Professional Interpreters for Justice, c/o Involvis, The Coach House, Holbrook, IP9 2QR

25 September 2013

By email to: pacereview@homeoffice.gsi.gov.uk

Dear Sir or Madam

Revised PACE Codes of Practice: C and H

These submissions are made on behalf of the representative organisations of Professional Interpreters for Justice in response to the Home Office consultation issued on 21 August. They concern the proposed changes to the PACE codes of practice C and H which aim to implement the EU Directive on the right to interpretation and translation in criminal proceedings[1], and specifically the 'Notes for Guidance, 13A:

> *'Notes for Guidance*
>
> *13A Chief officers have discretion when determining the individuals or organisations they use to provide interpretation and translation services for their forces provided that the services which are provided satisfy the requirements of the Directive. One example would be the Ministry of Justice Framework Agreement for interpretation and translation services. ~~Whenever possible, interpreters should be provided in accordance with national arrangements approved or prescribed by the Secretary of State~~.*

In particular, we wish to express our concerns and objections regarding:

- the inclusion of the Ministry of Justice Framework Agreement as an example of services provided that satisfy the requirements of the Directive
- the deletion of the sentence stating that wherever possible, interpreters should be provided in accordance with national arrangements approved or prescribed by the Secretary of State.

Interpreters are used by the police services for essential communication with the public, 95% of which is of an evidential nature for victims, witnesses and suspects and so is required to be of the highest standard to be evidentially reliable.

Failure to achieve the required standards results in increased risks of, at the very least, unacceptable delays in justice and, at worst, miscarriages of justice. Either way any failures are accompanied by increased costs (e.g. keeping people in custody) and reductions in public confidence and satisfaction.

Standards for interpreters used in the Criminal Justice System were set by the National Agreement (NA)[2] in 1999 as a result of a serious miscarriage of justice caused by the use of unqualified interpreters. The NA is a safeguard to basic human rights and was put in place following the recommendations of Lord Justice Auld in order to ensure the right to a fair trial. It requires interpreters to be registered on the National Register of Public Service Interpreters (NRPSI)[3] and the National Registers of Communication Professionals working with Deaf and Deafblind People (NRCPD)[4] and to have full qualifications and experience before they can be used in the criminal justice arena.

Our considered view is that the Ministry of Justice Framework Agreement, introduced in February 2012, is far from being able to meet the needs of the police service and the communities they serve. It is not capable of providing a consistent, effective service and falls below the quality required by the EU Directive.

Evidence of the failures relating to this Framework Agreement have been widely publicised in the media and in particular we draw your attention to the parliamentary reports on this language service contract (National Audit Office, Public Accounts Committee and Justice Select Committee) and the parliamentary debate on 20 June 2013, all of which can be found on the PI4J website[5].

This Framework Agreement has already caused massive problems in the UK courts and this situation must not be allowed to be extended to the police forces if similar disruption and poor quality service are to be avoided.

More adequate examples to be used would be the Metropolitan Police Service Language Programme, and the models for language provision used by Cambridgeshire Constabulary and Wales Interpreting and Translation Services. These are all delivering savings to the police forces and providing the benefits which the MoJ Framework Agreement makes claims about but clearly fails to deliver. They all maintain high standards by using qualified professional interpreters in line with the National Agreement and complying with the EU Directive.

In view of this **we urge you to remove the MoJ Framework Agreement from the Police and Criminal Evidence Act,** and to keep the sentence proposed for deletion in order to ensure that, wherever possible, interpreters should be provided in accordance with national arrangements approved or prescribed by the Secretary of State.

On behalf of Professional Interpreters for Justice (PI4J),

Yours sincerely

Penny Arbuthnot
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On behalf of Professional Interpreters for Justice (PI4J)

Association of Police and Court Interpreters (APCI) – chairman@apciinterpreters.org.uk
Chartered Institute of Linguists (CIOL) - Keith.Moffitt@iol.org.uk
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National Register of Public Service Interpreters Ltd (NRPSI) – chairman@nrpsi.co.uk
National Union of Professional Interpreters and Translators, part of Unite the Union (NUPIT) - nupit@unitetheunion.org
Professional Interpreters Alliance (PIA) – info@profintal.org
Society of Official Metropolitan Interpreters UK Ltd (SOMI) – board@somiukltd.com
Society for Public Service Interpreting (SPSI) – chairman@spsi.org.uk
Wales Interpreter and Translation Service (WITS) - wits@gwent.pnn.police.uk

