

NSW LAW REFORM COMMISSION

REPORT 114

Blind or Deaf Jurors

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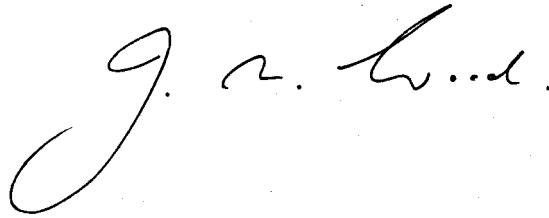
Letter to the Attorney General

To the Honourable Bob Debus MP
Attorney General for New South Wales

Dear Attorney

Blind or Deaf Jurors

We make this Report pursuant to the reference to this Commission received
19 March 2002.

A handwritten signature in black ink, appearing to read 'J. Wood', with a large, stylized initial 'J'.

The Hon James Wood AO QC

Chairperson

Commissioners

The Hon. Justice Michael Adams

Associate Professor Jane Goodman-Delahunty

The Hon. Justice David Kirby

The Hon Gordon Samuels AC CVO QC (Commissioner in charge)

Professor Michael Tilbury

The Hon James Wood AO QC

September 2006

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TERMS OF REFERENCE

In a letter to the Commission received on 19 March 2002, the Attorney General, the Hon R J Debus MP made the following reference:

- To inquire into and to report on whether persons who are profoundly deaf or have a significant hearing or sight impairment should be able to serve as jurors in New South Wales and, if so, in what circumstances.
- In undertaking this review, the Commission should have regard to the *Anti-Discrimination Act 1977* (NSW), the *Disability Discrimination Act 1992* (Cth), and the need to maintain confidence in the administration of justice in New South Wales.

PARTICIPANTS

Division Members

Pursuant to section 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

The Hon. Justice Michael Adams

Associate Professor Jane Goodman-Delahunty

The Hon. Justice David Kirby

The Hon Gordon Samuels AC CVO QC (Commissioner in charge)

Professor Michael Tilbury

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**Alastair McEwin, Chief Executive Officer, People With Disability
Australia Incorporated**

**The recommendations contained within this report are those of the
Division Members and do not necessarily reflect the views of
Members of the Reference Group.**

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LIST OF RECOMMENDATIONS

CHAPTER 4

Recommendation 1 – see page 59

The *Jury Act 1977* (NSW) should be amended to reflect the following:

- (a) that people who are blind or deaf should be qualified to serve on juries, and not be prevented from doing so on the basis of that physical disability alone;
- (b) that people who are blind or deaf should have the right to claim exemption from jury service;
- (c) that the Court should have power to stand aside a blind or deaf person summoned for jury duty if it appears to the Court that, notwithstanding the provision of reasonable adjustments, the person is unable to discharge the duties of a juror in the circumstances of the trial for which that person is summoned. This power should be exercisable on the Court's own motion or on application by the Sheriff;
- (d) that interpreters and stenographers allowed by the trial judge to assist the deaf or blind juror should swear an oath faithfully to interpret or transcribe the proceedings or jury deliberations;
- (e) that interpreters or stenographers allowed by the trial judge to assist the deaf or blind juror should be permitted in the jury room during deliberations without breaching jury secrecy principles, so long as they are subject to and comply with requirements pertaining to the secrecy of jury deliberations;
- (f) that offences be created, in similar terms to those arising under s 68A and 68B of the Act, in relation to the soliciting by third parties of interpreters or stenographers for the provision of information about the jury deliberations, and in relation to the disclosure of information by such interpreters or stenographers about the jury deliberations.

Recommendation 2 – see page 60

The Sheriff should develop guidelines for the provision of reasonable adjustments, including sign language interpreters and other aids for use by deaf or blind jurors during the trial and deliberation.

Recommendation 3 – see page 60

A blind or deaf person receiving a notice of inclusion on the jury roll or a jury summons should be required to complete a form either claiming exemption from jury duty or notifying the Sheriff of the reasonable adjustments required by that person to participate as a juror.

Recommendation 4 – see page 61

All relevant personnel, including judicial officers and court staff, should be given the opportunity to participate in professional awareness activities that focus on practical measures to facilitate the inclusion of blind or deaf persons as jurors. The Judicial Commission should develop supporting materials and procedural guidelines as part of this process.

1. Introduction

- History of this reference
- Current practice
- Views contained in submissions
- A fair trial
- Role of the sheriff in jury composition

HISTORY OF THIS REFERENCE

1.1 In 2002 the Attorney General, the Hon R J Debus MP gave the Commission a reference to inquire into and report on whether people who are profoundly deaf or have a significant hearing or sight impairment should be able to serve as jurors. Work on the reference commenced in 2003, and in February 2004 the Commission released Discussion Paper 46¹ (“DP 46”), in which a number of questions were raised for comment. In response to an invitation to the public, ten submissions were received from individuals and organisations.

