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The Curse of Babel and the Criminal Process.

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Summary: *This article considers the challenges posed by the implementation of the EU Directive on the Right to Interpretation and Translation in Criminal Proceedings within the criminal justice system of England and Wales. The article questions whether or not the policies and processes of the criminal justice system with regard to interpreting and translating are sufficiently robust to ensure full compliance with the Directive. It argues that there are three principal and interrelated challenges to implementation: capacity, quality and cost. To meet these challenges successfully, it claims that a cultural shift is needed within the criminal justice system, whereby the translator and interpreter become more imbedded, regulated and mainstreamed within the corps of criminal justice personnel.*

Introduction

The European Union's *Directive on the Right to Interpretation and Translation in Criminal Proceedings*¹, which entered into force on 27 October 2013, represents an attempt to establish common standards in the provision of legal interpreting and translation in criminal proceedings throughout the EU.² The Directive forms part of the EU's wider programme of measures to promote mutual recognition and consistency of standards, in the cause of trans-jurisdictional cooperation, in criminal matters.³ Not all are totally optimistic that the

* My thanks to the editor and the referees for their comments and suggestions on an earlier draft.

¹ Directive 2010/64/EU.

² For an American perspective on interpreters in criminal trials, see Susan Berk-Seligson, *The Bilingual Courtroom: Court Interpreters and the Judicial Process* (University of Chicago Press, Chicago, 1990).

³ *European Council, Presidency Conclusions*, Tampere, 15-16 October 1999; Directive 2010/64/EU, preamble, para. 2.

ambitious goal of procedural harmonisation is achievable.⁴ Nevertheless, the Directive represents a first step towards implementing the EU's roadmap for strengthening the common procedural rights of suspected or accused persons in criminal proceedings within the EU.⁵ The Directive addresses the objectives of measure A (translation and interpretation) of that roadmap.⁶

Although the Directive also applies to interpreting for blind or deaf persons, this article focuses on its linguistic aspects. It considers the extent to which full compliance with its provisions is likely within England and Wales, especially in light of the concerns raised by the House of Commons Justice Committee in its report, *Interpreting and Translation Services and the Applied Language Solutions Contract*, published on 6 February 2013.⁷

The Directive

The Directive's provisions are based upon the right to the free assistance⁸ of an interpreter in criminal proceedings, which is protected by Arts. 5 and 6 ECHR. Its goal is to ensure that ECHR language rights are implemented consistently throughout the EU.⁹ Among the Directive's key provisions, Article 2 ensures a suspect or defendant's right to interpretation, during police questioning, interim hearings and at trial.¹⁰ Interpretation must also be available for lawyer-client meetings,¹¹ and there must be appropriate mechanisms to determine the suspect or defendant's linguistic proficiency.¹² Article 2.5 requires procedures to be in place that can enable a challenge to a refusal to grant the assistance of an interpreter, or challenge

⁴ See Jacqueline S. Hodgson, "Safeguarding Suspects' Rights in Europe: A Comparative Perspective" (2011) 14 (4) *New Criminal Law Review*, 611-665.

⁵ *Resolution of the EU Council on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings*, 30 November 2009 (2009/C 295/01).

⁶ For commentary on the procedural safeguards in general, see Laurens van Puyenbroeck and Gert Vermeulen "Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU" (2011) 60 (4) *I.C.L.Q.*, 1017-1038.

⁷ House of Commons Justice Committee, *Interpreting and translation services and the Applied Language Solutions contract HC 645*, 6 February 2013 (T.S.O., London, 2013).

⁸ See ECHR, Art. 6 (3) (e); also *Luedicke, Belkacem and Koc v. Germany*, (1980) 2 E.H.R.R. 149.

⁹ The challenges of managing the demands of multilingualism in the context of criminal proceedings are, of course, global in extent. See, for example, D. Mildren, "Redressing the Imbalance: Aboriginal People in the Criminal Justice System" (1999) 6 (1) *Forensic Linguistics: the International Journal of Speech, Language and the Law*, 137-160; J. Carroll, "The Use of Interpreters in Court" (1995) 2 (1) *Forensic Linguistics: the International Journal of Speech, Language and the Law*, 65-73; C. Lane, K. McKenzie-Bridle and L. Curtis, "The Right to Interpreting and Translation Services in New Zealand Courts" (1999) 6 (1) *Forensic Linguistics: the International Journal of Speech, Language and the Law*, 115-136.

¹⁰ See, Directive, Art.2.1.

¹¹ *ibid.*, Art. 2.2.

¹² *ibid.*, Art. 2.4.

the quality of the interpretation provided.¹³ Article 5.3 promotes the duty of confidentiality owed by interpreters and translators to suspects or accused persons. Although not explicitly stated in the Directive, the duty of confidentiality, for it to have meaning and purpose, should be reinforced by legal professional privilege.¹⁴

Article 2.6 permits communication via video conferencing, telephone or the internet unless the physical presence of the interpreter is required to safeguard fairness. But a word of caution: empirical research on the use of video conferencing when interpreting in legal contexts has revealed a number of interpreting problems which could threaten procedural fairness.¹⁵ The most significant include turn-taking problems (overlapping speech)¹⁶ and omissions (loss of information). Interpreters were unaware of the loss of information caused by overlapping speech (in other words, people talking at the same time or not sure whose turn it was to speak), although were aware that speech coordination was an issue and realised the disruption which resulted from these speech overlaps. Interestingly, in the context of England and Wales, remote interpreting is not an option offered under the revised PACE Codes of Practice (considered below).

