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ARTICLE

## **Justice is blind as long as it isn't deaf: excluding deaf people from jury duty – an Australian human rights breach**

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### **ABSTRACT**

In the wake of a recent decision by the High Court of Australia, currently a deaf person, who relies on sign language, is not able to serve as a juror because Australian law does not permit the swearing in of an interpreter as the '13th person' in the jury room. In 2016, the United Nations Committee on the Rights of Persons with Disabilities found that Australia is in breach of its obligations under the Convention on the Rights of Persons with Disabilities, and indicated that legislative and policy change is both mandated and feasible. Four pieces of research conducted over the last decade in Australia have proved that deaf people have the ability to understand complex legal discourse in a courtroom setting using sign language interpretation and therefore, are able to discharge the functions of juror. The latest research, funded by the Australian Research Council, has highlighted some residual procedural and logistical issues, alongside reservations from some legal stakeholders involved in the project. However, this article argues that these can be addressed, and what is now required is the motivation to address this breach of human rights that treats deaf people differently to hearing

people.

#### **KEYWORDS**

Human rights, discrimination, deaf jurors, Auslan interpreters, court practice and procedure, evidence, jury deliberations.

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#### **Introduction**

As a consequence of a recent High Court of Australia decision, deaf people are unable to be empanelled as a member of a jury in any jurisdiction in Australia. This places deaf people in the position of being treated less favourably compared to a person without the same disability. Their exclusion from jury service ought to be regarded as discriminatory and as a breach of Australia's obligations under the United Nations Convention on the Rights of Persons with Disabilities.

Over one million people in Australia have some form of hearing loss with an estimated 6500 of those being severely or profoundly deaf and who use Australian Sign Language (Auslan) as their preferred method to communicate (Auslan Signbank 2016). Napier and McEwin (2015, 23) describe deaf sign language users in the following way:

Although deaf signers are considered to be members of a linguistic and cultural minority group, the accommodations made to meet their linguistic needs are met through legal provisions under disability discrimination law. These provisions ensure that deaf people can access and negotiate the justice system.

This article will background the human rights framework applicable to the State's treatment of deaf people regarding their eligibility to serve on a jury. After briefly describing the legislative and procedural processes for empanelling juries and the criteria for juries to discharge their statutory function, it will compare the approach of the High Court in *Lyons v Queensland*<sup>1</sup> (*Lyons*) with that by the United Nations Committee on the Rights of Persons with Disabilities (UNCRPD). In support of the decision of the UN Committee, this article will turn to the substantial body of research now available that addresses concerns about the negative implications or consequences that might flow from the inclusion of deaf people on juries. This includes research that has addressed whether Auslan adequately translates legal discourse and whether it delivers an appropriate level of comprehension to enable deaf people to discharge their duty as jurors. The fourth and most recent tranche of research funded by the Australian Research Council has examined the effects on a jury deliberation process where one of the (mock) jurors was deaf, and communicated in the jury room using Auslan, and in particular has tested the question of whether the presence of a '13th person', namely an Auslan interpreter, has a positive, negative or neutral impact on the function of a jury. Finally, we will suggest a way forward to ensure equality for deaf people in relation to jury duty and to ensure that Australia's political and judicial systems are not complicit in breaching the human rights of deaf people.

## **Background**

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<sup>1</sup> *Lyons v Queensland* [2016] HCA 38.

In 2008, Australia ratified the UN Convention on the Rights of Persons with Disabilities and subsequently amended the *Disability Discrimination Act 1992 (Cth) (DDA)* to give effect to that Convention.<sup>2</sup> A person who is profoundly deaf is a person with a disability pursuant to s 4 of the Act and so should not be discriminated against on the basis of their disability. Further, there is a prohibition on both direct and indirect discrimination on the basis of a protected characteristic.<sup>3</sup> The *DDA* provides that direct discrimination can occur where there is a failure to make 'reasonable adjustments' to accommodate the needs of a person with a disability who is seeking access to a relevant service or benefit, that results in less favourable treatment vis-a-vis a person without a disability. Indirect discrimination can occur where a condition is imposed upon a person with a disability that they cannot meet, by reason of their disability, or there is a failure to make 'reasonable accommodation' in the setting of conditions, such that again, the person with a disability is treated less favourably vis-a-vis a person without that disability.

This article will discuss the framework in the states of New South Wales (NSW) and Queensland because the two referrals to the UNCRPD are based on incidents that occurred in NSW and the first case of a deaf person being refused jury duty in Australia to make its way to the High Court emerged from Queensland. The discussion of the treatment of deaf jurors in those two states is largely mirrored in each state jurisdiction of Australia.

In NSW, the empanelment of juries is managed by the Office of the Sheriff, which is part of the Department of Justice whose responsible Minister is the Attorney-General. The process of empanelment is governed by the *Jury Act 1977 (NSW)*, s 14(4) of which provides that the Sherriff may exempt a person from jury duty if the Sherriff is of the opinion that there is good cause for exemption. Further, s 14A(b) states that a person has good cause if

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<sup>2</sup> *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009 (Cth)*.

<sup>3</sup> See s 5 (direct discrimination) and s 6 (indirect discrimination), *Disability Discrimination Act 1992 (Cth)*

that person is unsuitable for or incapable of effectively serving as a juror.

While there is no express exclusion for deaf people, evidence of the convention practised by the NSW Department of Justice is the fact that no deaf person has ever served on a NSW jury. Queensland has a similar provision pursuant to s 4(1) of the *Jury Act 1995* (Qld) and other states and territories in Australia have similar provisions to make a person with a disability unqualified to serve by virtue of their inability to discharge the role of juror.<sup>4</sup>

The ineligibility described in both the NSW and Queensland legislation is largely based on the requirement to have one or more Auslan interpreters present in the courtroom and more specifically in the jury room during deliberations.<sup>5</sup> There appears to be no evidence that a person's disability per se, is the trigger for exclusion from jury service. Similarly, logistical requirements do not appear to be the cause of an apparent breach of the basic human rights of deaf people. It appears that the primary reason for excluding deaf people from jury duty is the legislative barriers that prevent anyone other than a sworn juror from discussing the trial and the requirements of confidentiality over those deliberations.