Links for further information

1) EU Directive 2010/64**:** EU Directive on the right to interpretation and translation in criminal proceedings
2) National Agreement (NA): National Agreement on Use of Interpreters
3) National Register of Public Service Interpreters (NRPSI)
4) National Registers of Communication Professionals working with Deaf and Deafblind People (NRCPD)
5) PI4J website containing parliamentary and media reports): Professional Interpreters for Justice (PI4J)

FURTHER POINTS AND SUPPORTING EVIDENCE

1. The Home Office has published proposed revisions to PACE and invited comments, with a deadline of 25 September 2013 (Annex A).
2. Paragraph 13A states the following: *"Chief officers have discretion when determining the individuals or organisations they use to provide interpretation and translation services for their forces provided that the services which are provided satisfy the requirements of the Directive."*
3. It goes on to say, "*One example would be the Ministry of Justice Framework Agreement for interpretation and translation services*."
4. The next sentence is to be deleted: *"Whenever possible, interpreters should be provided in accordance with national arrangements approved or prescribed by the Secretary of State."*
5. The EU Directive referred to in paragraph 13A is assumed to be Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.
6. Paragraph 3 above is disputed insofar as such services satisfy the Directive, and we are mindful of Article 8, the Non-regression clause.
7. Commencing first with paragraph 4 above, 'national arrangements' is assumed to be a reference to what is known as the "National Agreement on Arrangements for the Use of Interpreters, Translators and Language Service Professionals in Investigations and Proceedings within the Criminal Justice System, as revised 2007" (NA).
8. It is our position that the NA, prior to amendments made in 2007/8 and more recently, is consistent with the requirements of the EU Directive. For this reason paragraph 4 should not be deleted.
9. It is equally our position that the "*Framework Agreement*" (FWA) is not consistent with the EU Directive for the reasons laid out below.
10. There is a considerable body of documented evidence as to the levels of failure of the contractor under the FWA to supply interpreters to Courts, the police and other CJS agencies.
11. Common failures appear to include: failure to book an interpreter when requested; failure of the interpreter to attend; failure of the interpreter to remain until conclusion of the case; unauthorised substitution of the interpreter; last minute cancellation by the contractor; supply of interpreters who are unqualified, unvetted and/or inexperienced interpreters; failure to perform at a reasonable or acceptable standard; failure to interpret at all for defendants in the dock; failure to interpret for the benefit of giving legal advice before or after hearings. These are not anecdotal in nature, but documented with corroborative detail.

Article 2

For the full text of the EU Directive, see Annex B

12. Paragraph 1 requires that interpreters be provided "*without delay"*. There are a huge number of documented instances where court cases have been adjourned due to the failure of the contractor to supply within a reasonable time or at all. The police have on a large number of occasions had to release suspects without interview for the same reason.

13. Paragraph 2 requires that interpreting be available for "*communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings".* There is a common theme running through many comments and complaints from Counsel concerning the refusal of the FWA contractor's interpreters to interpret before or after a hearing, since they are not paid to do so.

14. Paragraph 4 requires that "*a mechanism be in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings*". A common observation from complainants is that the FWA contractor fails to send, for example, a Lithuanian interpreter and sends a Russian one instead, presumably on the basis of geographical proximity. This occurs in many languages. Likewise there are many complaints that the wrong variant of languages such as Kurdish is provided.

15. Given that the FWA has been in place for over 19 months, it would reasonably be expected that such issues should have been resolved if they simply indicated a training requirement or tighter supervision.

16. Paragraph 5 states, "*suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings*." It is a common complaint that interpreters supplied by the contractor fail to fulfil their duties to an acceptable standard, and there are worrying examples of failure to interpret at all. The complaints procedure is unclear to court users, and the sanctions imposed by the contractor follow no published protocols and appear arbitrary.

17. Paragraph 8 requires that interpretation services "*shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence."* There is a substantial body of evidence that the quality of interpreting provided under the FWA is unacceptably low and defendants are not being supplied with interpreting of a standard which enables adequate understanding of the evidence against them. It follows they will not be able to defend themselves, which they have a right to do. This is dangerous, and exposes the UK to litigation.

Article 5

18. Paragraph 1 states that "*Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required*". What these concrete measures might be is unclear. But it may reasonably be inferred that such measures will include a continuous assessment as to the quality of all interpreting being delivered. There is no evidence that such measures are in place under the FWA. This is a reasonable inference due to the continued volume of failures documented in the Dossier mentioned above.