Articles 3 and 4 of the Directive create obligations with regard to the provision of free translation of essential documents in connection with the proceedings.¹⁷ Although Art. 6 ECHR does not explicitly mention documents or translations thereof, the right to an interpreter has been held to include oral statements and documents.¹⁸ However, Article 3 of the Directive provides that, “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.”¹⁹ Article 3.7 also qualifies the requirement for written translation by allowing an oral translation or oral summary of essential documents, provided that this does not prejudice the fairness of the proceedings.²⁰

These provisions may cause difficulties in practice, especially in the context of police disclosure of documents, and in the assessment of what is *essential* and *relevant*. Furthermore, Article 3.2 states that, “essential documents shall include any decision

¹³ *ibid.*, Art. 2.5.

¹⁴ See *R. (on the application of Bozkurt) v Thames Magistrates Court* [2001] EWHC Admin. 400; [2002] R.T.R. 15

¹⁵ Sabine Braun, “Keep your Distance? Remote Interpreting in Legal Proceedings: A Critical Assessment of a Growing Practice” (2013) 15 (2) *Interpreting*, 200-228.

¹⁶ *ibid.*, at pp. 224-226.

¹⁷ Directive, Arts. 3 and 4, which implements Art. 6(3)(e) ECHR.

¹⁸ See *Kamasinski v. Austria* (1991) 13 E.H.R.R. 36; the right to written translations are implicit to give effect to the rights protected by Art. 6.(3).

¹⁹ *ibid.*, Art. 3.4.

²⁰ *ibid.*, Art. 3.7.

depriving a person of his liberty, any charge or indictment, and any judgment”.²¹ These documents may well be relevant for a suspect or defendant in conducting their defence, but it could hardly be described as an exhaustive list, especially if promoting consistency across the EU is the objective. No mention is made of witness depositions or other evidence which may also be essential for the defence. Article 3.3 offers suspects and their lawyers the right to request translations of other documents and Article 3.5 requires a right to challenge a decision refusing the translation of documents and, when poor translation has been provided, to complain about the quality of the translation.²² However, we are still left with a rather circular proposition whereby a suspect needs a translation before knowing that a translation of the document is in fact necessary. Obviously, the safeguards can only work effectively where the suspect has the benefit of a legal advisor or another intermediary who can read the document and carry out that assessment on his behalf. Furthermore, identifying or recognising poor quality translation may also require a difficult if not unrealistic assessment on the spot in the police station, and, in practice, qualitative defects may only become apparent later in the proceedings. Article 3.8 deals with the alternative scenario where the suspect of his own accord decides to waive the right to have a translation of an essential document, a provision which carries further safeguards requiring that any waiver must be unequivocal, voluntary and made after receiving legal advice.²³

The Directive also creates a number of quality-control obligations. Article 5 requires that the interpretation and translation must be of adequate quality.²⁴ Poor quality interpretation undermines the fairness of the proceedings and interferes with the individual’s understanding of the prosecution case and their capacity to mount their defence properly.²⁵ Accordingly, a register of qualified and independent legal interpreters and translators must be created to ensure quality and professionalism.²⁶ Article 6 also requires there be training for judges, prosecutors and court staff on the Directive’s provisions, with “special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication”.²⁷

In summary, the Directive seeks to implement consistently the language rights that are protected under ECHR. Although it is not an instrument that develops the existing framework

²¹ Directive 2010/64/EU, Art. 3.2.

²² *ibid.*, Art. 3.5.

²³ *ibid.*, Art. 3.8.

²⁴ *ibid.*, Art. 5.1.

²⁵ *ibid.*, Art. 2.8.

²⁶ *ibid.*, Art. 5.2.

²⁷ *ibid.*, Art. 6.

of European language rights by introducing new rights or expanding the province of language rights, it has the potential to further embed language rights observance within the criminal justice processes of EU member states. It provides useful flesh on the bones of the provisions of Arts. 5 and 6 ECHR by setting out the practical measures required for its linguistic provisions to be fully implemented. The Directive's provisions should thus be seen as laying down the base-line for language rights in criminal proceedings. Accordingly, there can be no latitude on the matter of compliance.

Implementation in England and Wales

The Directive does not herald a revolution in the criminal process of England and Wales, as the language rights protected under Arts. 5 and 6 ECHR already enjoy well-established currency in English and Welsh domestic law. The courts have long recognised the need for translation and interpretation where a defendant does not speak English,²⁸ and have held that where a defendant has not understood the proceedings, the proceedings should be deemed a nullity.²⁹

However, the implementation of the Directive should avoid a repetition of the scenario in *Cuscani v United Kingdom*,³⁰ when the court proceeded on the basis that the defendant's brother could interpret as and when required (he was never called to interpret, as things transpired). The European Court of Human Rights held that there had been a breach of Arts. 6(1) and 6(3) (e), and that the judge should properly have assessed the need for an interpreter and not rely on the untested linguistic skills of the brother.³¹ Other cases, such as *R. (on the application of Gashi) v Chief Adjudicator (Need for Competent Interpreter)*³², have held that the court bears a duty to ensure the competence of the interpreter and the quality of interpretation.

The PACE Codes of Practice, specifically Code C.13, deals with the role of interpreters at the investigative stage of the proceedings.³³ Before the Directive came into force, it was already a Code C.13 requirement that a person must not be interviewed in the absence of an interpreter if they have difficulty understanding English, the interviewer cannot

²⁸ See *R. v. Lee Kun* [1916] 1 K.B. 337.