Sections 72A(1) and 50 of the *Jury Act 1977* (NSW) and *Jury Act 1995* (Qld) respectively require a juror to swear or affirm that they will give a true verdict according to the evidence. Neither Act allows a person who is not a juror to be sworn or affirmed as a juror therefore, there is no legislative authority for an Auslan interpreter to participate as a member of a jury.

Further, both Acts prevent disclosure or any form of communication about jury deliberations with a person who is not a member of the same jury.<sup>6</sup> In Queensland the penalty

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<sup>4</sup> *Juries Act 1967* (ACT), s 10C; *Juries Act* (NT), sch 7, specifically exempting, "a person who is blind, deaf or dumb or otherwise incapacitated by disease or infirmity from discharging the duties of a juror"; *Juries Act 1927* (SA), s 13; *Juries Act 2003* (Tas), sch 2, s 9; *Juries Act 2000* (Vic), s 9(4); *Juries Act 1957* (WA), s 34G(2).

<sup>5</sup> See, *Re: The Jury Act 1995 and an application by the Sherriff of Queensland* [2014] QSC 113 at [6].

<sup>6</sup> See, *Jury Act 1977* (NSW), ss 68A, 68B; *Jury Act 1995* (Qld), ss 50, 54, 70.

for breach is two years imprisonment and in NSW a fine of 20 penalty units. Given these legislative prohibitions, an Auslan interpreter could find themselves the subject of prosecution or a fine depending on where the breach occurs. The prohibitions in both pieces of legislation have exceptions that allow a judge to consent to a person communicating with a juror<sup>7</sup> or the wilful disclosure of information to a person not a juror<sup>8</sup> however, because there has not been a deaf person empanelled as a juror in either of these jurisdictions, these legislative provisions have yet to be exercised in the case of an Auslan interpreter. Other states and territories in Australia have similar provisions to the requirement to only swear or affirm a juror and prohibitions on disclosing jury deliberations.<sup>9</sup>

### **Lyons v State of Queensland**

Prior to 2012, there were no cases in Australia where the issue of a deaf person serving on a jury had been fully examined by an Australian court or tribunal. The case of Ms Gaye Lyons changed that. Ms Lyons is an adult and has been profoundly deaf since she was 10 years of age. She has a total loss of hearing, meaning her impairment fell within the definition of having a total loss of a bodily function pursuant to the *Anti-Discrimination Act 1991* (Qld) (*ADA*). Ms Lyons is a proficient lip reader but prefers to use Auslan.

Ms Lyons was selected for jury duty in 2012 at the Ipswich District Court and was excluded from being empanelled as a juror. Ms Lyons lodged a complaint with the Anti-Discrimination Commission of Queensland that was heard by the Queensland Civil and Administrative Tribunal (QCAT) who dismissed the complaint,<sup>10</sup> finding that there was no

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<sup>7</sup> See, *Jury Act 1995* (Qld), s 54(1).

<sup>8</sup> See, *Jury Act 1977* (NSW), s 68B(1).

<sup>9</sup> See, *Juries Act 1967* (ACT), ss 42C, 45; *Juries Act* (NT), ss 58, 49A; *Juries Act 1927* (SA), s 33; *Juries Act 2003* (Tas), ss 38, 58; *Juries Act 2000* (Vic), ss 42, 78; *Juries Act 1957* (WA), s 56B.

<sup>10</sup> *Lyons v State of Queensland (No 2)* [2013] QCAT 731 (11 December 2013).

evidence of direct or indirect discrimination and rather, that the Court acted according to what was permissible by law. The Court did not base its decision on Ms Lyon's inability to hear, rather the fact that the *Jury Act 1995* (Qld) did not: provide for the swearing in of a person who was not a juror; allow a non-juror to be present in the jury deliberation room; and, allow for anyone other than the Court Officer to have contact with the jury. Ms Lyons appealed the decision to the QCAT Appeals.<sup>11</sup>

Prior to the appeal, the Queensland Sheriff made an application to the Supreme Court of Queensland Trial Division for a ruling by the Court on the eligibility of a deaf person to be empanelled as a member of a jury.<sup>12</sup> Douglas J found that a deaf person is incapable of effectively performing the functions of a juror and is therefore ineligible for jury duty. His Honour's reasoning was that pursuant to the relevant legislation, jury deliberations must be conducted in private and although there is a discretion for the presiding judge to grant leave to permit the presence of an interpreter, according to Douglas J, that leave is, 'not well adapted to permitting an interpreter to sit in a jury room' (*Re: The Jury Act 1995* (2014), [4]). Finally, there is an absence of legislative provision to allow an interpreter to take an oath or make an affirmation to maintain the secrecy of jury deliberations within the jury room. QCAT Appeals dismissed the appeal although for different reasons to the Tribunal at first instance, preferring to follow the reasoning of Douglas J in *Re: The Jury Act 1995*. It judged that the legislation prevents a deaf person from having an Auslan interpreter present in the jury room, and breaching this would lead to an unfair trial.

Ms Lyons appealed to the Queensland Supreme Court of Appeal,<sup>13</sup> who affirmed the decision of the QCAT that a deaf person could not perform jury duties because of the

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<sup>11</sup> *Lyons v State of Queensland* [2014] QCATA 302 (21 October 2014).

<sup>12</sup> *Re: the Jury Act 1995 and an application by the Sheriff of Queensland* [2014] QSC 113 (14 May 2014).

<sup>13</sup> *Lyons v Queensland* [2015] QCA 159 (28 August 2015).



impossibility to swear in an interpreter for a juror. The Court found that indirect discrimination had not been proved because the decision to exclude did nothing that resulted in the imposition of a term or condition. Instead, it applied existing statutory requirements for the eligibility rather than performance of a juror. The Court also found that direct discrimination had not been proved because an attribute which merely gives rise to circumstances in which particular treatment occurs is not to be treated as being the basis for that treatment. Further, QCAT Appeals had applied the appropriate test under s 10(4) of the *ADA* by finding that the conduct was not based on Ms Lyons' deafness or her need to use Auslan as a means of communication. Therefore, Ms Lyons was not treated less favourably because of her hearing impairment. Finally, the Court stated that the legislation governing juries did not allow a juror to discuss their deliberations with a non-juror without breaking their oath or affirmation and the Court could not envisage how a trial judge could give leave for a juror to break their oath or affirmation.