CURRENT PRACTICE

1.2 The *Jury Act 1977* (NSW) (“the Act”) does not directly prohibit blind or deaf people from serving as jurors. Section 14 of the Act requires the Sheriff to delete from the supplementary jury roll the names of those persons he or she determines are disqualified or ineligible to serve as jurors. Schedule 1 to the Act lists the categories of those disqualified from serving. They are:

1. A person who has been imprisoned within the last 10 years;
2. A person found guilty of an offence and detained in an institution for juvenile offenders within the last 3 years;
3. A person currently bound by an order pursuant to a criminal charge or conviction (eg parole or recognizance).

Schedule 2 lists those who are ineligible to serve on a jury:²

1. The Governor;
2. A judicial officer;
3. A coroner;
4. A member or officer of the Executive Council;
5. A member of the Legislative Council or Legislative Assembly;
6. Officers and staff of Parliament;

1. NSW Law Reform Commission, *Blind or Deaf Jurors* (Discussion Paper 46, 2004).
 2. See also the *Jury Exemption Act 1965* (Cth).

7. An Australian lawyer;
8. A person engaged in law enforcement, criminal investigation, the provision of legal services in criminal cases, and the administration of justice or prisons;
9. The Ombudsman and a Deputy Ombudsman;
10. A person who has been a judicial officer, coroner, police officer, Crown Prosecutor, Public Defender, Director or Deputy Director of Public Prosecutions or Solicitor for Public Prosecutions.
11. A person who is unable to read or understand English.
12. A person who is unable, because of sickness, infirmity or disability, to discharge the duties of a juror.

1.3 It is evident that item 12 of Schedule 2 differs from all other categories appearing in either Schedule (with the possible exception of item 11) in that it requires the making of a subjective judgment as regards fitness to serve. The Sheriff has determined that people who are blind or deaf or have a significant impairment to their sight or hearing are unable to discharge the duties of a juror, and are thus ineligible to serve.³

VIEWS CONTAINED IN SUBMISSIONS

1.4 Ten submissions were received following the release of DP 46. Almost all upheld the right of people who are blind or deaf to be treated in a non-discriminatory manner by being allowed to serve as jurors if they are capable of discharging the requisite duties. These submissions also largely accepted that reasonable adjustments⁴ would be required and should be provided. The main variant within these submissions was the degree of confidence in the capacity of deaf or blind people to succeed in the task. The Director of Public Prosecutions of NSW,⁵ expressed cautious acceptance:

Overall, it appears that many jurisdictions are moving away from treating persons with disabilities as being incapable of serving on juries. ... Blind or deaf persons should not

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3. NSW Office of the Sheriff, information supplied 24 March and 10 May 2006.
 4. See DP 46 at para 4.15-4.18, and below at para 2.11– 2.15, 3.3-3.6.
 5. Cowdery, *Submission* at 1.

automatically be excluded from jury service. The criteria for ineligibility for jury service must be found in a lack of ability to discharge the relevant duties and not be focussed on a particular disability.

He called for existing discretions, such as the judge’s ability to discharge unsatisfactory jurors, to remain, and also noted that:

without excellent facilities to assist blind and deaf persons, available immediately to them, I cannot accept that they could discharge their jury functions.

1.5 The Law Society of New South Wales⁶ appears to be uncomfortable with the prospect of reform in this area, even though it has always been:

a strong advocate in opposing discrimination, and recognises that denying a sector of the community the opportunity to fulfil their obligations as citizens is a denial of the principle of equal rights. ...

The only consideration ought to be whether blind or deaf individuals, given the proper services and facilities, are able to properly discharge the important duties with which they are entrusted as jurors in a trial in terms of assessing evidence, whether it be oral, visual, documentary or in some other form.

As to this, the Law Society “continues to have reservations”:⁷

Assuring that the rights of certain people can be exercised, however, may not always be consistent with achieving the proper and efficient administration of justice, and ensuring that an accused is tried fairly. Even given appropriate supports and accommodations, it is the [Law Society’s] Criminal Law Committee’s view that the nature of evidence in certain trials would make it difficult for a profoundly deaf or severely visually impaired person to properly perform the duties of a juror.

1.6 Almost all the remaining submissions were from individuals with a disability, or organisations with links to those with disability, and they expressed confidence in the ability of blind or deaf people to serve successfully as jurors in conducive circumstances. For example, the Royal Blind Society’s view⁸ is that:

6. Law Society of NSW, *Submission* at 1, 4.

7. Law Society of NSW, *Submission* at 1.

8. Royal Blind Society, *Submission* at 1. Note that in 2004 Royal Blind Society merged with two other organisations to form Vision Australia, a

people who are blind or who have vision impairment should not be precluded from jury duty on the grounds of disability. We are of the view that given support, which in most cases will be minimal or not even required, people who are blind will ably carry out the functions and responsibilities of a juror.