19. Article 5 goes on "*Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified".* Such a register already exists in the UK. It is called the National Register of Public Service Interpreters (NRPSI).

20. The NRPSI maintains a publicly available website. It is to be found here: www.nrpsi.co.uk Details of Registered Public Service Interpreters (RPSIs) may be verified.

21. Paragraph 2 requires that the register should "*where appropriate, be made available to legal counsel and relevant authorities*".

22. The FWA contractor has a list of linguists it sends to court and elsewhere. It is kept secret, and is not available for scrutiny. Details of qualifications, vetting and experience on the part of the contractor's interpreters are therefore unverifiable.

23. Paragraph 3 requires confidentiality on the part of interpreters and translators "*regarding interpretation and translation provided under this Directive".* The FWA contractor's linguists may not have received training or notification of this vital requirement, given the "blogging" activities of a number of them, where clients, indictments and other elements of their work have been discussed and trivialised. Full details are available.

Article 8

24. This article is the non-regression clause. In essence it means that no Member State (MS) which has a system in place which meets or exceeds the requirements of the Directive may reduce the standard of those provisions.

25. There is considerable evidence that the provisions of the FWA constitute a reduction in the levels of service provided by courts, tribunals, police and other CJS agencies in the UK.

26. In particular, it is our position that the omission of the NRPSI from the present arrangements for the provision of interpreters under the FWA and the removal from the Codes of Practice of any reference to it constitute acts of regression contrary to this Article.

Conclusions

27. It is highly probable that there is a continuous and high volume of daily breaches of the EU Directive in Courts, Tribunals and at police stations across the UK.

28. These breaches are of varying levels of seriousness, but are indicative of a systemic problem rather than a simple set of difficulties which may be addressed through training or better management.

29. Implementation of the FWA in its present form is therefore not consistent with the provisions of the EU Directive.

30. It is dangerous and against the interests of justice to rely upon the FWA for the supply of interpreters.

31. Such reliance would open the possibility of considerable financial cost to the state when challenged by appellants or other parties, which in our view would be the inevitable result of an ill-considered abandonment of the NA.

32. Annex C is an opinion of Mr Matthew Harding of Counsel dated 20 September 2011. Many of the problems detailed here are supported by Counsel's opinion, written before implementation of the FWA.

Annex A – Home Office Consultation Revised PACE codes of practice: C and H

'Notes for Guidance

13A Chief officers have discretion when determining the individuals or organisations they use to provide interpretation and translation services for their forces provided that the services which are provided satisfy the requirements of the Directive. One example would be the Ministry of Justice Framework Agreement for interpretation and translation services. ~~Whenever possible, interpreters should be provided in accordance with national arrangements approved or prescribed by the Secretary of State~~.

https://www.gov.uk/government/consultations/revised-pace-codes-of-practice-c-and-h
This consultation closes on **25 September 2013**

Summary
This consultation concerns the treatment of 17-year-olds in police custody and the translation and interpretation of essential documents for non-English speaking detainees.

Open consultation **Revised PACE codes of practice: C and H**
Organisation: Home Office
Page history: Published 21 August 2013
Policy: Helping the police fight crime more effectively
Minister: The Rt Hon Damian Green MP
Series: Police and Criminal Evidence Act 1984 (PACE): current versions
Documents
Revised PACE code C (detention)
Revised PACE code H (detention-terrorism)

Consultation description
This consultation runs until Wednesday 25 September 2013.
Each draft has a covering note and detailed table outlining all the changes and their purpose with links to the paragraphs concerned. The changes to the Codes and reasons for the changes are summarised below.
Proposed changes to Codes of Practice C (Detention) and H (Detention – Terrorism)
The draft changes to the codes have been made in order to:

- comply with the Divisional Court judgment in HC v The Secretary of State for the Home Department and the Commissioner of Police of the Metropolis.
- implement the EU Directive on the right to interpretation and translation in criminal proceedings

HC judgment
In the judgment, the court held that PACE Code C must be amended so that 17-years-olds were not treated in the same way as adults aged 18 and over.
The changes apply the safeguards in codes C and H currently applicable to juveniles (aged 16 or under) to 17-year-olds except in relation to primary legislation which cannot be extended to 17-year-olds unless it is amended by Parliament.
The main effect is to require an appropriate adult be called to help a 17-year-old and for a person responsible for the welfare of the 17-year-old (such as a parent or guardian) to be informed of their status as a detainee.