Ms Lyons appealed to the High Court,<sup>14</sup> and submitted that the true reason behind the exclusion was her hearing impairment. She argued that QCAT's error was failing to give effect to s 10(5) of the *ADA* which makes irrelevant the reasonable provision of special services or facilities when it comes to the equal treatment of a person with an impairment compared to another person in the same circumstances. In the instant case, the provision of an Auslan interpreter should not have been a barrier to Ms Lyons being empanelled as a juror. Further, the Tribunal erred in selecting as a comparator, a hearing person who asked to have another hearing person present to assist him or her during jury deliberations. In the alternative, the appellant submitted that the Tribunal erred in rejecting her submission that she had been subjected to indirect discrimination because the Court required Ms Lyons to

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<sup>14</sup> *Lyons v Queensland* [2016] HCA 38.

serve as a juror without an Auslan interpreter, thereby disadvantaging her.

The respondent adopted the arguments of Douglas J in *Re: The Jury Act 1995* and sought to have the Court of Appeal's decision affirmed on the grounds that for a person to perform the functions of a juror, he or she must be able to listen to oral evidence and participate in jury deliberations without the need for a non-juror to be present. Further:

The State's argument is that a deaf juror who has the evidence mediated through the services of an Auslan interpreter is not able to give a true verdict based upon his or her assessment of the evidence. Interpretation of the evidence to a juror is said to result in a trial that is no longer wholly under the supervision of the judge. The trial at which the evidence of one or more witnesses is interpreted is distinguished, in the State's argument, on the basis that in such cases each juror gives a true verdict according to the same evidence. Moreover, in such cases a party who is dissatisfied with the accuracy of the interpretation may challenge it. There is no way to challenge the accuracy of the interpretation of communications made in the jury room. (*Lyons v Queensland* (2016) [32])

Five justices of the High Court unanimously dismissed the appeal on the basis that Ms Lyons was not unlawfully discriminated against when she was excluded from jury duty because, pursuant to legislative provisions in Queensland she was incapable of effectively performing the functions of a juror. In a joint judgment by French CJ, Bell, Keane and Nettle JJ, their Honours found that the *Jury Act 1995* (Qld) did not allow disclosure of the jury's deliberations to a non-juror, namely an Auslan interpreter. Notwithstanding the power of the judge to grant leave for a non-juror to communicate with the jury, the High Court found that that power is for the benefit of the Court Officer who has charge of the jury during their deliberations but even that power is not a power that can be granted to anyone to be present during any part of the jury's deliberations. The Court also judged that a contributing factor to their finding was the absence of legislative power to administer an oath to an interpreter notwithstanding the powers in ss 26–30 of the *Oaths Act 1867* (Qld) that allows for an oath to be administered to an interpreter in a range of judicial proceedings, although not in the case

of jury deliberations.

Finally, the Court addressed the prohibition of publishing jury information by finding that such a prohibition would more than likely not apply to an Auslan interpreter given the nature of their work. While the Court accepted the appellant's submission that, 'the secrecy of the jury's deliberations would not be compromised by the presence of an accredited Auslan interpreter in the jury room during the jury's deliberations' (*Lyons v Queensland* (2016), [37]), none the less, the Court concluded that, 'Queensland law does not permit an Auslan interpreter to be present during the jury's deliberations' ([37]). Thus, while the High Court did not address directly the application of *Purvis v New South Wales*, raised by the appellant in her submissions, the Court did implicitly endorse the respondent's narrow approach to the selection of the appropriate comparator, as it confirmed the lower courts' preference for a legislative, rather than judicial intervention.<sup>15</sup>

### **United Nations Committee on the Rights of Persons with Disabilities**

In 2013, Mr Michael Lockrey and Ms Gemma Beasley represented by the Australian Centre for Disability Law, lodged complaints with the UNCRPD claiming Australia had violated their rights pursuant to various articles of the United Nations Convention on the Rights of Persons with Disabilities (the Convention).<sup>16</sup> Both complainants are deaf and had been refused the opportunity to serve as jurors in NSW because the courts refused to provide either an Auslan interpreter in Ms Beasley's case or steno-captioning in Mr Lockrey's case. On 28 November 2014, NSW submitted its observations on the admissibility and merits of

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<sup>15</sup> For a critical look at the consequences of the *Purvis* decision, both in terms of disability law, and in terms of its role in establishing a preference for a narrow reading of progressive legislation, see, Thornton M. 2009. Disabling discrimination legislation: the High Court and judicial activism. *Australian Journal of Human Rights* 15(1): 1–28.

<sup>16</sup> *Lockrey v Australia*, CRPD/C/15/D/13/2013 and *Beasley v Australia*, CRPD/C/15/11/2013, respectively.

the complaints. Both complaints were in similar terms, and relied on a violation of rights under arts 4, 5, 9, 12, 13, 21 and 29 of the Convention. The findings of the UNCRPD were correspondingly similar, and we focus here on the decision in relation to Ms Beasley's complaint.

In contrast to the outcomes in the *Lyons* cases, the UNCRPD found that the exclusion of deaf people from jury duty was discriminatory, and critically, the failure of the New South Wales government to act to include those with a hearing disability on a jury constituted a breach of Australia's obligations under the Convention. NSW had responded generically to the complaint by stating, among other things, that despite their refusal to implement key recommendations from the 2006 NSW Law Reform Commission Report, '[t]he NSW Department of Justice will undertake a review to consider reform opportunities, including with regard to a possibility to provide Auslan interpretation or steno-captioning' (*Beasley v Australia* (2013), 6). NSW argued that the complainant had not produced evidence of an ongoing policy preventing deaf people from serving on juries. Further, that pursuant to art 13 of the Convention, the term 'effective access to justice' means the accessibility of persons with disability to the justice system but not necessarily participating in the different components of the justice system. In particular, they argued that art 29 which provides political rights for people with disabilities, refers to rights related to political process such as voting and not to jury duty. Finally, while NSW agreed that Auslan interpretation is a form of communication, it submitted that it had satisfied its obligations under art 21 to provide appropriate measures in light of the State's resource constraints, without creating an absolute obligation on the State.