²⁹ See *R. v. Iqbal Begum* (1989) 93 Cr. App. R. 96, CA

³⁰ (2003) 36 E.H.R.R., 2.

³¹ see further commentary in *Crim. L.R.* (2003), 50.

³² [2001] EWCH Admin 916; *The Times* 12 November 2001

³³ Code C is the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers.

speak the suspect's language and the person wants an interpreter present.³⁴ Other provisions in Code C.13 pre-date the Directive. For example, where there is more than one defendant with language difficulties, each defendant must be allocated a separate interpreter.³⁵ The interpreter is required to make a note of the interview in the suspect's language, and the suspect and the interpreter should be given the opportunity to verify the accuracy of its content.³⁶ If the suspect makes a statement under caution to the police in a language other than English, the interpreter shall record the statement in that language, invite the suspect to sign it, and then an official translation is prepared.³⁷ An interpreter used at a police station should not normally interpret at the subsequent trial,³⁸ as that interpreter could be a potential witness in the trial.³⁹ However, where it is not possible to find another competent interpreter, the Court and all parties may be notified of the intention to use the same interpreter for the court proceedings.⁴⁰

It is the responsibility of the prosecution and defence to arrange interpreters for their own witnesses at court. If a defendant requires an interpreter to interpret the proceedings, it is the responsibility of the court to arrange for the attendance and payment of an interpreter.⁴¹ Breach of the PACE Codes, of course, enables the court to exclude evidence on the grounds of fairness.⁴²

Notwithstanding these well-established rules and procedures, compliance with the Directive at the investigative stage of the proceedings required amendments to the PACE Codes of Practice, and the revisions came into operation on 27 October 2013.⁴³ The amended Codes were principally designed to ensure compliance with the Directive's provisions

³⁴ PACE 1984, Code C 13.2.

³⁵ If the suspect requires a separate interpreter for consultation with his solicitor at the police station, it is the responsibility of the police to arrange for the interpreter to attend: see Code C 13.9, 13.10.

³⁶ PACE 1984, Code C 13.3 and 13.7

³⁷ *ibid.*, Code C 13.4 See, *R v Raynor Times Law Reports* 19 September 2000.

³⁸ As argued by K. Polack and A. Corsellis, "Non-English Speakers and the Criminal Justice System" (1990) 140 *New Law Journal*, 1676-1677.

³⁹ When a suspect has been interviewed through an interpreter and there is an issue at trial about what was said, evidence at trial will be given by the interpreter. If an interpreter is required to give evidence in the trial, he may be required to confirm the accuracy of any record of an interview at which he was present, by, for example, listening to the taped interview. It has been held that evidence from a police officer about what the accused said in interview, as it was related to him by the interpreter, is hearsay: see *R. v. Attard* (1958) 43 Cr.App.R. 90.

⁴⁰ See *R. (Bozturk) v Thames Magistrates' Court*, [2001] EWHC Admin 400; [2002] R.T.R. 15; *The Times*, 26 June 2001.

⁴¹ See Prosecution of Offences Act 1985 section 19(3)(b); also, P. J. Richardson (ed.), *Archbold Criminal Pleading, Evidence and Practice* 2014, 62nd edition (Sweet & Maxwell, London, 2013), para. 4-58. In *Regina v. Mustapha Kadiu* [2004] EWCA Crim 487 it was held that written grounds of appeal to the Court of Appeal should indicate if an interpreter was used in the Crown Court.

⁴² PACE 1984, s. 78. See, further, *R v Quinn* [1990] Crim. L.R. 581.

⁴³ However, delaying the consultation on the changes to a month before the scheduled commencement date caused inevitable challenges for police systems and practices.

regarding access to a qualified interpreter and written translations of essential documents.⁴⁴ Essential documents are defined in the revised Code C as being those concerning decisions to deprive a person of their liberty by keeping them in police custody and documents which provide details of any offence for which they are charged or reported. In this regard, the narrow definition of essential documents in Code C mirrors that of Art. 3.2 of the Directive, reflecting the minimalist approach which state authorities will almost inevitably adopt with regard to the Directive's provisions.

As a result of the Directive, chief police officers now explicitly bear responsibility for ensuring that appropriately qualified and independent interpreters are available for suspects or detained persons, and for providing translations of essential documents.⁴⁵ The suspect should also now be informed explicitly that the service of the interpreter and the translation of documents are borne out of public funds.⁴⁶ The new provisions in Code C.13 emphasise the suspect's right to understand, communicate,⁴⁷ and be given a written translation of essential documents in order to safeguard the fairness of the proceedings.⁴⁸

Procedures must also be put in place to determine if the assistance of an interpreter is needed,⁴⁹ and to respond appropriately where the detained person complains about the quality of the interpretation or translation.⁵⁰ A challenge by the suspect to any decision made by the officer that no interpreter or alternative interpreter, translation or alternative translation are required, must be reported to an inspector as a complaint if the challenge is made during an interview.⁵¹ A note for guidance in Code C.13 suggests that the procedure for determining whether an interpreter is needed might be developed using simple tests or relying on an interpreter's assessment.⁵²

This point of detail is critical, because it recognises that an assessment of a suspect's language skills is best carried out by a trained interpreter with expertise rather than a police officer with hardly any linguistic expertise. It will also require the creation of adequate processes to determine what may be a difficult assessment of language proficiency.

