically, they should not cross. However, often interpreters are the only party who share the linguistic and cultural backgrounds of both sides. This arguably makes them best placed to raise any such potential misunderstandings to the attention of the court (see Chen, *Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study*, 2019, p. 36; and Hale, 2014).

Prior to Australia establishing their own, detailed, ‘Recommended National Standards for Working with Interpreters in Courts and Tribunals’ (Judicial Council on Cultural Diversity, 2017) (‘Australian Guidelines’), Professor Sandra Hale conducted a study examining the expectations of interpreters in comparison to that of judicial officers and tribunal members in relation to interpreters raising potential intercultural miscommunication issues in court (Hale, 2014). This study found there to be significant differences between the judicial officers’ and tribunal members’ expectations in comparison to that of the interpreters’. 87% of judicial officers and tribunal members noted they would expect interpreters to raise such potential issues to the courts’ attention, while only 55% of interpreters noted they would do so. This

divergence highlights the discord of understandings between the two professions as to the interpreter's role and expectations around it when no clear guidance on such topics exist.

The results of Hale's study are concerning from an access to justice perspective as depending on the interpreter you had on the day, you would have around a 50/50 chance as to whether the interpreter would bring such potential issues to the court's attention or not. This means, arguably, that judges and tribunal members in half of the court appearances which use court interpreters would be better informed culturally than the other, creating a more culturally informed court process for some individuals in comparison to others. With the current MOJ Guidelines providing very little in the way of guidance as to when and how to bring such issues to the court's attention, it is foreseeable that a similar disconnect currently exists in our courtrooms.

It is timely to be researching and considering these issues as the New Zealand Government begins to implement new standards requiring certification by 2024 for all interpreters wishing to work across the public sector (Ministry of Business, Innovation & Employment, 2021). Given my undergraduate studies in both law and languages, and post-graduate studies in intercultural communication and interpreting, I believe I am well-placed to undertake such research and critical analysis into this area. It is hoped this research will be of practical assistance to the New Zealand Government and encourage further development of detailed guidance for our court interpreters.

## Structure of this Paper

This paper is based on literary research and is divided in to four major parts.

In the first part, I provide an executive summary of some of the most common types of intercultural miscommunications which have historically occurred or could likely occur in court. This summary will be based on both New Zealand examples and examples from other overseas common law jurisdictions, due to the similarities they share with our evidence law practises.

Based on my prior knowledge in this area, I hypothesized that the most common types of potential intercultural miscommunication in the courtroom could largely be grouped into three categories: linguistic; body language; and cultural norms. However, as I will explore in this

first part, my research highlighted that the potential for such intercultural miscommunications is far broader than this.

In the second part, I shall outline the current, limited guidance found in New Zealand on this issue, before moving on to look at practical guidance currently implemented internationally in the third part of this paper.

I had originally anticipated to do case studies on Australia, England and Wales, the United States of America and Canada. However, during the course of my research it became apparent that a detailed understanding of this number of case studies was too ambitious for the scope of this paper. As such, I have chosen to focus primarily on Australia (as our closest neighbour, with a similar legal and social culture) and England and Wales (a jurisdiction which has played a fundamental role in shaping our legal system into what it is today).

I chose these jurisdictions as they are both common law, Anglo-Saxon jurisdictions and tend to be jurisdictions commonly referred to when examining international law for precedents, here in Aotearoa New Zealand. I hypothesized that both of these jurisdictions would have clear and detailed, official guidance for court interpreters on how to address such potential intercultural miscommunications. I anticipated that examining the guidance provided by these jurisdictions would be of assistance when moving on to part 4 of this paper: Suggestions for Aotearoa New Zealand.

This fourth and final part will engage in a critical analysis of all the research gathered in light of Aotearoa New Zealand's social and legal contexts, providing suggestions for future development based on this research.

I note that this research is focused on languages and cultures outside the three national languages of New Zealand, being New Zealand English, Māori and New Zealand Sign Language. Māori and New Zealand Sign Language each have specific legislation tailored around the use of these languages in court. This paper focuses on languages and cultures which at present, do not have such additional legislation or unique legal processes in place.

## Part 1: Intercultural Miscommunication in Court

*“We all view the world through culturally tinted lenses, and we rarely take them off.”*  
– (Liu, Volčič, & Gallois, 2015, p. 54)

To be able to appropriately assess the importance of cultural considerations in the New Zealand criminal courtroom, we must first understand why we need to be aware of potential intercultural miscommunications and what these can look like in practise. This part will reflect on both of these aspects in turn.

### The Importance of Intercultural Communication Awareness in Court

The recognition of and ability to appropriately respond to intercultural miscommunication issues are of utmost importance in the courtroom setting. The courtroom is a very daunting environment, in which, by its very nature, judgments on others are passed. These judgments can have dire consequences. This section will delve into the nuances of culture and communication, review some of the prominent aspects of the New Zealand legal culture, before reflecting on how the combination of these two elements could lead to potential miscommunication.