In answer to the resource issue, the UNCRPD found that there was no evidence presented by NSW that providing Auslan interpreters for deaf jurors would constitute an undue burden or that they had taken reasonable steps to accommodate the complainant. In

April 2016, the UNCRPD concluded that NSW had failed to fulfil its obligations under numerous articles of the Convention and made the following recommendations, which can be summarised in the following way:

1. NSW is under an obligation to provide Ms Beasley with a remedy including reimbursement of legal costs and compensation, and to enable her to participate in jury duty using an Auslan interpreter;
2. NSW must take measures to prevent similar violations in the future including providing reasonable accommodations to any disabled person presenting for jury duty, compliance with all laws relating to the treatment of people with disabilities, and training on accessibility for persons with disabilities for all staff involved in the provision of judicial services; and,
3. NSW should submit to the Committee within six months a written response including information on actions taken in light of the findings and recommendations of the Committee.<sup>17</sup>
4. Finally, NSW should publish and widely disseminate the Committee's views in order to reach all sectors of the population.

A significant point raised by the Committee was that although New South Wales relied on arguments that there would be negative consequences, in terms of the cost, duration and complexity of trials, that would flow from the inclusion of deaf jurors, '[the State party did] not provide any data or analysis to demonstrate that it would constitute a disproportionate of undue burden'. (*Beasley v Australia* (2013), 15). So, in the next section, and to provide supporting evidence for the conclusions reached by the Committee, we turn to outline the

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<sup>17</sup> At the time of writing this paper, the Committee had not disclosed whether it had received a response from NSW and the substance of any response.

results of research that has examined the implications of including deaf people on juries.

## **Investigating whether deaf people can serve as jurors: the four tranches of research**

### ***Comparing comprehension: the first three tranches***

In March 2002, the then NSW Attorney-General requested the NSW Law Reform Commission (the Commission) to inquire into and to report on whether persons who are profoundly deaf or have a significant hearing should be able to serve as jurors in NSW and, if so, in what circumstances. In February 2004 the Commission published Discussion Paper 24 entitled 'Blind and Deaf Jurors' and invited submissions and comments. A detailed study was conducted that led to the publication of a research monograph<sup>18</sup> that influenced the insights and recommendations of the Commission's Final Report.<sup>19</sup> The aim of the study was to assess the accuracy of the interpretation and the level of comprehension of potential deaf jurors compared to hearing jurors employing a number of back translation exercises of a NSW Court of Appeal jury direction which sought to explain the elements of manslaughter. In relation to the translatability of legal concepts, the Research Report (NSWLRC 2007, 41) stated:

In terms of equivalence in content, analysis showed that the interpretation was 87.5% accurate. This was calculated based on the prevalence of 72 key legal concepts in the original source text, of which 63 were found in the back translation text.

Interpreters who sit the National Accreditation Authority for Translators and Interpreters

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<sup>18</sup> See, NSW Law Reform Commission, *Deaf Juror's Access to Court Proceedings via Sign Language Interpreting: An Investigation*, Research Report No 14 (March 2007). The study was conducted by researchers at Macquarie University: Dr Jemina Napier, Department of Linguistics; Mr David Spencer, Department of Law; and, Mr Joe Sabolcec, post graduate student, Macquarie University.

<sup>19</sup> See, NSW Law Reform Commission, *Blind and deaf Jurors*, Report No.114 (2006).

(NAATI) accreditation examination are required to achieve a pass mark of 70% for successful accreditation. Therefore, the research finding of 87.5% accuracy among Auslan interpretation 'is more than acceptable' (Napier and McEwin 2015, 25).

In relation to the comprehension of deaf jurors, the Commission's Final Report (2006, 29) stated:

The pilot study commissioned for this reference found that both hearing and deaf 'jurors' misunderstood some legal concepts. In relation to closed/multiple choice questions, approximately 10.5% of the questions were answered incorrectly by all participants. Of open ended questions, some responses were problematic from both deaf and hearing participants. In post-test interviews, all participants commented that the facts were easy to follow, but that the legalistic language and amount of repetition made the text difficult to comprehend. In sum, the preliminary findings of this study show that both deaf and hearing 'jurors' equally misunderstood some terms and concepts.

The number of correct responses from deaf and hearing participants differed by only 2.8%.

The research showed that factual scenarios and legal concepts that are required to be understood by jurors can be conveyed in Auslan to enable deaf people to discharge their duties as jurors.

The second tranche of research involved further testing the comprehension results from the first tranche of research. Thirty deaf and 30 hearing people were tested and the findings confirmed those of the pilot study. Further, there was no major statistical significance in difference in terms of age, gender or employment; rather, any statistical difference seemed to be influenced by whether deaf people had Auslan as their first language (Napier and Spencer 2017).

The third tranche of research was an international study of legal professionals and sign language interpreters working in the justice system. The research sought to gather perceptions of the impact of having a deaf person on a jury and whether it would affect the outcome of

the trial. It also sought to ascertain the feasibility of providing deaf jurors with access to the justice system via the courts. The study involved an online survey using Likert scales of agreement with factual, attitudinal and behavioural statements as to whether deaf people should be excluded from jury duty, and the role of interpreters in meeting the needs of deaf jurors. Survey responses were received from 179 interpreters and 97 legal professionals from seven common law countries including Australia, and were followed up with semi-structured interviews. The results showed general support from sign language interpreters and less support from legal professionals, although the responses varied according to country.