⁴⁴ See *Explanatory Memorandum to the Police and Criminal Evidence Act 1984 (Codes of Practice) (Revisions to Codes A, B, C, E, F and H) Order 2013*: 2013 No. 2685, para 4.7.

⁴⁵ PACE 1984, Code C 13.1.

⁴⁶ *ibid.*, Code C 13.1B.

⁴⁷ Appropriate Adults should, if needed, also have access to an interpreter- see Code C13.2A.

⁴⁸ PACE 1984, Code C13.1A .

⁴⁹ *ibid.*, Code C, Note for Guidance 13B. As for the court's procedures to determine if an interpreter is necessary, see the judgement in *Sharma* [2006] EWCA Crim 16, which must now be read in light of the Directive. For commentary, see Sir Anthony Hooper and D. Ormerod (eds.), *Blackstone's Criminal Practice* 2014 (Oxford University Press, 2013), para. D16.32.

⁵⁰ *ibid.*, Code C 13.10A and 13.10C.

⁵¹ *ibid.*, Code C 13.10D.

⁵² *ibid.*, Code C, Note for Guidance 13B

Establishing fluency in a language is not a simple matter. A suspect's grasp of what may be a second or third language will vary, and factors that can affect fluency include intelligence, aptitude, the stage in life when the language is learnt (with children having a greater propensity to master other languages)⁵³ and a host of socio-economic and cultural factors.⁵⁴ Even proficiency in a first language can be problematic for members of certain social groups, especially those from groups which are socially or economically disadvantaged.⁵⁵ Language difficulties for certain vulnerable individuals can be at their most acute in an intimidating or hostile environment, such as a police station or courtroom.⁵⁶ Untested assumptions that a person is 'educated' or 'intelligent', and thereby does not require the assistance of an interpreter, should be appropriately tested and measured.⁵⁷

Many of these crucial decisions are in practice the responsibility of the custody officer or interviewing officer in accordance with the procedures settled by the chief officer. Yet, identifying deficient interpretation or translation may be difficult in practice for the police, who rely almost entirely on the interpreter, the subject of the complaint, when communicating with the suspect. These difficult decisions, especially when made by an investigating police officer at the police station with little linguistic expertise, should not be underestimated or thought of as routine matters. It is foreseeable that only later, after the investigation has been concluded, and after the case has proceeded to trial, that quality issues with the interpretation and translation actually surface. It is therefore essential that, from the outset, there are robust quality assurance mechanisms to ensure the competence of interpreters and translators that are deployed to police stations.

Code C, Annex M sets out the detail and the procedure in relation to documents and records to be translated (and echoes the provisions of Article 3.2 of the Directive). A table of essential documents in Annex M sets out which written translations must be created and provided. These are:

⁵³ Even then, children can vary in their talent for language acquisition due to native ability: see Barry McLaughlin, "The relationship between first and second languages: language proficiency and language aptitude", in B. Hardy and others (eds.), *The Development of Second Language Proficiency* (Cambridge University Press, 1990), at p. 172.

⁵⁴ See, for example, John Archibald, "Second Language Acquisition" in W. O'Grady (ed.) *Contemporary Linguistics* (Longman, London, 1997), at pp. 503-539.

⁵⁵ See John Edwards, *Language and Disadvantage* (Arnold Publishers, London, 1989), at p. 126.

⁵⁶ See Ikuko Nakane "Problems in Communicating the Suspect's Rights in Interpreted Police Interviews" (2007) 28 (1) *Applied Linguistics*, 87-112 .

⁵⁷ *R. v. Merthyr Tydfil Justices, ex parte Jenkins* [1967] 1 All E.R. 636.

- The authorisation and grounds for detention of the suspect, which must be provided as soon as is reasonably practicable after the authorisation is given.
- Notice of the offence charged or offence for which the suspect may be prosecuted, which must be provided as soon as is reasonably practicable after the person has been charged or reported
- Written interview records or statements under caution: these must be created contemporaneously by the interpreter for the suspect to read and sign and copies to be provided as soon as reasonably practicable after the person is charged or told they may be prosecuted.

The table in Annex M defines the minimum list of documents that must be translated, of course. The police, exercising discretion, may also authorise the translation of other documents. As has already been noted, this rather vague and imprecise position is permitted by the Directive's Article 3. However, it is almost inevitable that the definition of essential documents will vary within jurisdictions let alone as between EU member-states.

There are also significant practicalities to consider, as providing translations of documents in all the languages which suspects may require is potentially a daunting prospect. However, the Ministry of Justice seem to have appreciated the value of national coordination in this regard, and are currently working with the National Policing Lead & College of Policing to determine how templates could be provided which might expedite the process and achieve some level of consistency and standardisation.⁵⁸ In the meantime, it appears that forces must work with their interpreter service providers in building a bank of essential documents in the languages in which they will be required.

Code C.13 also provides that, exceptionally, a custody officer may authorise an oral summary or translation instead of a written translation.⁵⁹ An oral translation or summary of grounds for detention or the charge notice may be authorised provided that it does not prejudice the fairness of the proceedings by undermining or limiting the suspect's capacity to communicate or understand the process. In deciding whether or not an oral translation would cause unfairness, there is little guidance, save for a sentence which advises that, "the quantity and complexity of the information in the document should also be considered".⁶⁰ With such

⁵⁸ Ministry of Justice, *Codes A, B, E, F: Responses to Consultation Requesting Changes or Re-Consideration – Summary*, 14 October 2013, p. 6.