‘Cultural’ and ‘communication’ are both nuanced concepts and while they can be understood separately, they are also intrinsically linked (Liu, Volčič, & Gallois, 2015, p. 54). ‘Communication’ can occur a number of ways, including language, touch, eye contact and gestures. What is required for successful communication, is for all parties to understand a common ‘code’ (Liu, Volčič, & Gallois, 2015, p. 26), one of the most prominent being a shared cultural background. ‘Culture’ is very diverse but can broadly be seen as *“the distinctive ideas, customs, social behaviour, products, or way of life of a particular nation, society, people or period.”* (Oxford University Press, 2021). Due to the broad and all-encompassing nature of ‘culture’, it can be challenging to recognise the difference between ‘culture’ and ‘stereotypes’ in practice.

It is also important to be conscious of New Zealand’s legal culture and how this may vary from cultural expectations others may possess. A prominent jurisprudential view is that law

can be seen as a ‘mirror’ of society and that the relationship between law and society is strongly connected to that particular society’s customs and morality (see Tamanaha, 2001). Our legal system is strongly based off that of England and Wales, which over time has been developed and adapted to reflect our own cultural values.

As legal systems are founded within a particular cultures, these cultures are often reflected in the law in relation to a culture’s understandings of right and wrong, what appropriate systems for the criminal process look like, and can even be embedded in our black letter law (for example the ‘reasonable person’ test leads to the presumption that a judge or individual jurors would assess this based on a ‘reasonable person’ of their own individual culture. For a more detailed discussion of this point, see Chen, *Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study*, 2019, p. 45).

As our criminal justice system is founded on different cultural values to that of other cultures, it is not surprising that ethnic minorities feel the system does not align with their values (see Mitchell, 2020; and Judicial College (England and Wales), 2021, p. 211). This is also likely to be reflective of why we can see higher incarceration rates of some minority cultures both here and in England and Wales (see New Zealand Police, n.d.; and Judicial College (England and Wales), 2021, pp. 190 and 208).

It is also important to be aware of the cultural backgrounds of our legal fact-finders, i.e. “*the person or body having the legal authority to determine questions of fact in judicial proceedings*” (Spiller, 2019). In our criminal jurisdiction, the fact-finder could either be a judge (or judges) or a jury. It is important to look at the cultural backgrounds of both of these groups, as this will strongly influence as how they view the world, which, unconsciously or consciously, may be detrimental to individuals from other cultures.

When you think of a judge, what do you think of? A middle-aged to elderly white male in a big white wig, peering down over a pair of specs? While this may be a stereotype, there is a reason why it is a long-held one. Up until 1976, our judiciary was composed entirely of men (Ministry of Justice, 2018), and while it has diversified substantially since, we still have a disproportionate amount of male (60%) and Pākehā (79%) judges within our system (see Gay, 2021). Further, all judges are ‘recruited’ from within the legal profession, a profession largely

comprised of individuals from affluent backgrounds (Chief Justice Dame Helen Winkelmann, as cited in McManus, 2019).

New Zealand juries are composed of a group of 12 laypeople (Juries Act 1981, s18). It is thought that having such a group of such individuals as the fact-finder provides verdicts which are reflective of the wider community and their views on justice (Law Commission, 2001, p. 55). However, from the research done leading up to the Law Commission's 2001 report, it is clear that while jury duty is meant to be a civil service in which all members of our adult community participate in equally, this is not what occurs in reality. In 1995, over half of our adult population sought to be excused from jury duty, with obligations around employment and family being amongst the most common reasons for excusals (Law Commission, 2001, p. 63). If the same is true today, this would mean the pool of individuals who are serving on our juries is reduced to those with personal lives which provide them with the flexibility to do so.

Further, not only is there no obligation in New Zealand to ensure a juror is of the same cultural background of the defendant (Law Commission, 2001, p. 56), but there is also some suggestion that individuals from minority ethnic backgrounds are less likely to participate in jury duty (Chen, Crisis facing courts as Chinese people seek justice in NZ, 2019). Our jury pool is thus not one which is representative of the wider community.

It is therefore most likely that defendants who require an interpreter will be judged by individuals (either jury or judge) from very different cultural backgrounds to their own. It is thus of utmost importance that when we have an individual in court who does not come from a Pākehā background, that parties are conscious that additional intercultural communication awareness will likely be required.

#### Examples of Intercultural Miscommunication in Court

This section will review examples of intercultural communication which have occurred in the criminal courtroom, as noted in literature. It was anticipated these reviews would allow me to outline the common ways through which intercultural miscommunication could present itself in this environment. However, the incredibly varied nature of culture and the number of different cultures throughout the world makes this a near impossible task. I shall instead outline

some of the common trends I found, before going on to explore this in light of New Zealand and the most common cultural groups that court interpreting is being requested for here.

### *International Literature*

During my initial research, I noticed that the majority of literature I was coming across from common law jurisdictions was typically centred around Spanish interpreters. Given around 96% of all court interpreting requests in the United States of America are for Spanish (United States Courts, 2017) and that Spanish is the second language of one of Australia’s leading scholars in this area, this is not particularly surprising.