The pattern of responses revealed that, in principle, participants perceive that there is no problem with deaf people serving as jurors, and that with supportive and clear policies and guidelines, and sufficient training for interpreters and court staff/stakeholders it can work successfully. (Napier and McEwin 2015, 26)

Another finding from the research was that the United States is leading the way in allowing deaf people to serve as jurors, with Australia and the United Kingdom significantly behind.

Together, the first three tranches of research provide evidence that Auslan is an effective language in the legal setting and that using that language, deaf people can sufficiently comprehend the content of courtroom discourse. Further, the majority of interpreters and legal professionals believe that deaf people should not be excluded from jury duty.

### ***Trial Dynamics and Jury Deliberation: The Fourth Tranche***

In order to confirm the findings of the third tranche of research and to test the perceptions and dynamics of having a 13th person in the jury deliberation room, the Australian Research Council (ARC) funded the fourth and current tranche of research. It can be characterised as a



detailed quantitative and qualitative analytical case study of a simulation of a trial and jury deliberations with a deaf juror and two interpreters. The research sought answers to the following questions:

1. Does the presence of an interpreter as 13th person in the jury room have an impact on jury deliberations?
2. What are the interaction patterns of jury deliberations when a deaf juror and sign language interpreter are present?
3. What are hearing juror perceptions of deaf juror participation and sign language interpreter presence in jury deliberations?
4. What are stakeholder perceptions of the presence of a deaf juror in a courtroom trial?

The study comprised: observation of court cases with deaf jurors in the United States and interviews with United States court officials; a mock trial conducted in Australia, followed by juror deliberations with a deaf juror and sign language interpreters; interviews with all the participants about their experiences; and, focus groups with deaf and legal stakeholders over the issues raised in the post-trial interviews.

The simulated trial was based on a real case in the NSW District Court over possession and supply of a prohibited substance. A simulated trial took place in the Parramatta District Court featuring practising lawyers, serving police officers and court staff. Two of the five lawyers had appeared in the real case while witnesses for the defence were played by professional actors with the jury being randomly recruited by a professional recruitment agency from those deemed eligible to serve as jurors in NSW. With the assistance of Deaf Australia, two deaf jurors were randomly recruited of whom one would be balloted to go into the jury room. Two trained and NAATI-accredited Auslan interpreters

worked as a team to conduct sign language interpreting throughout the trial rotating at about 20 minute intervals.

In order to simulate the trial as accurately as possible, there was little information given to the jurors and interpreters other than a one-page briefing note and a direction from the judge at the commencement of the trial on the role of professional interpreters. After one and a half days, the jury retired to the jury deliberation room and were given two hours to bring down a verdict. Only the jury, the two Auslan interpreters and the Court Officer were present in the jury deliberation room, and deliberations were audio- and video-recorded for analysis. At the conclusion of the trial all players, including the interpreters were interviewed by different members of the research team in logical groupings.

The analysis of the recordings of the jury deliberations showed that the deaf juror took 99 turns at speaking (via signing) placing him in the top 33% of turn takers, following: the Jury Foreperson who took 225 turns; Juror No. 11 with 126 turns; Juror No. 2 with 125 turns; and, the dissenting Juror with 123 turns. This is a favourable indication of the level of interaction by the deaf juror in the jury deliberation room and shows that the deaf juror was more active in the deliberations than the majority of the hearing jurors. These quantitative results are supported by the following sample of qualitative results gleaned from post-trial interviews with the jury:

‘I thought [*deaf juror*] had greater attention to detail probably than most of us’. (Juror No. 1) [General agreement from the rest of the jurors]

‘It was [*deaf juror*] who picked up the wrong information ...’ (A reference to an instance where there was an inconsistency with one of the dates given in evidence. The only juror who picked up on this inconsistency was the deaf juror, which led to a question being sent to the judge for clarification.) (Juror No. 4)

‘In the end I think, for me, when we came to deliberate, [*deaf juror*] was so specific of what he heard, but he didn’t hear anything. It was what was interpreted to him. So everything that had got interpreted was spot on’. (Juror No. 7)

‘Yeah, I agree with [another juror]. I was surprised, it was just so easy and even after just one day, you’re so comfortable with the people and the interpreters that you start looking at the people rather than the interpreters and I was surprised how well it worked and how easy it was. ... It was so natural’. (Juror No.1)

‘Yeah, I thought it might be distracting ... Yeah, just the placement of them near the witness and things like that. But it turns out it wasn’t an issue at all’. (Juror No.1)

The Court Officer observed that during jury deliberations the deaf juror took part in the conversation in the same way as deliberations of a jury comprised solely of hearing people. Further, the deaf juror was not shy and was involved in the conversations leading to a verdict. Finally, the Court Officer noted that the jurors had been more courteous than usual, in following the directions of the foreperson, and in particular by allowing the deaf juror to give his opinion without speaking over the top of him (or indeed other jurors). On this issue the Court Officer stated, ‘It was most impressive’.

While the above is a mere snapshot of the outcomes that address the first three research questions, this article will now discuss the outcomes that address the fourth research question – which is of primary interest to the remainder of this article – that of stakeholder perceptions of a deaf juror participating in a trial.<sup>20</sup>

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<sup>20</sup> For a more detailed analysis of the findings, including on the results as to turn taking, and the level of engagement in deliberations by the deaf juror, see “Participation in the administration of justice: deaf citizens as jurors” (Report to the Australian Research Council, November 2016).

## **Issues for the legal stakeholders arising from the research**

The following discussion is based on post-mock trial interviews with the players and a large focus group with members of the NSW Supreme Court bench, senior barristers and solicitors and Department of Justice representatives. In both the interviews and focus group, the issues raised either related to the procedural nature of having deaf jurors and interpreters in the court and jury deliberation rooms, or the substantive content of the interpretation of evidence.

Absent knowledge of Auslan interpretation, the procedural issues largely focused on perceptions held by lawyers (including the judge) and other players in the mock trial across a range of procedural elements. For example, there were concerns raised about the accuracy of Auslan in the legal setting. Further, it was generally agreed between the judge and the lawyers that the more complex a trial is, the less likely that accurate interpretation would occur leading to a miscarriage of justice. A similar issue was the perception of deaf people.