⁵⁹ PACE 1984, Code C13.10B.

⁶⁰ *ibid.*, Code C13, Annex M para.3.

imprecision in official guidance, the risks of local and divergent practices becoming widespread, with the implications of this for the interests of justice, are obvious.

More concrete guidance is offered in Annex M to deal with the scenario where the suspect waives the right to a written translation of essential documents, with the following safeguards:

- Suspects must waive the right voluntarily after receiving legal advice or otherwise, with full knowledge, give their informed written consent.⁶¹
- Before giving their consent, they must be reminded of their right to legal advice.⁶²
- Police should not try to persuade the suspect to waive the right.⁶³
- An appropriate adult must have an input where the suspect is mentally vulnerable and parent or guardian if the suspect is a juvenile.⁶⁴
- Officers should seek the advice of a senior colleague of the rank of inspector or above if in doubt in relation to the way to proceed.⁶⁵

In addition, note for guidance M2 states that the police should not indicate to the suspect that the period of detention might be reduced if they decide to waive their right to a written translation of an essential document (or if they decide to seek legal advice before making that decision). However, it is the case that a Superintendent may authorise an extension to the period of detention to enable the translated transcript to be prepared before charging.⁶⁶ Delay is unavoidable where interpretation or translation is required, and forbearance on the part of all participants is critical in order to observe properly these rules to safeguard procedural fairness.

Finally, to ensure transparency and facilitate scrutiny, the Codes state that important decisions must be recorded in the custody record or interview record.⁶⁷ These include any decisions made in accordance with Annex M, such as when an alternative oral translation or summary of an essential document is given, along with the officer's reasons as to how this would not prejudice the fairness of the proceedings⁶⁸ or if the suspect, having received legal

⁶¹ *ibid.*, Annex M para.4.

⁶² *ibid.*, Annex M, para. 5.

⁶³ *ibid.*, Annex M, para. 6 and Note M2.

⁶⁴ *ibid.*, Annex M, para. 7.

⁶⁵ *ibid.*, Annex M, para.7.

⁶⁶ See *R (on the application of Wiles) v Chief Constable of the Hertfordshire Constabulary* (2002) All E.R. (D) 263 (Feb.).

⁶⁷ PACE 1984, Code C13.11.

⁶⁸ *ibid.*, Annex M para. 3.

advice, waives his right to a translation.⁶⁹ Any decision to refuse the suspect's request for a translation of a document which is not included on the Annex M table⁷⁰ should also be recorded.

On the whole, the revised PACE Codes of Practice appear to implement the Directive's provisions comprehensively: so far, so good. Yet the wording of the Codes does not reflect the serious challenges that exist in securing qualified and competent translators and interpreters to work within the criminal justice system, challenges which have been greatly exacerbated by the Ministry of Justice's recent policy on providing interpreters and translators to criminal justice agencies.

Effective Implementation?

The need for the interpreter to be both appropriately qualified and impartial has long been upheld by the courts of England and Wales.⁷¹ The *Review of the Criminal Courts of England and Wales*,⁷² chaired by Sir Robin Auld, acknowledged the need to monitor and uphold standards in interpreting and to address issues of training, monitoring, accreditation and remuneration.⁷³ The Auld Report also recommended the proper integration of the interpreter within the criminal justice system by the provision of appropriate facilities fit for an officer of the court.⁷⁴

To further this objective, the Chartered Institute of Linguists was established as a professional body to uphold professional standards in interpreting. A National Register of Public Service Interpreters was established by the Institute to serve as a professional register for interpreters accredited to provide interpretation or translation services in the public sector. Inclusion on the register depended on professional competence and clearly stated expertise in a specialist area of practice (including legal interpreting). Quality assurance mechanisms, including a professional code of conduct, were developed. The Institute devised quality

⁶⁹ *ibid.*, Annex M para. 4.

⁷⁰ *ibid.*, Annex M para. 8.

⁷¹ See *R.v.Mitchell* [1970] Crim.L.R. 153, CA.; see also *R.v.West London Youth Court, ex.p.N.* [2000] 1 W.L.R. 2368, DC.

⁷² *A Review of the Criminal Courts of England and Wales* (London, T.S.O.,2001).

⁷³ The importance of training and the potentially valuable role of academic institutions in this regard were considered by V. Benmaman, "Bilingual Legal Interpreter Education", (1999) 6 (1) *Forensic Linguistics: the International Journal of Speech, Language and the Law*, 109-114.

⁷⁴ *A Review of the Criminal Courts of England and Wales*, op. cit., Chapter 11, paragraphs 155-162. The Auld Report recommended that the government should fund courses to support and complement the work of the Institute of Linguists, and to strengthen the National Register of Public Service Interpreters.

assurance mechanisms to ensure that accredited interpreters observed appropriate professional standards. The Institute also created a Code of Conduct to set out and maintain professional standards in relation to competence, procedure, ethical and professional skills, and the implementation of disciplinary procedures. An agreed protocol between the Institute and criminal justice agencies ensured that every interpreter working in courts and police stations was registered with the National Register of Public Service Interpreters.