Although requests for Spanish speaking interpreters make up only 3% of requested court interpreters in New Zealand (between 1 January 2016 and 31 July 2021, according to a letter to the author from the Ministry of Justice dated 6 September 2021, containing information received under an Official Information Act 1982 request (‘MOJ Sept 2021 Letter’)), these international case studies not only provide useful guidance when engaging with Spanish speaking parties in court, but also provide valuable insight in relation to how such intercultural miscommunications might occur.

As hypothesized, the examples found in literature did cover intercultural miscommunications which were due to linguistics, body language and cultural norms. However, they also went beyond this and provided examples of how this can occur due to social and political factors influencing the behaviour of certain cultures as well. Summaries of the facts of a few of each of these types of examples are outlined in Table 1 below:

*Table 1: Summary of selected case studies and examples from literature examining intercultural communication in court.*

<b>Miscommunication due to language differences</b>		
<b>SOURCE</b>	<b>SUMMARY OF MISCOMMUNICATION</b>	<b>IMPACT</b>
Hale, 1996, p.64	A Spanish speaking witness responding ‘Yes.’ without further explanation, when asked ‘ <i>Can you tell the court what happened?</i> ’	It is obvious that miscommunication has occurred. This is easy to rectify by asking a follow up question to extract the required information, which is what the judge did in this case.



Hale, 2014, p. 325	A Spanish speaking witness stated he and his wife were unsure whether they would spend their lottery winnings on their mortgage, or their daughter's fifteenth birthday party.	Deciding whether to spend a large amount of money on a mortgage or a birthday party would not make sense to a lot of English speakers without knowing the importance of this birthday in some Latin American cultures. Lack of this further information may have left the English speaker seeing the witness as dishonest or not mentally stable, which could have impacted on how credible they viewed them as a witness.
<b>Miscommunication due to body language</b>		
<b>SOURCE</b>	<b>SUMMARY OF MISCOMMUNICATION</b>	<b>IMPACT</b>
Pecol, 2017, p. 31	Often individuals from Latin American will nod to indicate they are listening to someone.	In Anglo-Saxon culture, nodding typically means one is agreeing with what the other person is saying. This again could impact on a English speaking juror's credibility assessment of a defendant or witness if no further information in relation to this was provided.
Australian Guidelines, p. 67	Within some Aboriginal and Torres Strait Islander societies, mothers-in-laws and sons-in-law are unable to meet face to face or speak directly with one another.	If no cultural explanation is given in relation to this, English speakers would likely perceive this as strange. This could be particularly detrimental if one of these parties was the defendant and the other a witness, as lack of eye contact may be perceived by English speakers as a sign of a guilty conscious.

<b>Miscommunication due to differing cultural norms</b>		
<b>SOURCE</b>	<b>SUMMARY OF MISCOMMUNICATION</b>	<b>IMPACT</b>
Pecol, 2017, p. 30	Latin American individuals often prefer to avoid saying "no", even in situations where they may wish to do so, as they believe that asking questions would be seen as an annoyance or them being conflictive.	In some instances in court, such as during cross-examination, witnesses may need to strongly disagree with statements which are designed to cast them in a negative light. If other parties in the court are not aware of this cultural norm, it could, unintentionally cast the speaker in a negative light and again impact on how credible they are seen as being.
<b>Miscommunication due to actions based on socio-political factors</b>		



SOURCE	SUMMARY OF MISCOMMUNICATION	IMPACT
Pecol, 2017, p. 30	Latin American parties in the United States of America often want to resolve court matters quickly to avoid the potential of bringing attention to themselves for fear of potential negative immigration complications. Wanting to resolve legal matters quickly by these parties may also be heightened due to Latin American individuals commonly being distrustful of law enforcement as such agencies in their home countries are often highly corrupt.	If fact-finder is unaware of these background factors and don't encourage parties to take their time, the parties are less likely to receive a fair outcome.

Another aspect I came across developed on the aforementioned concept of different legal systems being reflective of different cultures and the idea of what is versus what isn't socially acceptable being highly culturally charged. An interesting example of where too much weight was likely given to cultural background factors was in the 1985 Californian case of *People v. Kong Moua* ('Kong Moua case').

Kong Moua was a man of Hmong ethnicity (a minority ethnicity of Laos), who was charged with kidnapping and raping a woman of the same ethnicity. The defence which played a part in successfully reducing his sentence by a significant amount, was based on the cultural practise of "marriage by capture" (*zij poj nam*) which was considered a culturally appropriate way of obtaining a bride in this culture (Bilge, 2006). This is one of several examples provided by Bilge in her 2006 article cautioning against what she describes as the 'culture defence', as often it can cause injustices to women who were the victims in such cases.

All of these examples highlight the diverse nature of how cultural elements can present themselves in a number of different ways in the courtroom, which can cause miscommunication and have the potential to cause a range of consequences. The most likely from the examples I examined, being the potential of this to negatively impact on a party's

credibility. These examples highlight the importance of parties in the courtroom needing an in-depth understanding of the non-English speaking party's culture but as Bilge shows, however, fact-finders must be careful to appropriately balance such cultural knowledge with ensuring a just outcome.