[M]y impression is that [an] ordinary hearing person presumes that deaf people are a bit stupid. So the jury has to be educated a bit about that because very often they're much more on the ball. Because sometimes they've got this very peculiar tone to their voice, if they've got a voice, and the fact that when you're talking – well we presume people who don't speak English are a bit stupid too. (Excerpt from the interview transcript with the presiding judicial officer, 6)

Finally, the issue of the qualifications, training and preparation for trial was raised as a concern and in this respect there was widespread ignorance of the requirements of NAATI accreditation and the Code of Ethics imposed on members of the Australian Sign Language

Interpreters' Association,<sup>21</sup> that ensure professional accountability and confidence in the accuracy of translation by members. In relation to training, it was stated by the lawyers and police officers that no training is provided by the state government on the use of Auslan interpreting services in court and very little if any training on the use of foreign language interpreting services.

It was agreed by all of the interviewees that all of the above issues can be dealt with via some relatively minor procedural changes to the way trials are conducted. For instance, a short discussion, information sheet and demonstration to the jury and lawyers prior to the commencement of the trial would allay concerns about: the accuracy of Auslan interpreting; perceptions about deaf people; and, the qualifications of interpreters. Some threshold training for lawyers and judges involved in such trials would also put those players at ease regarding the ability of evidence to be conveyed accurately via Auslan.

The remaining procedural issues surrounded the physical and visual demands of sign interpretation. For example, all participants in the mock trial agreed that ensuring sight lines were maintained between deaf jurors and: advocates; the accused; witnesses; and, at times, the judge, is critical to the efficient and effective submission of evidence. Addressing this issue was seen as important to assist deaf jurors in understanding the non-verbal element of communication that occurs as part of the delivery of evidence in court. Both groups conceded that rearranging larger court rooms to facilitate better sight lines was not a major issue in order to achieve the inclusion of deaf people as jurors. Further, ensuring jury deliberation rooms are large enough for interpreters to work in was also seen as not being a big issue as most existing rooms would accommodate Auslan interpreters.

There were three substantive issues raised by the interviewees and the focus group.

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<sup>21</sup> See, ASLIA Code of Ethics at <https://aslia.com.au/code-of-ethics/>.

The first issue was how Auslan can convey the non-verbal elements of oral evidence. This is important in trial advocacy because the voice and the body can express non-verbal paralinguistic messages conveyed by: intonation; tone of voice; vocally produced noises or pause; body posture and gesture; and, facial expressions and eye movements. Sign language interpreters have a raft of ways to convey non-verbal communication through their own facial expressions and use of hand gestures. Sight lines between deaf jurors, witnesses giving evidence, advocates and interpreters may be crucial to the effective first-hand conveyance of the paralinguistic messages associated with verbal communication. Notwithstanding this, the sign language interpreter can enhance the non-verbal communication through the interpretation process, which counters the perception that Auslan merely interprets verbal speech. Fundamentally, we would see this objection, in so far as it relates to the capacity, or otherwise, of Auslan to provide the deaf juror with a rich perception of what the witness has said, as one that should not stand in the way of the participation of a deaf person on a jury.

~~The sA~~ second issue raised by the legal stakeholder focus group was the requirement for courts and fact finders to base their decision on ‘primary’, and not secondary evidence. The term ‘primary evidence’ was initially raised in the context of a deaf juror having to listen to oral evidence from, for example, a telephone or listening device intercept, which is common in surveillance techniques today. However, the ~~The~~ concerns encompassed by this claim extended beyond this specific example to larger questions, including the expectation that all members of the jury will be exposed to the relevant evidence in *the same way*.<sup>22</sup> This discussion also revealed anxieties about the need for judicial oversight of interpreting (and the jury’s reception of evidence via interpreters) as well as attentiveness to the risks that these differences *may* raise implications in terms of the court’s obligation to ensure that the

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<sup>22</sup> The expectation that all jurors should receive the ‘same’ evidence, as well as desire to monitor the interpreter were both points raised in argument before the High Court. See *Lyons v Queensland* [2016] HCA 38, 32.

defendant receives a fair trial.<sup>23</sup>

While ~~raised initially in the context of surveillance material, starting~~ with the idea that all jurors should be exposed to (the same) ‘primary evidence’ it was clear ~~as the discussion developed that that~~ the concern extended beyond evidence from listening/surveillance ~~evidence~~ presented in court, to ~~potentially~~ encompass any oral evidence from a witness and interpreted via an Auslan interpreter. A majority of the legal stakeholders agreed with one of the judicial members of the group who stated:

The trouble with having one deaf juror is that one out of 12 jurors is receiving different evidence from what all the others are receiving. He's [sic] only receiving the transmission of the medium through the sign language ... But the effect of having a deaf juror who has to be interpreted to, is that one juror is getting something different. It also has the effect that when the interpretation process takes place in the jury room it's not in the sight of or underneath – surveillance of, as it were, the participating parties – the people who are critically effected – the crown on behalf of the community and the defence counsel in the interests of a fair trial and the liberty of the subject. It's not under their sight nor under the sight of the presiding judge who has responsibility for holding the balance between those two interests. (Excerpt from the legal stakeholder focus group transcript, 17–18)

~~In this context, At one level, this concern can be answered by considering the extent to which the expectation that all members of the jury should be able to engage with the ‘primary’ evidence is reliant on -adherence to the stakeholder was relying on and referring to~~ common law ‘best evidence’ principles, ~~as~~ applied in early cases involving surveillance materials where the audio was in a language other than English and the jury could not comprehend the audio without the assistance of a transcript.<sup>24</sup> However, it is important to note that these

<sup>23</sup> Overall, while there has been a recent shift to explore the human rights context of the criminal trial, these remain traditionally focused on the rights of the defendant (and to a lesser extent of witnesses). See discussion in for example, Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011), 380 and Chapter 10.