It seemed that the message that firm measures to promote professional standards were the key to meeting the demand for high-quality interpreting to ensure procedural and trial fairness was being acted upon.⁷⁵ However, prevarication also seemed to creep in. In *R v. Mihaly Ungvari*⁷⁶, for example, the Court of Appeal held that the appellant was not entitled to the assistance of an interpreter drawn from National Register of Public Service Interpreters provided that he had the free assistance of a competent interpreter. Of course, the judgement begged the fundamental question, how is it that an objectively competent interpreter is one that is not accredited by the relevant professional body? It is almost akin to granting right of audience to a layman who is not a qualified lawyer, provided he is otherwise ‘competent’. How can competence in such circumstances be assured and by what consistent measure? It surely undermines the core function of any professional guild which is to transparently uphold standards in the public interest.

Maintaining quality in the provision of interpretation and translation was also the objective of the *National Agreement on Arrangements for the Use of Interpreters, Translators and Language Service Providers in Investigations and Proceedings within the Criminal Justice System*.⁷⁷ It consolidated previous guidance and gave a clear direction on best practice and on the importance of professionalism:

“It is essential that interpreters used in criminal proceedings should be competent to meet the ECHR obligations. To that end, the standard requirement is that every interpreter working in courts and police stations should be registered with one of the recommended registers, i.e. the National Register of Public Service Interpreters”.⁷⁸

⁷⁵ Recognising, no doubt, the significant body of literature on the subject: see, for example, L. Noaks and I. Butler, “Silence in Court? Language Interpreters in the Courts of England and Wales” (1995) 34 (2) *Howard Journal of Criminal Justice*, pp. 124-135; R. Morris, “The Gum Syndrome: Predicaments in Court Interpreting” (1999) 6 (1) *Forensic Linguistics: the International Journal of Speech, Language and the Law*, 6-29; R. Morris, “Interpreters and the Legal Process” (1996) 13 *New Law Journal*, 1310-1311.

⁷⁶ [2003] EWCA Crim 2346.

⁷⁷ *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*.

⁷⁸ *ibid.*, para. 3.3.1.

However, in August 2011, things began to go awry when the Ministry of Justice signed a four year Framework Agreement for language services with Applied Language Solutions (ALS, now Capita Translation and Interpreting), who would be the sole contractor for the delivery of interpreting and translation services.⁷⁹ Some sections of the National Agreement would no longer be applicable for criminal justice organisations with contracts under the new Framework Agreement. This move to a contract with ALS seemed to threaten the future of the National Agreement and to create a mixed economy with interpreters and translators being sourced through various routes.

Organisations were encouraged to operate under the new Framework Agreement. But it effectively created a free market, now embedded in the PACE Codes, which means that Chief Officers can decide which individuals or organisations they use to provide interpretation and translation services.⁸⁰ The only condition is that they must comply with the requirements of the Directive (something which the Framework Agreement was best placed to achieve). The Ministry of Justice's Framework Agreement is mentioned as an example of a provider of services. But arrangements are left to the discretion of chief officers and details of the arrangements for the provision of interpreters are not mentioned in the Code. The paragraph in the previous version of Code C, Note for Guidance 13A, that read, "Whenever possible, interpreters should be provided in accordance with national arrangements approved or prescribed by the Secretary of State" was removed.

From 30th January 2012, Applied Language Solutions began implementing the Framework Agreement for the Courts and Tribunals Service. The new regime appeared to be in stormy waters from the outset. Applied Language Solutions faced a significant capacity problem as they were unable to recruit and thereafter deploy qualified and experienced interpreters in sufficient numbers. Problems with the quality of the interpreting services led to court hearings being adjourned or delayed, with unavoidable repercussions in terms of the expedient handling of cases, delays impacting on defendants being processed through the system, and consequential costs.

Even the appellate courts became aware of potential difficulties with the new regime, as in the case of *R. v Applied Language Solutions Ltd (now Capita Translation and*

⁷⁹ *Rider to the 2007 National Agreement on arrangements for the use of interpreters, translators and language service professionals in investigations and proceedings within the Criminal Justice System* (Ministry of Justice, 24 August 2011).

⁸⁰ PACE 1984, Code C.13, Note for Guidance 13A.

Interpreting Ltd).⁸¹ There, the Court of Appeal held that Capita Translation and Interpreting Ltd was not guilty of serious misconduct when due to an isolated incident of internal administrative error it failed to provide an interpreter for a particular crown court sentencing hearing. Accordingly, it was not liable to pay costs under the Prosecution of Offences Act 1985 s.19B for the aborted hearing. However, in allowing the appeal, the Court of Appeal reinforced the principle that the provision of an interpreter where either a witness or a defendant did not speak English was essential for a fair and just system of criminal justice.

Even if the Court of Appeal saw the case as an isolated incident, rumours began to circulate that the Framework Agreement was not being delivered effectively. In a debate in the House of Lords, one member expressed concern about:

“...the complaints we hear daily from judges and others about the failure to supply interpreters, or the sending of unqualified people with no experience of simultaneous interpreting and some people who were simply incompetent—in one case not understanding the difference between murder and manslaughter”.⁸²

Because of these concerns, in July 2012 the House of Commons Justice Committee began an inquiry on the provision of interpreting and translation services since Applied Language Solutions began operating the Framework Agreement.⁸³ The inquiry faced a number of procedural challenges as it went about its task of forming a picture of the effectiveness of interpreting services in courts, the most surprising being the non-cooperative attitude of the Ministry of Justice.⁸⁴ Despite the allegedly obstructive tactics of the Ministry, the Justice Committee believed that it had succeeded in acquiring sufficient cooperation from a range of agencies and parties to be able to form a view and offer findings on the matter.