### *The New Zealand Context*

In recent years New Zealand's population has become increasingly multi-cultural (Hon Chris Finlayson QC in Chen, *Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study*, 2019, p. 9). According to 2018 Census data, round 30% of our population do not identify as 'European', with high proportions of this minority noting their ethnicity as 'Māori', 'Pacific peoples' or 'Asian' (New Zealand Government, n.d.). This is reflected in court interpreting, where Samoan, Mandarin and Tongan are the three most highly requested languages for interpreters in criminal appearances (MOJ Sept 2021 Letter).

Unfortunately, at this stage I have been unable to locate any pertinent resources around important cultural factors to be aware of when dealing with Samoan and Tongan parties in court. There has, however, been a major study done on Chinese speaking parties and the important cultural considerations our courts need to begin adapting to so as to ensure access to justice for these parties (Chen, *Culturally and Linguistically Diverse Parties in the Courts: A Chinese Case Study*, 2019 ('Superdiversity report')).

The Superdiversity report outlines two prominent Chinese cultural concepts. These are *mianzi* ('saving face' – this concept is also discussed in the *Equal Treatment Bench Book* for Judges in England and Wales (Judicial College (England and Wales), 2021)) and *guanxi* (an importance placed on social relationships based on mutual interest).

The concept of 'saving face' in some East Asian cultures can go beyond 'saving one's own face' and extend to that person being concerned about 'saving the face' of judges and others in court (Judicial College (England and Wales), 2021, p. 225). In a criminal context, this cultural norm can present itself as a defendant being less likely to plead guilty, show remorse or admit to not understanding (Superdiversity report, p. 19; and Judicial College (England and Wales), 2021, p. 225).

New Zealand lawyers have also noticed that often, due to the cultural value of *guanxi*, Chinese accuseds have been found to be more likely to instruct a Chinese lawyer who is not familiar with criminal work, than a New Zealand European lawyer who may have experience in that area. This is said to be due to them feeling that with this choice there would be a lack of any cultural barriers, a pre-existing connection with the lawyer and an ability to speak with them in Mandarin or Cantonese (Crown Prosecutor Steve Symon in Superdiversity report, p. 59).

As such, both these deeply enshired cultural values and norms could cause the defendant to be in a significantly disadvantaged position when they appear in court if fact-finders are unaware of these cultural factors.

#### Conclusion on Intercultural Miscommunication in Court

While this section has only touched on a small number of examples of intercultural miscommunications in court, it has shown that the ways culture can present itself in this environment are far more varied than originally anticipated. It is clear that this is an area which needs to be treated with the utmost care and is one in which fact-finders require accurate, culturally and legally appropriate guidance in order to ensure that all parties receive fair and equal access to justice.

## Part 2: Current Guidance in Aotearoa New Zealand

As mentioned in the introduction to this paper, the current guidance provided on the question of potential intercultural miscommunication issues in New Zealand is very slim. However, there are a few key sources which do contain limited guidance which are important to assess and be aware of. The three key aspects I have found, which shall each be discussed in turn, are the current Ministry of Justice Guidelines, the Supreme Court case of *Abdula v R* [2011] NZSC 103 (*'Abdula'*) and cultural reports presented to the court under section 27 of the Sentencing Act 2002 (*'Section 27 reports'*).

I also note that in 2019 it was noted (in the Superdiversity report at p. 41) that work was being done to implement an Equity/Diversity Handbook for judges. If such a Handbook has been completed, it does not appear to be publicly available at this time.

### Ministry of Justice Guidelines

The term *'cultural'* is mentioned twice in the Ministry of Justice Guidelines. The first mention is in relation to the obligation of impartiality, which notes that interpreters are expected to set aside personal cultural beliefs and avoid any unnecessary contact with any of the parties involved outside of what is appropriate for adequate preparation. The second mention is in relation to interpreters having an obligation to inform the court or tribunal immediately if something cannot be accurately interpreted because of cultural or linguistic differences. While it is encouraging to see this noted in the guidelines as something interpreters are empowered to do, it is currently limited to interpreting alone and does not account for all other potential types of intercultural miscommunication which might occur and how these are expected to be handled.

### Abdula

As New Zealand's leading case on court interpreting, *Abdula* is also an important resource to examine in relation to this question. The case is not laden in guidance around intercultural miscommunication issues. However, it does provide at least one example of it (in relation to the defendant not feeling comfortable voicing his concerns about the first interpreter during the trial, as noted at p. 467), as well as providing useful pieces of *obiter dictum* relating to the obligations on judges around the court interpreting process (at p. 468). While the latter was not

in relation to intercultural communication matters, but about the quality of the interpreting process generally, it is encouraging to see that case law notes this as an expectation of judges.

### Section 27 Reports

Section 27 reports currently appear to be the most prominent way cultural evidence comes to the attention of the fact-finder. These reports allow for a more holistic view of a person's cultural background and context to be considered during sentencing (Hāpaitia te Oranga Tangata, Safe and Effective Justice Programme, 2018, p. 21). As these reports are primarily used for sentencing purposes, it is likely they would have a strong focus on cultural reasons which could act as potential justifications for the offending, without touching on other important cultural considerations around intercultural communication.

