

Guidelines for communicating rights to non-native speakers of English in Australia, England and Wales, and the USA

Communication of Rights Group

(an international group of linguists, psychologists, lawyers and interpreters, whose names appear at the end of the document)

Note: The Guidelines have been endorsed by the AAAL membership at the AAAL business meeting in April 2016. They have also been endorsed by the Australian Linguistics Society, the International Linguistic Association, and the Washington State Coalition for Language Access, by the British Association for Applied Linguistics (BAAL), Linguistic Society of America (LSA) and the International Association of Forensic Linguistics (IAFL), by the Board of Trustees of the International Research Foundation for English Language Education (TIRF) and by the Board of Directors of the international association of Teachers of English to Speakers of Other Languages (TESOL). AAAL is hosting this document as a service to the (Independent) Communication of Rights Group.

PREAMBLE

Suspects' interview rights, referred to as Miranda Rights in the United States and as police cautions in Australia, England and Wales, are country-specific mechanisms for protecting due process in criminal investigations and trials. These rights include the right not to incriminate oneself. They are protected in various national and state criminal justice systems through legislation, common law or constitutional interpretation and are considered fundamental in much of the international community. The purpose of the requirement to communicate these rights/cautions to suspects is to ensure that those in criminal proceedings know their fundamental rights under the law. A failure to protect the rights of individuals during interviews risks the integrity of any investigation.

Current research shows that even native speakers of English do not always understand the rights delivered to them (see Appendix for studies of comprehension of rights by native and non-native speakers of English). The ability of native speakers of English to understand their rights is affected by their level of education, their cognitive abilities, the context and manner of communication of the rights and the wording used to express individual rights. The problems are even greater among vulnerable populations, including juveniles and people with mental disorders. The focus of the present guidelines is on a different vulnerable population, non-native speakers of English.

Psycholinguistic research (including studies listed in the Appendix) shows that people who have learned another language later in life process information differently in this second language than in their native language. This processing difference compounds their linguistic and cultural difficulties in communicating in English. Even speakers who can maintain a conversation in English may not have sufficient proficiency to understand complex sentences used to communicate rights/cautions, legal terms, or English spoken at fast conversational rates. They also may not be familiar with assumptions made in the adversarial legal system. Yet, like other vulnerable populations, non-native speakers of English have the right to equal treatment. Therefore, if they do not have mastery of English, it is crucial that their rights be delivered to them in the language they can understand.

The purpose of these guidelines, prepared by linguistic and legal experts from Australia, England and Wales, and the United States, is to articulate recommendations in terms of (a) wording of the rights/cautions (Part A) and (b) communication of the rights/cautions to non-native speakers of English (Part B). These recommendations are grounded in linguistic and psychological research on the comprehension of rights (listed in the Appendix) and in our collective experience of working with cases involving the understanding of rights by non-native speakers of English. Our focus is on the right to silence, as this is the only right shared across jurisdictions in our respective countries, but the same principles apply to the communication of other rights. We recognize that some of the recommendations below apply to all suspects, not only those who do not speak English as their main language. However, the focus of this document is on non-native speakers of English. We also recognize that non-native speakers of English experience difficulties in invoking their rights but this issue is beyond the scope of this document.

A. THE WORDING OF THE RIGHTS/CAUTIONS

RECOMMENDATION 1: USE STANDARDIZED VERSION IN PLAIN ENGLISH (CLEAR ENGLISH)

To enhance understanding by non-native and native speakers of English alike, we recommend that traditional formulas, such as *You have the right to remain silent, anything you say can be used against you in a court of law*, should be re-worded in clear English (also known as Plain English). Revisions should be made in consultation with police officers, defense lawyers, and experts in linguistics. They should be based on the following linguistic principles that derive from the research listed in the Appendix:

AVOID

- words with multiple meanings and homophones, such as *waive*;
- technical language (i.e., legal jargon), such as *waiver, evidence, or matter*;
- low-frequency words and other expressions that are likely to be unfamiliar to speakers with limited English proficiency, such as *remain silent*;
- abstract nouns and expressions, such as *anything you say*;
- derived nouns, such as *failure* in the expression *failure to do so*;
- passive and agentless constructions, such as *may be used as evidence*;
- grammatically complex sentences and sentences with multiple clauses;
- sentences with conditional clauses introduced by *unless* and *if*, because these terms do not have exact translations in many languages and, as a result, may be misunderstood by non-native speakers of English.

WHENEVER POSSIBLE USE:

- frequently-used English words, e.g., *speak, talk*;
- short sentences with single clauses (one idea, one sentence), e.g., *You do not have to talk to anyone*;
- active voice that clearly indicates the agent of the action, e.g. *I will ask you some questions. You do not have to answer.*

RECOMMENDATION 2: DEVELOP STANDARDIZED STATEMENTS IN OTHER LANGUAGES

All vital documents must be made available in a language the suspect can understand. These documents include, but are not limited to, the following: (a) information about the rights of the suspect, (b) information about restrictions on the suspect's liberties, (c) information about language assistance, and (d) documents that require response from the suspect (including signature). We recommend that all jurisdictions develop standardized statements of rights/cautions in languages other than English. These statements should be prepared in consultation with bilingual lawyers, linguistic experts, and professional interpreters and translators with expertise in legal interpreting and the varieties of the languages involved¹. They should then be tested in relevant populations to make sure that they are generally understood. These translations should be made available to all

¹ In England and Wales, translations are available at <https://www.gov.uk/notice-of-rights-and-entitlements-a-persons-rights-in-police-detention>

suspects alongside the English version both in writing and via audiorecording. Sign language users should have access to an interpreter and a videorecorded version of rights in their own sign language.