The Justice Committee’s Report recognised that developing an effective interpreting and translation service to the courts had been an ongoing challenge for some years and there were administrative problems with the previous arrangements. However, it also concluded that:

⁸¹ [2013] EWCA Crim 326.

⁸² *Parliamentary Debates - House of Lords’ Official Report of Proceedings* (Hansard), 9 July 2012, col. 908: <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120709-0001.htm> (last visited 16 August 2014).

⁸³ House of Commons Justice Committee, *Interpreting and translation services and the Applied Language Solutions Contract*, HC 645, 6 February 2013 (T.S.O., London, 2013).

⁸⁴ *ibid.*, p. 77.

“...there do not appear to have been any fundamental problems with the quality of services, where they were properly sourced, i.e. through arrangements that were underpinned by the National Register of Public Service Interpreters, with interpreters qualified in the Diploma in Public Service Interpreting, and under the terms set out by the National Agreement.”⁸⁵

Little wonder that the Ministry of Justice felt disinclined to cooperate with the Committee as one of the most damning findings was that the process which led to the contract with Applied Language Solutions was flawed and failed to produce an appropriate model for the delivery of the interpreting services required by the courts.⁸⁶

The Justice Committee had discovered that one of the most serious consequences of the model which the Framework Agreement established was the dissatisfaction within the interpreter community with the new terms and conditions under which they would have to operate. Within the new model, a distance key performance indicator was introduced as a cost-saving device to mitigate costs incurred by paying travel expenses to interpreters. Its purpose was to encourage the sourcing of expertise locally and thus minimise interpreters' expenses. However, the Justice Committee found this to be unworkable, as the required expertise would often not be locally based, and certainly not in a way that would service the irregular and unpredictable nature of the demand from police and other agencies. What had also not been foreseen was how this attempt at cost-saving would result in interpreters refusing to work under the Framework Agreement, thereby exacerbating the capacity deficit. The Justice Committee thus concluded that the impact of and response to the cost-saving indicator had not been fully evaluated, and that this had led to serious manpower issues for Applied Language Solutions.⁸⁷

Another cost-saving initiative, criticised in the Justice Committee Report, had been the introduction of a three tier system for interpreters.⁸⁸ The first tier consisted of highly qualified and experienced interpreters, with the second and third tiers representing lesser qualified interpreters. This meant that, in some cases, poorly qualified and lesser paid tier three interpreters were assigned to the police station or court. This was an innovation much objected to by many of the professional interpreters, who argued that the courts were being denied the service of highly qualified interpreters and who felt that the profession as a whole

⁸⁵ *ibid.*, p. 78.

⁸⁶ *ibid.*, p.79.

⁸⁷ *ibid.*, pp. 79-80.

⁸⁸ *ibid.*, p. 80.

was being undermined.⁸⁹ Many raised concerns about the skills and competence of interpreters under the three tier system, and this was further reason for the boycott of the profession of interpreters. The National Agreement, and the National Register and qualifications that underpinned it, were felt to be sidelined by an exercise in cost reduction which, ultimately, put the right to a fair trial at risk. The contractual terms regarding the verification of the qualifications of interpreters, even under the three tiered system it introduced, were also being ignored by the contractor.⁹⁰

The Justice Committee responded to these concerns by recommending that the use of tier three interpreters should only occur in exceptional cases, such as where linguistic expertise is very rare and thus unavoidable.⁹¹ Fair and proper remuneration for interpreters and translators based on expertise and work actually done was also recommended. It recognised that declining rates of pay had had a direct impact on recruitment to the profession. A national pay scale was proposed to provide a transparent and consistent approach to remuneration that would restore confidence in the Framework Agreement within the profession.⁹² It was also commented that efforts at cost-savings had mostly impacted on remuneration for interpreters rather than due to real efficiencies in administration.⁹³

The Justice Committee concluded that Applied Language Solutions had failed properly to quantify the resources it required to deliver its business-plan and anticipate the hostile response of the interpreter profession to its operating model under the Framework Agreement.⁹⁴ Since the take-over by Capita, further investment had remedied some of the initial difficulties with service-delivery and lessened the hostility from the interpreters.⁹⁵ But winning back the confidence of the profession cannot be accomplished at the drop of a hat. In its response to the consultation on the revised PACE Codes, and on the specific issue of Note for Guidance 13A, Professional Interpreters for Justice⁹⁶ requested that the Ministry of Justice Framework Agreement should not be cited as an example of arrangements which

⁸⁹ See <http://www.lawgazette.co.uk/69387.article> (last visited 16 August 2014).

⁹⁰ *Interpreting and translation services and the Applied Language Solutions Contract*, *ibid.*, p. 83.

⁹¹ *ibid.*, p. 81.

⁹² *ibid.*, p. 85.

⁹³ *ibid.*, p. 81.

⁹⁴ *ibid.*, pp. 79-80.

⁹⁵ *ibid.*, p. 83.