It is also important to consider that at present these reports are costly for the Defendant (Superdiversity report, p. 37, citing Anneke Smith “Funding cultural reports a matter of ‘natural harmony’ – lawyer” *Radio New Zealand* (online ed, 8 July 2019)) and their quality appears to vary significantly (Vaughan, 2021).

### Conclusion on Current Guidance in Aotearoa New Zealand

It has been acknowledged that further cultural competencies are needed for judicial and legal personnel (Superdiversity report at [135], citing *Speaking about cultural background at sentencing: Section 16 of the Criminal Justice Act 1985* (Ministry of Justice, Research Paper, November 2000) at xi). Although it is possible to locate snippets of the beginnings of guidance in this space, the guidance is general in nature and the quality of cultural evidence can vary significantly. The current guidance provides a good starting point, however, in my view, more needs to be done in this space.

### Part 3: Guidance from Overseas

*“The matters dealt with in court or legal settings and the consequences they can have are far too serious to leave them in the hands of a person who, helpful and well-intended as he or she may be, does not have the proper skills, training, knowledge and experience.” – (Pecol, 2017, p. 29)*

The concept of having adequate guidelines for interpreters, lawyers and judicial officers around the expectations of what should happen when something arises which has the potential to cause intercultural miscommunication is a desirable, yet challenging task. *How do you know what to look for? When do you need to raise it? When do you cross over from being an interpreter into the realm of cultural expert? Should you even be crossing this realm in the first place?* New Zealand currently provides little guidance on this issue, however, it is something which has been explored more fully in other jurisdictions.

This section will be looking in-depth at the guidance put in place around this area in Australia and England and Wales. I will discuss the extent to which cultural factors are mentioned, as well as some of the key points in relation to this, as noted in their guidance.

#### Guidance from Australia

Similarly to New Zealand, Australia is a highly diverse nation. According to 2016 census data, more than one fifth of Australians speak a language other than English at home, among the most prominent of these languages are Mandarin, Arabic, Cantonese and Vietnamese (Australian Industry and Skills Committee, 2022).

This diversity is acknowledged in the guidance Australia has around court interpreting. Australia has a number of multicultural equality pieces of legislation, policies and benchbooks (see Judicial Council on Cultural Diversity, 2017, p. 106; and Judicial Council on Cultural Diversity, 2016). However, for our purposes, the most prominent piece of guidance is their *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (Judicial Council on Cultural Diversity, 2017) (‘Australian Guidelines’).

### *The Australian Guidelines*

The Australian Guidelines were formed by a committee of judges, academics and interpreting and immigration bodies (Australian Guidelines, p. V). They are presented as a guide for judges, judicial officers, lawyers and interpreters alike. In relation to culture, not only do these Guidelines provide a specific section focusing on the question of ‘Language and culture’ (from p. 84), but they also mention cultural aspects and considerations to be borne in mind throughout.

As well as discussing a number of the types of potential intercultural miscommunication which could arise (see pp. 81 and 84), the Guidelines also highlight several other important cultural aspects which should be at front of mind when interpreting in this setting. Three of the most important of these being: empowering the court interpreter; adequate preparation; and sharing the onus of being aware of such potential issues.

#### Empowering the court interpreter

Similarly to the MOJ Guidelines, the Australian Guidelines empower interpreters to seek leave from the judicial officer to raise to them that there may be a potential intercultural miscommunication issue (Standard 20.6, p. 14, also noted at p. 84). However this is framed more broadly than in the MOJ Guidelines, which are restricted to cultural elements impacting the interpreter to accurately interpret.

The permissibility in the Australian Guidelines for interpreters to do this provides further certainty and greater fairness in relation to the access to justice concerns mentioned in the introduction to this paper. However, this may be ethically challenging for court interpreters as it is not their role to provide ‘advice’.

Although it would be impossible for these guidelines to give detailed standards as to when interpreters should raise these issues, in a way which covers all potential issues over all potential cultures, in all potential contextual situations. However, it could have been of assistance for the guidance to provide examples of when such interventions could be necessary and where this is being taken too far with too frequent interruptions for more minor issues which could result in irritating the judge, potentially negatively impacting a defendant’s case.

Ultimately, whether such issues would be raised by interpreters remains a judgement call. While this is not the most desirable conclusion to reach in the legal arena, it is a realistic and workable way of ensuring such potential issues are raised so that judges are aware of them and can choose how to proceed.

#### Adequate preparation

The Australian Guidelines also provide recommendations around ensuring all parties involved in the court interpreting process feel adequately prepared, which includes cultural considerations, such as the use of ‘mentors’ to be available to provide advice to those acting as interpreters with less experience in this setting (p. 57). Of particular interest to me was the Guidelines’ recommended collaborative and engaged approach with ensuring the Judge, interpreter and non-English speaking party are all active participants in ensuring the interpreter is the ‘right fit’ for the job. This is achieved through several means, including an obligation on the judge to ensure the interpreter is appropriate and the Guidelines provide considerations for them to take into account when doing so (p. 72).