<sup>24</sup> Secondary evidence ~~is able to can~~ be tendered in Australian courts. For example, copies of documents can be tendered as evidence where the original has been lost, destroyed or is impossible to produce. As a general rule, at common law, the party relying on the secondary evidence must adduce primary evidence of its contents. See *Butera v Director of Public Prosecutions (Vic)* (1987) 164 CLR 180. See also Heydon J.D. 2004. *Cross on*

principles have been moderated by the provisions of the Uniform Evidence Law (the UEL), including the abolition of the original documents rule, such that the concept of ‘best evidence’ ~~can should~~ no longer be ~~assumed to apply relied on~~ in the same way.<sup>25</sup> Further, while there may be cases where the nature of the evidence gives rise to the need for a jury to make their own assessment of the words spoken on an audio recording (and/or the identity of a speaker), precluding the participation of a deaf juror in a particular trial, it should also be noted that this autoptic preference is one that itself carries with it substantial risks to accurate fact finding.<sup>26</sup> In particular, the presumption that lay hearing jurors are able to make (sufficiently) accurate decisions about either content or identity from such materials, is one that has been strongly challenged in the empirical literature.<sup>27</sup> It also tends to ignore the problematic effects of exposure to transcripts (or other forms of priming) that are not ameliorated by confining their use to that of an ‘aide memoire’.<sup>28</sup>

[As noted, the expectation that all members of the jury must experience the same evidence was raised by the State in argument before the High Court in Lyons, with additional](#)

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*evidence*, 7th ed. Sydney: LexisNexis Butterworths, Chapter 20: Documentary Evidence, at [39005]. However, under the Uniform Evidence Law regime, which now governs the majority of Australian jurisdictions, including the Commonwealth (*Evidence Act 1995* (Cth)) New South Wales (*Evidence Act 1995* (NSW)) and Victoria (*Evidence Act 2008* (Vic)), s 48 provides for a range of alternative ‘copies’ to be relied on as proof of the content of audio recordings, including transcripts, as equivalent to the ‘original’. Where there is a dispute as to the content of an audio recording, the status of the transcript as an ‘aide memoire’ has been preserved in later cases, but in cases where the audio is in a language other than English, this distinction is unhelpful, since the evidence can only be received meaningfully by way of an appropriately qualified interpreter. See *Eastman v R* (1997) 76 FCR 9; *R v L Cassar*; *R v E Sleiman (Judgment No 17)* [1999] NSWSC 436 (10 May 1999); *Foreign Media v Konstantinidis* [2003] NSWCA 161; Edmond G., and San Roque M. 2009. Quasi-justice: Ad hoc expertise and identification evidence. *Criminal Law Journal* 33(1): 8–33 at 10.

<sup>25</sup> See *Evidence Act 1995* (NSW), s 51.

<sup>26</sup> See San Roque, M. 2017. “Updating Beliefs: Rethinking the Regulation of Identification Evidence Under the UEL.” In *Critical Perspectives on the Uniform Evidence Law*, edited by Andrew Roberts and Jeremy Gans, 195 – 210. Sydney: The Federation Press.

<sup>27</sup> See, for example, Aglieri A, Watson R, Pernet C et al. 2016. The Glasgow Voice Memory Test: Assessing the Ability to Memorize and Recognize Unfamiliar Voices. *Behaviour Research Methods* 1 – 14; Laub CL, Wylie, LE, and Bornstein. 2013. Can the Courts Tell and Ear from an Eye? Legal Approaches to Voice Identification Evidence. *Law and Psychology Review* 37: 119. Edmond G., Martire K., and San Roque M. 2011. Unsound Law: Issues with (‘Expert’) Comparison Evidence. *Melbourne University Law Review* 35(1): 52–112

<sup>28</sup> See, for example, Fraser H. and Stevenson B. 2014. The power and persistence of contextual priming: more risks in using police transcripts to aid jurors’ perception of poor quality covert recordings. *International Journal of Evidence and Proof* 18(3): 205–229.



argument that the interposition of an interpreter interfered with the obligation of the juror to render a ‘true verdict’ according to the evidence under s 50 of the *Jury Act 1995* (Qld). ~~Land~~ the State in *Lyons*, tThose in the focus group who were concerned about the issue of juror parity, and the question of primary versus secondary evidence in the focus group interpretation (in the court) from sign language interpretation (on the jury) on the grounds that in the former, ‘[w]hat a foreign language interpreter does is all in court in the sight of all the parties and the presiding judge ... all jurors are exposed to the same’. Ultimately, in reaching its decision in *Lyons*, the High Court did not address, directly, the State’s argument that the presence of an interpreter compromised the ability of a juror to render a ‘true verdict’, preferring to rely on the common law principle that the jury be kept ‘separate’ as the determining factor. Thus the outcome in *Lyons* does not necessarily imply an endorsement of the expectation that all jurors must experience the ‘same’ evidence, and in an unmediated form. Further, in the same way that contemporary research on voice comparison and the auditory environment in the courtroom throws new light on our understanding of the capacity of fact finders, contemporary demographic changes pose a challenge to the belief that all hearing jurors will experience interpreted evidence in the same way. During the interviews post-mock trial, the authors were made aware of a case in the Parramatta District Court where a trial was aborted because of poor interpretation by a foreign language interpreter. Evidence was being given by a witness in a foreign language, which was being interpreted into English by a court-appointed interpreter. More than one member of the jury was fluent in the foreign language being spoken by the witness and they sent a note to the Judge via the Court Officer that the translation was not accurate. The Judge had no choice but to abort the trial and reschedule a new trial with a new jury because the original jury had not heard an accurate interpretation of the evidence. In cases where an accused or witnesses to an offence have English as a second language and require the services of a foreign language interpreter, any

member of the jury fluent (or even only competent) in that language receives ‘primary evidence’ in the foreign language and secondary evidence via the English interpretation. Given the multicultural nature of Australian society, it would have transpired and will continue to transpire that some jurors will receive multilingual evidence differently to others, and that, in contrast to the situation with a deaf juror, these differences may not be revealed to the court or the parties. In addition to the points raised above concerning the reception of surveillance materials, this potential for variability places the concerns raised by some members of the legal stakeholder focus group that having a deaf person on the jury means they can only ever receive secondary evidence in its proper context.