EU Directive 2010/64
The EU Directive came into force on 20 October 2010 and is required to be implemented in UK law by 27 October 2013. To comply with the directive, the changes include a new requirement for suspects to be provided with a written translation of certain 'essential' documents. Such documents are those concerning decisions to deprive a person of their liberty by keeping them in police custody and documents which set out any offence for which they are charged or reported.
A number of other minor changes have been made in the interests of legal accuracy and to reflect current practice.

Next steps
These drafts are being circulated for consultation in accordance with section 67(4) of PACE.
Please email your responses to: pacereview@homeoffice.gsi.gov.uk

Annex B - EU Directive 2010/64

Article 1

Subject-matter and scope

1. This Directive lays down rules concerning the right to interpretation and translation in criminal proceedings and proceedings for the execution of a European arrest warrant.

2. The right referred to in paragraph 1 shall apply to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal.

3. Where the law of a Member State provides for the imposition of a sanction regarding minor offences by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed to such a court, this Directive shall apply only to the proceedings before that court following such an appeal.

4. This Directive does not affect national law concerning the presence of legal counsel during any stage of the criminal proceedings, nor does it affect national law concerning the right of access of a suspected or accused person to documents in criminal proceedings.

Article 2

Right to interpretation

1. Member States shall ensure that suspected or accused persons who do not speak or understand the language of the criminal proceedings concerned are provided, without delay, with interpretation during criminal proceedings before investigative and judicial authorities, including during police questioning, all court hearings and any necessary interim hearings.

2. Member States shall ensure that, where necessary for the purpose of safeguarding the fairness of the proceedings, interpretation is available for communication between suspected or accused persons and their legal counsel in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications.

3. The right to interpretation under paragraphs 1 and 2 includes appropriate assistance for persons with hearing or speech impediments.

4. Member States shall ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter.

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation and, when interpretation has been provided, the possibility to complain that the quality of the interpretation is not sufficient to safeguard the fairness of the proceedings.

6. Where appropriate, communication technology such as videoconferencing, telephone or the internet may be used, unless the physical presence of the interpreter is required in order to safeguard the fairness of the proceedings.

7. In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide persons subject to such proceedings who do not speak or understand the language of the proceedings with interpretation in accordance with this Article.

8. Interpretation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

Article 3

Right to translation of essential documents

1. Member States shall ensure that suspected or accused persons who do not understand the language of the criminal proceedings concerned are, within a reasonable period of time, provided with

a written translation of all documents which are essential to ensure that they are able to exercise their right of defence and to safeguard the fairness of the proceedings.

2. Essential documents shall include any decision depriving a person of his liberty, any charge or indictment, and any judgment.

3. The competent authorities shall, in any given case, decide whether any other document is essential. Suspected or accused persons or their legal counsel may submit a reasoned request to that effect.

4. There shall be no requirement to translate passages of essential documents which are not relevant for the purposes of enabling suspected or accused persons to have knowledge of the case against them.

5. Member States shall ensure that, in accordance with procedures in national law, suspected or accused persons have the right to challenge a decision finding that there is no need for the translation of documents or passages thereof and, when a translation has been provided, the possibility to complain that the quality of the translation is not sufficient to safeguard the fairness of the proceedings.

6. In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide any person subject to such proceedings who does not understand the language in which the European arrest warrant is drawn up, or into which it has been translated by the issuing Member State, with a written translation of that document.

7. As an exception to the general rules established in paragraphs 1, 2, 3 and 6, an oral translation or oral summary of essential documents may be provided instead of a written translation on condition that such oral translation or oral summary does not prejudice the fairness of the proceedings.

8. Any waiver of the right to translation of documents referred to in this Article shall be subject to the requirements that suspected or accused persons have received prior legal advice or have otherwise obtained full knowledge of the consequences of such a waiver, and that the waiver was unequivocal and given voluntarily.

9. Translation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.

Article 4

Costs of interpretation and translation

Member States shall meet the costs of interpretation and translation resulting from the application of Articles 2 and 3, irrespective of the outcome of the proceedings.

Article 5

Quality of the interpretation and translation

1. Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8) and Article 3(9).

2. In order to promote the adequacy of interpretation and translation and efficient access thereto, Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified. Once established, such register or registers shall, where appropriate, be made available to legal counsel and relevant authorities.

3. Member States shall ensure that interpreters and translators be required to observe confidentiality regarding interpretation and translation provided under this Directive.