It is also a recommendation that there always be a prior meeting of the non-English speaking party and the interpreter to ensure both parties are happy with the ‘fit’ (p. 67). This ties in to the importance the Guidelines note on selecting an interpreter who is ‘*culturally appropriate*’ for the assignment (Australian Guidelines: Recommended Standards for the Courts 4.3, 6.2 and 11 (pp. 8 – 10); Model Rules Directive 1.19(a) (p. 20). ‘*Culturally appropriate*’ can be far more nuanced than what one might expect, as this not only covers variations in cultures with languages which are spoken in a number of different countries (such as Spanish), but also gender and age considerations if relevant. I believe this to be a useful initiative for ensuring a high degree of cultural competency in relation to court interpreters.

#### Sharing the load

The Australian Guidelines also promote the awareness of potential intercultural miscommunication as something that is not just the interpreter’s responsibility, but also that of lawyers and judges. Examples of this include: lawyers ensuring interpreters are appropriately briefed, including in relation to cultural issues (p. 90) ; judicial officers listening for irrelevant answers which may indicate miscommunication due to background cultural factors (p. 74); and that it may be necessary for judges to adapt their directions to juries in assessing the credibility

of witness evidence when that witness comes from a different cultural background (pp. 74 – 75).

While all these suggestions rely heavily on an individual's own judgement, they all provide good prompts for these other parties to be taking an active role in engaging and being aware of these potential issues. This is an aspect which is also encouraged of lawyers in academic literature (see Hale, 2014 at pp. 325 – 326). I imagine having written guidance noting this provides some relief to interpreters in that the ethically ambiguous task of picking up on and raising potential intercultural miscommunication to the court's attention is not a responsibility they bear alone.

#### *Conclusion on Australia's Guidance*

While some aspects of the Australian Guidelines could be developed further, overall, they provide for a multitude of cultural considerations to be at front of mind and addressed in meaningful ways in the courtroom environment. Having this level of detail with official written guidance provides clarity to court interpreters (and judges and lawyers alike) who are now able to use them as a basis to demand a certain standard be upheld, as seen on the [change.org](http://change.org) petition demanding this in Australia ([change.org](http://change.org), 2021). I am aware that researchers at the University of New South Wales are currently reviewing the uptake and success of the Australian Guidelines. When this research becomes publicly available, It will be interesting to see how much of the guidance on intercultural communication is being applied in practise and how successful these initiatives have been.

#### Guidance from England and Wales

The jurisdiction of England and Wales is also highly diverse jurisdiction. According to Census data, in 2011 around 7.5% of the population of England and Wales had a main language other than English or Welsh (Judicial College (England and Wales), 2021 ('Equal Treatment Bench book'), p. 227; and Office for National Statistics (Government of the United Kingdom), 2012). However, of these, the ones which are most commonly requested for court interpreting are quite different to those most commonly requested in New Zealand, with Polish, Punjabi, Urdu, Romanian and Lithuanian being amongst the most requested (Ministry of Justice (England and Wales), 2015, p. 9).

This makes England and Wales an interesting case study for my purposes, as the most common minority cultures this jurisdiction have very different cultural backgrounds to those most commonly seen here. Due to this, I anticipated that some of the cultural guidance from this jurisdiction might provide quite different examples and considerations, which would be of benefit to New Zealand when these cultures appear in our courts.

From my research, there does not appear to be any overarching guidelines in England and Wales similar to that of the Australia Guidelines, which apply to interpreters, judicial officers and lawyers on court interpreting practises.

While all interpreters working in the courts of England and Wales should be registered with the National Register of Public Service Interpreters ('NRPSI') (The Crown Prosecution Service (England and Wales), 2019; and City Legal Translations, 2014), neither the NRPSI's Code of Professional Conduct, nor the Code of Professional Ethics of the European Association for Legal Interpreters and Translators ('EUALITA'), of which NRPSI is a member (see European Association for Legal Interpreters and Translators, 2022) provide significant advice for interpreters on this issue (National Register of Public Service Interpreters, 2016; and European Association for Legal Interpreters and Translators, 2013).

The most detailed guidance I was able to find from England and Wales was in the Equal Treatment Bench book. Guidance designed not for the benefit of interpreters, but for the judiciary.

*The Equal Treatment Bench book*

*"Ignorance of the cultures, beliefs and disadvantages of others encourages prejudice. It is for judges to ensure that they are properly informed and aware of such matters, both in general and where the need arises in a specific case."* - (Equal Treatment Bench book, p. 8)

The Superdiversity report describes the 2018 iteration of the Equal Treatment Bench book as having three main principles: good communication; demonstrating fairness; and diversity (Superdiversity report, p. 41). These underlying principles are just as prominent in the current,

2021 iteration as well. These principles are intrinsically applied to cultural diversity, as well as a range of other areas, such as disability, age and gender.

Chapter 8 of the Bench book focuses on aspects related to cultural diversity specifically, however, cultural considerations are referred to throughout the publication as well. Throughout, the Bench book provides a number of useful and practical examples highlighting how intercultural miscommunication might occur, as well as highlighting the A good example highlighting the interwoven nature of culture and other diversity factors.

For example, pages 116 and 117 discuss how cultural stigma can be a reason as to why certain ethnic groups are less likely to receive appropriate mental health support and are thus more likely to be detained under the Mental Health Act in England and Wales (citing ‘What are health inequalities?’ The King’s Fund (18 February 2020) and ‘Perceived barriers to accessing mental health services among black and minority ethnic (BME) communities: a qualitative study in South East England’: Memon and others. *BMJ Open* (2016)).