Finally, ~~another~~ the third substantive- issue raised by the mock-trial lawyers was their option to exercise their right to peremptory challenges over the inclusion of deaf people on a jury.<sup>29</sup> In this context it was raised as a constraint on the implementation of any recommendations to lift barriers to participation, ‘[t]his whole consideration is overshadowed by the existence of the peremptory challenges ... I can't imagine any defence or crown counsellor who wouldn't challenge off a deaf juror’ (Excerpt from the legal stakeholders focus group transcript, 16). This perspective, and a point raised by a judicial member of the focus group that jury trials were extremely ‘fragile’ (Excerpt from the legal stakeholders focus group transcript, 25) indicate that, in many respects, what judges and lawyers were most wary of was adding an *unfamiliar* layer of uncertainty to what is an already complex process. However, while it is understandable that trial lawyers (and judges) would want to control, as much as possible, the process that leads to a verdict, there is a certain level of selectivity in the assumption that, in contrast to a trial involving a deaf juror, in a ‘standard’ trial *all* jurors hear the same evidence

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<sup>29</sup> Pursuant to: *Juries Act 1967* (ACT), pt 7; *Jury Act 1977* (NSW), pt 6; *Juries Act* (NT), pt 8; *Jury Act 1995* (Qld), pt 5; *Juries Act 1927* (SA), pt 7; *Juries Act 2003* (Tas), pt 5; *Juries Act 2000* (Vic), pt 6; and, *Juries Act 1957* (WA), pt 7. For a discussion of this issue in the United States context see Weis A. 1997. Peremptory challenges: The last barrier to jury service for people with disabilities. *Willamette Law Review* 33(1).

and interpret it in the same way. Jury deliberations undoubtedly disclose different versions of the evidence and different understandings of the same evidence, yet trial lawyers and the judicial system more broadly in fact necessarily accepts these variables. But notwithstanding this, they would regard it as imperative to challenge a potential deaf juror to avoid a sign language interpreter accurately delivering secondary evidence to a juror or jurors in a trial. Further, this expectation of the need to peremptorily challenge a deaf juror sits in tension with the position, expressed by all of the lawyers directly involved and interviewed post-mock trial, who *also* agreed that removing the barriers to deaf people being able to serve on juries was desirable and necessary. This perspective was also acknowledged in the focus group:

There may be a peremptory challenge. But at the end of the day, we as a society should not be excluding people on a blanket basis if there is a way in which they can be accommodated. Even if it ends up being in a minute set of situations, it's still at least putting on balance and putting into proportion very important issues. Maybe issues of resources that need to be taken into account. But these people are citizens. They pay their taxes. They've got - they are not to be totally ignored I guess. No one is suggesting they be ignored but I'd suggest that maybe the way in which the debate might focus might be to look at where it is possible to achieve the inclusion of a deaf juror ... (Excerpt from the legal stakeholders focus group transcript, 28–29)

## **Conclusion**

Notwithstanding the outcome of, and the decisions in, the *Lyons* cases, this article argues that the exclusion of deaf people from serving on juries does discriminate against deaf citizens on the basis of their disability, and in turn places Australia in breach of its responsibilities under the Convention. Accepting the results of the first three tranches of research into whether deaf people can participate in jury duty leaves us with a clear understanding that deaf people can comprehend legal discourse in a court room setting and

that selected jurisdictions outside of Australia, manage the inclusion of deaf people on their juries.

The final tranche of research evidences that a deaf person can effectively participate in jury duty and most importantly, jury deliberations via the services of an Auslan interpreter. Further, there is no measurable detriment in having a deaf person and an interpreter as part of court proceedings and in the jury deliberation room. However, both post-mock trial interviews and stakeholder focus groups highlighted a number of challenges that need to be carefully considered and logistically addressed before deaf people could be included on an empanelled jury. Issues such as dispelling perceptions about deaf people, the role of Auslan interpreters and the process of sign language interpreting would have to be addressed through simple and precise education. Similarly, issues relating to the misperception regarding the accuracy and effectiveness of Auslan can be addressed through a developmental process of engagement with lawyers, judges, court staff and hearing members of a jury. Finally, the point needs to be made that other jurisdictions have successfully incorporated deaf citizens into their juries. In this regard, there seems little reason to accept arguments of Australian exceptionalism in our trial processes.

Notwithstanding this, the key observations from the fourth tranche of research include that: first, in principle, deaf people should be allowed to serve as jurors; and, second, a person's right to perform their civic duty as a juror cannot override a defendant's right to a fair trial in cases where there is a real risk that including a deaf juror will compromise a fair trial. But these perceived risks to the fair trial need to be assessed based on constraints of the specific case, rather than drawing on presumptions (and, potentially, misconceptions) as to what is the norm within the quotidian criminal trial. Implementation of these recommendations may require a shift in perspective amongst Australian legal personnel, in particular a recognition that the criminal trial may be governed by complementary human

rights frameworks. Finally, standards, quality and logistics of interpreting could be a potential primary barrier to equality of people with a disability, but these do not in and of themselves represent a compelling reason to derogate from the relevant obligations under the Convention.

Therefore, the latest research proposes three recommendations:

1. Amendments should be made to the respective legislation governing the composition of juries in each state to allow deaf people to serve as jurors using the services of qualified and accredited Auslan interpreters;
2. Recommendations already made by the NSW Law Reform Commission Report No. 114 of 2006, the Australian Law Reform Commission Report 124 of 2014, and the *Beasley* and *Lockrey* decisions of the UNCRPD in April 2016 be implemented; and,
3. Courtrooms housing juries should be modified to allow deaf people to serve as jurors.

The fourth tranche of research is the final step in a decade-long journey that has established that deaf people can serve as jurors, thereby providing the evidence that would allow for the elimination of a fundamental human rights breach perpetuated by the discriminatory practice of excluding deaf citizens from participating in the administration of justice. Notwithstanding that there are some substantive and logistical hurdles to overcome, which can be achieved via a developmental approach to change, the real issue is whether the political will exists to treat deaf citizens the same as their hearing counterparts, and to give them the right to sit on a jury in Australia.

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