⁹⁶ Professional Interpreters for Justice (PI4J) is an umbrella group for various organisations including the Association of Police and Court Interpreters (APCI); Chartered Institute of Linguists (CIOL); Institute of Translation and Interpreting (ITI); National Register of Public Service Interpreters Ltd (NRPSI); National Union of Professional Interpreters and Translators (NUPIT); Professional Interpreters Alliance (PIA); Society of Official Metropolitan Interpreters UK Ltd (SOMI); Society for Public Service Interpreting (SPSI); Wales Interpreter and Translation Service (WITS).

comply with the Directive. It also asked that the deleted reference to national arrangements be reinstated.⁹⁷

Even the projected financial gains of the new regime seemed to rest on rather flimsy foundations, according to the Justice Committee's findings. Although the servicing of the contract was delivering cost savings to the Ministry of Justice, this was not at the level of service anticipated, and was unsustainable because most of the financial gains for the Ministry were underwritten by the contractor, who was suffering a loss as a result. The Justice Committee predicted problems when the current contract came to an end, as re-commissioning interpreting and translation services might become difficult if contractors were expected to subsidise government savings. The contractor's attempt to deliver service at the reduced financial rates had resulted in underperformance which then resulted in further costs due to adjourned court hearings. There appeared to be a total failure to factor in these additional costs incurred as a result of underperformance.⁹⁸

To give credit where it is due, after it had become responsible for the performance of the agreement, Capita had recognised the need to implement safeguard mechanisms to assess interpreters' skills and competence. However, the Justice Committee expressed its disappointment that a proper programme of professional development had not been developed at the time its report was published.⁹⁹ With the clear emphasis on quality and appropriate mechanisms to safeguard quality of interpreting within the EU Directive, such failure exposes the Ministry of Justice to a risk of non-compliance and may add ammunition for grounds for appeal in cases where poor quality interpreting is provided.

Conclusion

As I write this article, I am reading for pleasure the fascinating memoirs of the late Sir Ronald Waterhouse, sometime Justice of the High Court and Presiding Judge of the Wales and Chester Circuit (as it was then).¹⁰⁰ In it, he recalls the usual practice in the courts of Wales in years past when the services of an interpreter was required in the context of the use of the Welsh language; that of relying upon the skills of nonconformist ministers, who would

⁹⁷ See *Explanatory Memorandum to the Police and Criminal Evidence Act 1984 (Codes of Practice) (Revisions to Codes A, B, C, E, F and H) Order 2013*: 2013 No. 2685, at p. 15.

⁹⁸ *Interpreting and translation services and the Applied Language Solutions contract*, p. 82.

⁹⁹ *ibid.*, p. 83.

¹⁰⁰ See Ronald Waterhouse, *Child of Another Century: Recollections of a High Court Judge* (Radcliffe Press, London, 2013).

step into the breach and provide what was often a rough and ready version in English of what the Welsh-speaking witness or defendant was saying.¹⁰¹ Those days, we can hope, belong to a different, more amateur and perhaps more linguistically homogenous age, where interpreters were playing a role no more crucial or significant than the person making the tea or polishing the judge's shoes.

On a general level, the *EU Directive on the Right to Interpretation and Translation in Criminal Proceedings* is a step forward in standardising criminal procedure within EU states, and achieving the goal of mutual recognition through common practices. It is also an example of an EU initiative designed to close the gap between declaring human rights and implementing Human Rights. But meeting the challenges posed by the Directive is by no means a straightforward for the criminal justice system in England and Wales. In terms of its capacity and quality aspects, there is a significant demand for expertise in a range of languages. As a government minister at the Ministry of Justice explained in a statement in the House of Lords, “we are talking about a system with some 800 requests a day for such interpretation. In the first quarter of its operation there were 26,000 requests in 142 languages”.¹⁰²

But recognising the size of the challenge is the key to developing appropriate and sustainable mechanisms. The government's experience on outsourcing expertise should serve as a warning of the risks of allowing localised and divergent practices to develop into inconsistent approaches which threaten capacity, quality and professionalism.¹⁰³ Robust quality assurance mechanisms are essential to ensure that appropriate and effective interpreting services are available to the police and to the courts. The Framework Agreement and other alternative models of delivery must satisfy the demand for qualified interpreters. Otherwise, public confidence in the system will fail and international human rights obligations will not be observed. Proper and fair remuneration is also critical for a corps of qualified professional interpreters able to service the demand. Yet, recently, the progress that had been made in developing the profession of legal interpreters in the years immediately following the publication of the Auld Report seems to have been undermined.

The House of Commons Justice Committee called for independent regulation of law interpreters, and proposed that, “there should be a regulation system that is independently

¹⁰¹ *ibid.*, pp. 228-229.

¹⁰² *Parliamentary Debates - House of Lords' Official Report of Proceedings* (Hansard), 9 July 2012, col. 908: <http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120709-0001.htm>

¹⁰³ The balance between central and local control of criminal justice is explored by John W. Raine in “Shifting power dependencies in criminal justice: the dual state of centre and locality in England and Wales” [2014] *Crim. L.R.*, 399-415.

organised to select and classify interpreters for the appropriate level of court and tribunal work”.¹⁰⁴ Certainly, there is a need to put matters back on track, and to establish firmer standards and procedures as envisaged by the Auld Report more than a decade ago. Indeed, since then, the greater movement of peoples within the EU, due partly to the expansion of the EU itself, has exacerbated the pressures on police and courts to secure qualified interpreters. Of course, the Ministry of Justice does not have a blank cheque, and cost efficiency is a legitimate consideration. Yet, the need to comply fully with EU law is surely paramount.¹⁰⁵ The *Directive on the Right to Interpretation and Translation in Criminal Proceedings* has come at a key moment, and may yet put the Framework Agreement and the Ministry of Justice’s current policy on the use of interpreters within the criminal justice system to the test.

¹⁰⁴ *Interpreting and translation services and the Applied Language Solutions contract*, p. 84.

¹⁰⁵ See Directive 2010/64/EU, Article 10- The EU Commission must 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 the Directive.