Article 6

Training

Without prejudice to judicial independence and differences in the organisation of the judiciary across the Union, Member States shall request those responsible for the training of judges, prosecutors and judicial staff involved in criminal proceedings to pay special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication.

Article 7

Record-keeping

Member States shall ensure that when a suspected or accused person has been subject to questioning or hearings by an investigative or judicial authority with the assistance of an interpreter pursuant to Article 2, when an oral translation or oral summary of essential documents has been provided in the presence of such an authority pursuant to Article 3(7), or when a person has waived the right to translation pursuant to Article 3(8), it will be noted that these events have occurred, using the recording procedure in accordance with the law of the Member State concerned.

Article 8

Non-regression

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

Article 9

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by …*.

2. Member States shall transmit the text of those measures to the Commission.

3. When Member States adopt those measures, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

* OJ: Please insert a date: 36 months after the publication of this Directive in the Official Journal.

Article 10

Report

The Commission shall, by ….*, submit a report to the European Parliament and to the Council, assessing the extent to which the Member States have taken the necessary measures in order to comply with this Directive, accompanied, if necessary, by legislative proposals.

Article 11

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

* OJ: Please insert a date: 48 months after the publication of this Directive in the Official Journal.

Article 12

Addressees

This Directive is addressed to the Member States in accordance with the Treaties.

Done at,

For the European Parliament For the Council

The President

The President

Annex C – Opinion of Mr Matthew Harding of Counsel dated 20 September 2011 on the Ministry of Justice Framework Agreement

Interpreters Contracts

OPINION

1. I have been asked to advise in regards to the Framework Agreement ('FWA') brokered between the Ministry of Justice to provide court and police station interpreters via a private organisation called 'Applied Language Solutions' ('ALS').

2. I note interestingly that this company featured on the popular TV show 'Dragon's Den' and was not accepted by 'the Dragons' but went onto success anyway with large multi-national companies.

3. The MoJ and related organisations including the various police forces, the CPS and probation trusts will be able to sign contracts under this framework agreement with ALS. The company envisage that the contract will commence in October 2011.

4. The framework agreement proposes to cut budgets significantly and proposes to cut the pay of interpreters to a significant degree.

5. Previously, the National Register of Public Service Interpreters required members to have a Public Services Interpreters qualification with rigorous criteria – see http://www.nrpsi.co.uk/pdf/CriteriaforEntry.pdf. The NRPSI is a voluntary organisation provides regulation to the interpreting and translation profession by ensuring standards and experience and publishing a register and its criteria.

6. I understand now from the ALS's website the position is as follows1:

1 http://www.appliedlanguage.com/about_us/news/linguist_lounge.aspx

"All linguists wishing to work on MoJ assignments with Applied Language Solutions (ALS) must apply for the registration and assessment processes that will lead to being listed on the Ministry of Justice's (Legal Interpreting & Translation) register. This is the only register that Applied Language Solutions will use to select linguists for MoJ assignments under the framework agreement.

We have created a dedicated website www.linguistlounge.com where you can find out more about the Ministry of Justice contract and start the registration process. . ."

7. The website referred to (http://www.linguistlounge.com) has a Frequently Asked Question FAQ which says as follows (http://www.linguistlounge.com/faq:)

"What has been taken into account by Applied Language Solutions in designing this service solution?

This work sits very firmly within a much broader context described by the need for quality. It sits within:

•The well-established commitment on the part of the United Kingdom to mutual trust and mutual recognition as the primary form of judicial cooperation within the European Union.

•DIRECTIVE 2010/64/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings.

•The position of the directive within the Stockholm Program

•The right of the individual to have criminal proceedings carried out expeditiously, with appropriate representation, and to understand the language used - in short to ensure the conditions of a fair trial are met through appropriate provision of language services - axiomatic in a democratic society.

Nearly 20 years of work has gone into the directive that is now in place and which the United Kingdom must comply with by October of 2013. It comes out of the work done by the GROTIUS and AGIS projects, the Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union"

8. The FAQ says as follows:

"The MoJ contract stipulates that Applied Language Solutions will maintain a register of approved legal linguists who will be available to the collaborative partners in addition to being available to solicitors and

barristers. The precise details of how this register is to be maintained are rightly an area of interest to concerned parties.

The register is not owned by Applied Language Solutions. For the life of the contract it will be fostered, in both senses of the word, by the company. At the end of the contract period it will be supplied to another organisation should we not continue to hold the contract.