I found this to be a particularly interesting example as it emphasizes practically how migrant communities can feel like they are not properly served by not only the legal system, but an array of different systems in their new home countries. They can feel disadvantaged in a number of ways, including employment, health and education. In time it is hoped that as more research and accommodations are made, these factors will no longer be so pronounced. However, in the interim, it is important to recognise that they play a important role in understanding the struggles migrants face and how they can bring this distrust they have for the host countries’ systems into the courtroom with them.

The Bench book also provides useful insight in relation to how different expressions of intercultural differences can interlink. For example, the terms for words such ‘compromise’, ‘fairness’ and ‘mediation’ could have very different meanings and connotations in different languages and cultures. This highlights how linguistic and semantic differences can be interwoven and coloured by larger political factors for some of these parties and it is important for fact-finders to be aware of such cultural connotations.

The Bench book provides useful and practical guidance judges on awareness, and how interact with such cultural aspects and important aspects. Such guidance ranges from being aware that other cultures may display emotion differently (p. 207), to the type of language to use with such parties to assist with clear communication (pp. 228 – 230), to considering culture when sentencing in relation to mental health and culpability (pp. 134 – 135, citing the October 2020 Sentencing Guideline), to considerations based on Edward Hall’s model of high and low context cultures (see pp. 207, 225 and 226).

#### *Conclusion on the Guidance from England and Wales*

While England and Wales does not appear to have any guidelines for interpreters on these elements, it is encouraging to see the cultural based research being done in this jurisdiction, as well as the detailed guidance in the Equal Treatment Bench book for judges. Similarly to the Australian Guidelines, this document empowers judges to not only become more familiar with different cultures and how potential intercultural miscommunication might arise, but also to take responsibility in relation to this. Education and empathy play huge roles in one’s ability to be an ambassador of culture and to the disempowered. The Bench book serves as a well rounded and detailed guide for judges to assist them in ensuring justice is able to be done regardless of one’s cultural background.

#### *Conclusion on Guidance from Overseas*

The process of reviewing the guidance of both Australia and England and Wales was highly informative. The main sources of guidance I examined for both these jurisdictions provided a number of useful real life examples, further highlighting the types of ways intercultural miscommunication might occur, as discussed in Part 1, as well as providing useful, clear and practical guidance around best practise for their target audiences.

The importance both of these guidance resources placed on the judge and them having responsibility around being live to potential intercultural miscommunications occurring was particularly interesting. This somewhat lessens the ethically ambiguous burden on the interpreter by emphasizing that other parties have responsibilities in this regard as well.

It was also surprising not to be able to find a document similar to the Australian Guidelines for the jurisdiction of England and Wales. While the Equal Treatment Bench book provides a number of important and useful insights into this area, I believe that a similar guide to that of the Australian Guidelines, tailored to interpreters could be of use to this jurisdiction as well.

## Part 4: Suggestions for Aotearoa New Zealand

Having reviewed New Zealand's current guidance as well as the guidance provided by Australia and England and Wales, it is clear that New Zealand is lagging behind in providing comprehensive guidance on this issue. The Superdiversity report proposes a number of recommendations for New Zealand, many of which would require large scale changes to our current systems. The suggestions I make in this part have been strongly guided by the recommendations of this report, as well as the key documents examined from Australia and England and Wales.

As this is a relatively recent area of development, it is impossible to be certain whether a particular aspect of guidance would be more effective in terms of ensuring equal access to justice and further research, which will come over time as these processes are reviewed will eventually provide us with a better foundation for informed change. However, at this stage, there are a number of key priorities I believe New Zealand should be looking to develop. Namely: Providing interpreters with a higher degree of empowerment; Providing continued education on intercultural communication and cultural competency to all members involved in the court interpreting process; and having clear, written guidelines on these issues.

In large part, a number of these developments could be based off and expanding upon some of the limited guidance we currently have in New Zealand. I shall discuss each of these suggested points of development in turn.

### Providing Interpreters with a Higher Degree of Empowerment

A useful starting point when considering the empowerment of our court interpreters, is the current MOJ Guidelines. As discussed in part 2 of this paper, these guidelines make reference to interpreters needing to put aside personal cultural beliefs and avoiding any contact with the parties, outside of what is needed to prepare. This does not explicitly prevent the types of pre-

appearance meetings encouraged in the Australian Guidelines (and supported as a recommendation by the Superdiversity report), however it is framed in a cautionary and negative manner, which means our interpreters are going to feel less empowered to suggest such a meeting and in turn, less confident and comfortable when commencing the interpreting job, in comparison to their Australian counterparts.

I believe we should adapt our current guidance so as to take a similar approach to that seen in Australia in relation to such pre-trial meetings, so as to ensure there are no potential cultural conflicts of the interpreter acting for the particular individual in advance of the day the interpreting is required.