B COMMUNICATING THE RIGHTS/CAUTIONS

Having made recommendations # 1 and # 2, we recognize that there is no one formulation of rights/cautions that would be immediately understandable to all. Our next set of recommendations deals with communication of rights/cautions. The purpose of these recommendations is to enable legal systems to meet minimal due process standards for affording rights to non-native speakers of English who enter the criminal justice system. We recognize that some of these recommendations (e.g., #6 and #7) may be seen as extending procedural rights beyond those currently afforded by some jurisdictions. We suggest that even if some of these procedures are not considered to be constitutionally or statutorily mandated, they should be adopted by law enforcement agencies as best practices, in order to ensure the integrity of the criminal justice process.

RECOMMENDATION 3: INFORM SUSPECTS ABOUT ACCESS TO AN INTERPRETER AT THE BEGINNING OF THE INTERVIEW

It is vital that all suspects are afforded due process, even if they do not speak English as their native language. Therefore, we recommend that at the beginning of the interview all non-native English-speaking suspects should be provided with the opportunity to request the services of a professional interpreter for the police interview. Police are not trained in assessing language proficiency and may be unaware of communication difficulties faced by non-native English speakers. As a result, the choice of whether to proceed with or without an interpreter should not be solely a matter of police discretion. Many jurisdictions have a clear right to an interpreter for non-native English speaking suspects. For jurisdictions that do not have an unambiguous right to an interpreter, we recommend developing or clarifying the right to a professional interpreter as a matter of law reform. If a suspect initially declines the services of an interpreter, it should be made clear that an interpreter is available at any time when a suspect no longer feels confident to continue in English without one.

When rights/cautions are communicated via an interpreter or through standardized translations, suspects should restate their understanding of the rights/cautions in their own words in their preferred language (see Recommendation # 6). Both the interpretation (or the delivery of the standardized written translation) and the restatement should be recorded because there remains the possibility of misinterpretation and misunderstanding, e.g., due to low quality of interpretation or translation, or differences between the suspect's and the interpreter's dialects.

RECOMMENDATION 4: PRESENT EACH RIGHT INDIVIDUALLY

Stress, confusion and noise reduce the ability to process information effectively in a second language. We recommend that each right be presented individually, clearly, at a slow pace, and repeated if needed. The speaker's face should be clearly visible to the suspect and background noise minimized. Suspects who can read should be given sufficient time to read each right. All suspects should be given an opportunity to ask follow-up questions about words and sentences they did not understand.

RECOMMENDATION 5: DO NOT DETERMINE UNDERSTANDING BY USING YES OR NO QUESTIONS

Just because a person can answer simple questions in English, this does not mean that the person can communicate effectively about more complex matters, such as legal concepts, terms and processes. Positive answers to yes/no questions, such as *Do you understand English?*, do not constitute evidence of language proficiency sufficient to understand legal rights/cautions. Non-native speakers of English may say yes out of fear or deference to authority, even if their proficiency is very limited and they are unable to understand their rights. The same argument applies to the use of questions, such as *Do you understand?*, after delivery of each right. There are many reasons why suspects may say yes, regardless of whether they actually understand their rights.

RECOMMENDATION 6: ADOPT AN IN-YOUR-OWN-WORDS REQUIREMENT

Jurisdictions vary with regard to the administration of rights/cautions. Some require the prosecution to show evidence of suspect understanding. Other jurisdictions treat the administration of the legally correct statement of rights as presumptive evidence of suspect understanding. We recommend that the legal standard should be ‘demonstrated understanding by the suspect’. To demonstrate such understanding, we recommend the adoption of an in-your-own words requirement that is already used in some jurisdictions. After each right has been presented, police officers should ask suspects to explain in their own words their understanding of that right and of the risks of waiving this right, as explained by the police officer. If suspects have difficulties restating the rights in their own words in English (e.g., if they repeat the words just read to them or if they remain silent), the interview should be terminated until a professional interpreter, with expertise in legal interpreting, is brought in. This should be done even if a suspect had earlier declined the offer of interpreting services.

RECOMMENDATION 7: VIDEORECORD THE INTERVIEW

The communication of the rights and the suspect’s restatement should be videorecorded, capturing all of the participants. Such recording is crucial to the court’s ability to determine whether the rights were properly communicated and understood by the suspect and, in the US, whether they were waived knowingly, intelligently, and voluntarily.

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Appendix

Communication of rights/cautions to non-native and native speakers of English: Bibliography

Diana Eades and Aneta Pavlenko

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1. Books and articles on communication of rights to non-native speakers (NNSs) of English

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