This register will not, however, be visible to the public. Your details as an approved supplier will be securely stored. The CJS service provider will be able to ask for an appropriate linguist but the individual will be selected to attend based on their abilities. An individual can be requested by name or identifying number but will only be provided if there is a specific and justifiable need for continuity. Otherwise, the work will be distributed equitably in relation to the nature of the job."

9. My facts are derived from a version of the report prepared by Involvis Ltd I have seen dated 31st August 2011.

10. I am asked in short to review the report and consider any legal issues that in my opinion are of significance and may result in potential unlawfulness or illegalities. I should also point out that this opinion is 'broad brush' at this stage rather than being detailed as to individual clauses of the proposed FWA. I have not seen the actual FWA or the proposed contract.

Relevant Details of the FWA

11. I understand that it is proposed that a single supplier is contracted to provide on a demand basis interpreters to the Courts and Tribunals Service and National Offender Management Service when required. The police, it would appear, will follow suit.

The EU Directive

12. EU Directive 2010/64/EU (which I shall call the 'Interpreters Directive') is part of a series of Directives being implemented by the European Union with a view to standardising as much as possible standards in criminal trials. The thinking is that for member states to recognise criminal convictions in other EU states, other member states must have confidence that the convictions were reached with all due procedural safeguards (Articles 3 to 10). It also explicitly recognises that existing protections under the ECHR are not enough to ensure adequate compliance across all member states.

13. Dated 20th October 2010, it was published in the Official Journal on the 26th October 2010.

14. Article 6, for instance, says as follows:

"Although all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States."

15. It is part of a 'roadmap' of measures first set down in 2009 to introduce boarder changes and standardisations across the EU is many aspects of criminal law. I also get the impression that underpinning these changes are concerns about the European Arrest Warrant system (see for instance preamble paragraph 15) functioning across Europe adequately.

16. This EU Directive was issued on the 20th October 2010 but has not, as far as I can see, been implemented into British domestic law. I also note this Directive was introduced after the Framework agreement was announced by Crispin Blunt MP on 15th September 2010.

17. Preamble paragraph 14 says as follows:

"The right to interpretation and translation for those who do not speak or understand the language of the proceedings is enshrined in Article 6 of the ECHR, as interpreted in the case-law of the European Court of Human Rights. This Directive facilitates the application of that right in practice. To that end, the aim of this Directive is to ensure the right of suspected or accused persons to interpretation and translation in criminal proceedings with a view to ensuring their right to a fair trial."

18. The Right is summarised in preamble paragraph 17, as follows:

“This Directive should ensure that there is free and adequate linguistic assistance, allowing suspected or accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their right of defence and safeguarding the fairness of the proceedings.”

19. It is defined as follows in Article 2:8:

“8. Interpretation provided under this Article shall be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence.”

20. The right encompasses both giving instructions to legal advisors as well as trial and the ability to exercise any onward appeal (preamble paragraph 17, 19 and 20, Articles 1 to 4). Preamble paragraph 21 provides for the requirement for a mechanism to be in place that can check the correct language is spoken, including consultation with the Defendant and that documents be translated for Defendants (Preamble paragraph 30).

21. Preamble paragraph 24 provides for a competent authority to be able to deal with problems with interpreting if put on notice of such issues AND Article 26 to replace such an interpreter.

22. Other safeguards are mentioned, in particular when video conference technologies are used or the defendant is particularly vulnerable.

23. Interestingly, the Directive also says as follows (preamble paragraph 31):

“Member States should facilitate access to national databases of legal translators and interpreters where such databases exist. In that context, particular attention should be paid to the aim of providing access to existing databases through the e-Justice portal, as planned in the multiannual European e-Justice action plan 2009-2013 of 27 November 2008 (1).”

24. Article 5 says as follows:

“Article 5

Quality of the interpretation and translation

1. Member States shall take concrete measures to ensure that the interpretation and translation provided meets the quality required under Article 2(8) and Article 3(9).

2. In order to promote the adequacy of interpretation and translation and efficient access thereto, Member States shall endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified. Once established, such register or registers shall, where appropriate, be made available to legal counsel and relevant authorities.

3. Member States shall ensure that interpreters and translators be required to observe confidentiality regarding interpretation and translation provided under this Directive.”