As we can see in the Superdiversity report, a number of judges view section 27 reports these as a particularly useful cultural resource which they would like to see used in a more flexible way (at p. 37). I believe Section 27 reports could be developed, so as to make them more flexible, of consistent high quality and publicly funded, which could then be combined with the requirement of having such a pre-trial meeting. If these Section 27 reports were required to be written prior to and provided during this meeting, they could serve as a subject of discussion and amendment during this time. This would ensure the report accurately reflects the personal and cultural values of the non-English speaking party, that these are aligned with the interpreter's understanding, while also assisting in providing further cultural education to the judge and lawyers during this time.

While it could be argued such an approach may interfere with the independence of the report, to me, this is would be outweighed by the benefits of providing a cross-check to ensure the quality of the report and to try and avoid any potential stereotyping which may not be true of the particular individual. To try and alleviate any concerns around independence, additions or amendments noted by the individual and the interpreter should be made clear so that while the judge is aware of these changes, they can also assess the weight they wish to give these given this has come from someone other than the cultural expert who prepared the original report.

## Continued Education

So all parties are live to the potential miscommunications which could occur when working with individuals from other cultures, continued education is paramount. A useful and constant education tool would be, as suggested in the Superdiversity report (at p. 39), to create full-time employed positions for in-house ‘cultural advisors’, hired by the Ministry of Justice, to provide assistance on cultural queries in relation to the main languages requested for court interpreting, who would be available to be called upon for such advice as and when needed. A similar approach is used in the United States of America, where the judiciary employs around 100 Spanish Court interpreters (United States Courts, 2017).

While less common languages would not reap the same benefits of this system and further measures would need to be implemented for those languages, I believe this would provide a useful mechanism which would be of great assistance in increasing accurate intercultural awareness for all parties.

## Clear, Written Guidelines

Our current MOJ Guidelines are seriously lacking when it comes to aspects to do with intercultural awareness and in my view, should be further developed in this regard, to a significant degree. Alongside the two aforementioned points, I also recommend that such improved guidelines include:

- a multitude of different examples around cultural awareness and how intercultural miscommunication might occur (as is seen in the Australian Guidelines and the Equal Treatment Bench book);
- an extension of the current ability of interpreters being allowed to raise potential intercultural miscommunications beyond language to cover the variety of ways we can see this may occur. Even if greater employment of cultural reports and cultural experts are used in criminal cases, in my view, it is still important to provide interpreters with the ability to raise still these issues if they have to; and
- clear expectations of all parties, including empowering the judge to be responsible not only for the quality of interpreting (see *Abdula*), but for the quality of communication in all its potential iterations.

Any such guidelines should only be implemented after the consultation with both interpreters and judges to ensure they provide workable solutions for both of these groups.

Such improved guidelines would not only provide clarity to all parties in relation to the expectations associated with this aspect, but also provide empowerment to ensure these standards are being upheld, as can be seen with the change.org petition regarding the upholding of the Australian Guidelines (change.org, 2021).

### Conclusion on Suggestions for Aotearoa New Zealand

I believe that the current guidance we have on this topic in New Zealand requires significant further development, but does provide useful foundations upon which we can build. In coming years it will be interesting to see whether any of the initiatives I have suggested in this part will be put into practice. As this is an undeveloped area of research, it is currently how impactful or costly these recommendations would be. However, it is clear that we are currently significantly lacking in this area in comparison to other jurisdictions and in my view, any progress or initiatives in this space would be a positive starting point upon which to build and further develop over time.

## Conclusion

While this research confirmed several of my hypotheses, it also provided a number of interesting concepts and initiatives which I had not anticipated prior to commencing my research.

I came to the first part of this research with a somewhat misguided hope that I would find a clear cut and decisive list of the most common cultural misunderstanding issues which have ever appeared in court. Culture does not work like that. We live in such a diverse world, filled with a multitude of vibrant cultures, each with their own unique values and norms that it would be impossible to ever be able to boil this down in to one neat and tidy list as I had originally hoped. What Part 1 did show me however, was that the way potential miscommunication can arise was so much broader than what I had originally anticipated. The question of culture in a courtroom goes beyond what the culture of that person's home country is, but what it is for people who have left that environment and are now in New Zealand. A person's history and journey will shape the culture they belong to and consideration of the specific culture to which they belong is of primary importance.

In New Zealand we are clearly far behind a number of other countries in our relation to our official guidance around potential intercultural miscommunication in court. Examining the three key documents of the Superdiversity report, the Australian Guidelines and the Equal Treatment Bench book, while limited in scope, was instrumental in assessing whether our current guidance is up to standard and ways in which it can be improved. These resources also shone light on how these issues should not solely fall to the interpreter to raise and that it is also the responsibility of judges to be conscious of such cultural norms and behaviours. If we implement this obligation, alongside developing others, as suggested in part 4, it is hoped that this would alleviate some of the ethical discomfort interpreters may feel around this area, while still ensuring such issues are brought to the fore and that interpreters feel empowered to do so if they feel it necessary in certain circumstances.

How we choose to develop in this area is ultimately a question for our legislators. It is hoped that this paper might provide some useful suggestions on practical starting points to get the ball rolling which develop on some of our existing processes. Only time will tell how we as a nation

will develop in this area. But with so little in place at present, any development is likely to be good development.



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