25. Article 8 says as follows:

“Article 8

Non-regression

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, other relevant provisions of international law or the law of any Member State which provides a higher level of protection”

26. What is perhaps noteworthy here is that the preference for registers of qualified interpreters to be kept by the state and be made available to legal Counsel. I do not know whether this features in English law but it would appear that such a list is kept by the National Register of Public Service Interpreters.

27. In my opinion, virtually all of the requirements as set out in this Directive are implemented already in existing domestic law. Judges are generally well versed in the issues that arise in proceedings conducted through interpreters and have wide powers and discretion to intervene and ensure a fair trial.

28. However, the issue of concern in regards to the implementation of the FWA is the question of 'adequacy' of interpreters. While each member state is given a margin of appreciation for how they define adequacy, and I note that the Directive does not define it, it would seem to be obvious to say that 'adequate' to mean 'adequate to do the job'.

29. This is interesting for two reasons. First, it does not require a standard to be 'excellent', for instance, but adequate to ensure the aims and objectives of the Directive are complied with. That must mean that the potential defendants are able to engage with and understand the whole of the procedure and the trial to allow them to have a fair hearing.

30. This is a hearing where they are fully able give their instructions to their lawyers and be effectively cross examined. It also means, perhaps equally relevantly, that the quality of interpreting is god enough to allow the nuanced language of cross examination to be effectively communicated to allow for effective and rigorous cross examination of all witnesses who do not have English as their first language.

31. I shall turn briefly to the position in domestic law.

32. I note that there is no specific 'right' to the assistance of an interpreter under English law. However, it has often been said that the accused should be "capable of understanding the proceedings" which implies a right to an interpreter if a defendant is unrepresented2. A trial is a nullity if the accused cannot comprehend the charges and instruct his lawyers3.

2 *R v Lee Kun* [1916] KB 337; *Kunnath v The State* [1993] 1 WLR 1315

3 *R v Iqbal Begum* (1991) 93 Cr App R 96

33. Under Article 6(3)(e) of the European Convention on Human Rights, a person charged with a criminal offence has the right to have the free assistance of an interpreter if he cannot understand or speak the language used in court. The guarantee is intended to enable the accused to understand the language of the court, and does not entitle him to insist on the services of the translator to enable him to conduct his defence in his language of choice4.

4 *F v France* (1983) 35 DR 203; *Bideault v France* (1986) 48 DR 232, EComm HR

5 X v *Germany* (1967) 24 CD 50; A v United Kingdom (1978) 2 Digest 916

6 Kamaskinski v Austria (1989) 13 EHRR 36 para 74

34. Whether the accused is capable of understanding the language is a determination of fact for the state to make, and the onus is on the accused to show the inaccuracy of its assessment5. The substance of 'assistance' required by Article 6(3)(e) extends beyond provision of an interpreter at the hearing to include the translations of 'all statements which it is necessary for him to understand in order to have a fair trial'6.

35. Thus it seems to me that a critical issue in the whole question is the meaning of the word 'adequate'. The UK Government must, under the ECHR (and therefore the Human Rights Act 1998 in English law) and to comply, with its obligations under the Interpreters Directive ensure that interpreting and translation services are adequate to ensure a fair trial.

36. I understand that there may be very real concerns as to whether or not under the proposed framework agreement, the standards in existence previously would be maintained. I say this because it is my understanding that interpreters currently employed by the ministry of justice who wish to interpret at court or tribunals had to have a DPSI (Law option) qualification in order to be registered for the NRPSI. This is no longer the case.

37. One particular concern is that 'Linguist lounge' allows for interpreters who qualify under Tier 1 to have a Chartered Institute of Linguists Certificate in Community Interpreting, CCI qualification only.

38. It seems to me that it must be right to say that if under the previous national agreement and good practice, it was felt that interpreting had to be of a sufficient standard, this would no doubt be considered adequate. In my view, any derogation of that standard may very well result in a suggestion that the potential standard of interpreting is no longer adequate. Such an argument could render the terms of the framework agreement non-compliant with the terms of the interpreting directive, as I have set out above.

39. A further concern arises out of the proposed fees that will be paid. Whilst this is of course in the main a matter for the Ministry of Justice and it subcontracted bodies and the interpreters, if the effect of those heavily reduced rates would be that the ability to obtain competent interpreters of the relevant standard is significantly impaired, then this may also leave the Framework Agreement challengeable as in essence not being able to implement the concepts enshrined in the interpreting directive.

40. Speaking as a court user with considerable experience in working with interpreters in both criminal, civil and immigration cases, it is not over the top to say that the most important person in the courtroom where a defendant or appellant does not speak English as a first language or not sufficiently competently to speak it in court, the interpreter is the most important person in the room, without exception.

41. There is an old adage in law that justice must not only be done, it must also be seen to be done. In cases with interpreters, if it is clear that a defendant or appellant is struggling to understand the proceedings or struggles to make their own points clear, justice is not being seen to be done.

42. It also follows that hearings may very well often be aborted or adjourned unnecessarily. I have already considerable experience of this problem even under the old regime and if it is right to say that there is a real risk that standard will drop, then it must also follow that it is much more likely that postponements, cracked trials and adjournments will also become more plentiful. This is of course enormously expensive and frustrating for all court users.

43. It is therefore some concern to me to see that under the new framework agreement, the likelihood may be that the standard of interpreting will worsen. Whether the existing framework agreement puts the United Kingdom in breach of its obligations under the interpreters' directive is hard to say at this stage. However, evidence on its implementation would not be difficult to obtain. Freedom of information requests could be made of relevant government bodies and the Ministry of Justice on statistics for cracked trials, adjourned and postponed hearings and the like.

44. If there can be a clear trend upward of these adjournments, then an argument might be advanced with some force that the Interpreters directive is not being applied properly because the assumption is that the existing system being adequate has been replaced with a new system that does not divide the same level of adequacy.

45. Even if such evidence would not render the actual framework agreement unlawful, clearly the implications for fair trials and the costs accrued because of unnecessary postponements and adjournments would be considerable. Further of course, there would be rights of appeal onward on the basis of a lack of a fair trial and unsafe convictions or unfair hearings on the basis of inadequate interpretation. This may potentially result perhaps in civil claims being brought if the implications of poor interpreting can be shown and result in miscarriages of justice or unnecessary lengths of detention.

46. It is therefore my opinion that any system that seeks to replace the existing system with one with less than adequate safeguards to ensure the current level of adequacy may be liable for challenges now, but certainly if not now in the future. This would appear to be regrettable.

Tendering

47. I understand that the Ministry of Justice have said that they have conducted a 'competitive procurement competitive dialogue'7.

7 Page 6 of the Report.

48. It is also suggested that the degree of consultation with users of the court systems and of interpreters has been wholly inadequate. It is also suggested that the actual tendering process has not been done with all of the thoroughness and rigour that the law demands.

49. There have been in place for many years considerable burdens on government bodies that seek to outsource government functions to private sector organisations. This of course is done to ensure a fully open and transparent tendering process so that the public can be satisfied that there money is being well spent. It also avoids any accusations of cronyism or favouritism.

50. I have not looked at the actual facts of the tendering process. However, the observation I make at this time is that if those who instruct me right to have legitimate queries about the manner of consultation and the adequacy of the tendering process, then that might result in legal challenges striking down the framework agreement.

51. This of course must not be considered in isolation but in conjunction with the above point. If it is clear that the consultation has not been adequate, the tendering process has not been fully complied with and the repercussions of the new proposed system make it likely that the United Kingdom government would be in breach of its obligations under the interpreters directive, then collectively these points may very well amount to a significant legal challenge to the legality of this framework agreement.

52. It is therefore my opinion that there are significant causes for concern regarding the proposed framework agreement and its effects on court users, both judges, advocates, defendants, witnesses and appellants alike. If the concerns on the level of consultation with the professions is correct, then it would be unfortunate for the Ministry of Justice to launch a new process without being fully informed of the facts and the implications on court users of all sorts.

53. Whilst I can readily understand in the current economic times the need to save taxpayers money, if the concerns as raised above are genuine regarding the adequacy of interpreters, then in my view, it is much more likely that any short-term savings made by the cutting of interpreters fees under the new scheme would be dramatically outweighed by the far greater costs of wasted court time, adjourned or postponed hearings, collapsed trials and onward appeals. This would not only have a significant financial cost above and beyond the proposed savings but also do potentially untold damage to the perception of British justice in the eyes of not only the broader public but in the eyes of the ethnically diverse communities who use and depend upon adequate interpreting services for them to have adequate access to justice. The government introduced the Access to Justice Act in 1990, enshrining the requirement of access to justice for all that the cornerstone of British justice. In my opinion, any proposed changes which result in less than adequate interpreting services deny justice at a fundamental level to those in society who perhaps need it more than anyone else.

Tuesday, 20 September 2011

Simon Harding