The Society said its comments were based on its “knowledge of the abilities of people who are blind and the limitations resulting from blindness”.

1.7 The Disability Council of NSW, the official advisory body to the NSW Government on disability issues and policy,⁹ expressed the view that:

People with disabilities have the right to be included in all aspects of the justice system and, consequently, to be facilitated to participate as members of juries. ...

Jury service is a right and obligation of citizenship. Council notes however that the justice system places the onus on people with disabilities to assert their rights and demonstrate their capacity to participate in a way that is not experienced by people who do not have disabilities.

1.8 The Australian Sign Language Interpreters Association (“ASLIA”)¹⁰ in its submission stated:

The presence of an Auslan interpreter in a courtroom has the potential to facilitate Deaf people participating in a similar way to their hearing peers. ...

The argument that Deaf people are unable to sit on juries because of their perceived disability or inability to understand English is not justified ... The use of appropriate interpreting will allow Deaf people to contribute to Australian society in all areas equally with their hearing counterparts.

1.9 Arguments central to many of the submissions concerned equality and human rights.¹¹ People with Disability Australia Incorporated (“PWD”) is a national peak disability rights and advocacy organisation.¹² It argued in its submission¹³ that:

national blindness agency: Vision Australia, “About Us: Our History” (as at 9 May 2006) «www.visionaustralia.org.au/info.aspx?page=645».

9. Disability Council of NSW, *Submission* at 1, 2.

10. ASLIA, *Submission* at 3, 4.

11. See also DP 46 at para 1.4 – 1.9.

12. PWD, “About PWD” (as at 4 April 2006) «www.pwd.org.au/aboutpwd.html».

13. PWD, *Submission* at 1.

The blanket exclusion of people who are blind or deaf from jury service denies their citizenship, and to the extent that it is based on irrational prejudice, stereotyping, and ignorance, it is also an abuse of their human rights.

1.10 Not all submissions, however, focused on such themes. Justice Hulme of the NSW Supreme Court, having expressed several reservations regarding the ability of people who are blind or deaf to serve successfully as jurors, observed:¹⁴

One may ask what are the perceived advantages of changing the law so as to permit blind or deaf people to participate in the jury process. None present themselves other than perhaps some amelioration of the perception such persons may have as to the consequences of their affliction. I do not for one moment suggest that such amelioration is necessarily inconsequential but, compared with the affliction itself, about which nothing can be done, I would venture to suggest that such amelioration is certainly very small and even if all the matters to which I have referred could be satisfactorily dealt with, would impose a cost on the community vastly out of proportion to any benefit which could be achieved.

A FAIR TRIAL

1.11 While the reasoning in this report applies equally where juries are used in civil cases and coronial inquests, its focus is on criminal trials, the principal context in which juries function. In that context especially, the prohibition on blind or deaf jurors is based on the concern that their disability will compromise their understanding of the evidence, or prevent them in some other way from fulfilling the tasks entrusted to them such as, in the case of deaf jurors, comprehending the addresses of counsel and the summing up. In such an eventuality the accused's right to a fair hearing – and thus to a fair trial – might be prejudiced.

1.12 The right to a fair trial is widely acknowledged but little defined. The reason for this is explained in *Dietrich v The Queen*:¹⁵

There has been no judicial attempt to list exhaustively the attributes of a fair trial. That is because, in the ordinary course of the criminal appellate process, an appellate court is generally called upon to determine, as here, whether something that was done or said in the course of the trial, or

14. R S Hulme, *Submission* at 2-3.

15. (1992) 177 CLR 292 at 300 (Mason CJ and McHugh J).

less usually before trial, resulted in the accused being deprived of a fair trial and led to a miscarriage of justice.

1.13 The jury, comprising twelve disinterested members of the community, is one of the features of a criminal trial designed to achieve fairness.¹⁶ As Lord Chief Justice Woolf recently stated:

[T]he view of the public generally is that normally, the jury trial is the fairest form of trial available. We have great faith in the ability of 12 persons randomly selected, and properly directed, to provide justice in the generality of cases.¹⁷

The understanding of fairness is not, however, static:

Fairness is a constantly evolving concept...it is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another.¹⁸

1.14 It is the judge's duty to ensure that the accused receives a fair trial.¹⁹ To achieve this end the Court has the power to control and supervise proceedings brought in its jurisdiction.²⁰ One way in which the interests of justice are met is by the removal of jurors who are unfit to serve. Some cases have alluded specifically to people who are blind or deaf. In *Mansell v The Queen*²¹ the Court stated:

[W]e cannot doubt that there may be cases, as if a juryman were completely deaf, or blind, or afflicted with bodily diseases which rendered it impossible to continue in the jury box without danger to his life, or were insane, or drunk, or with his mind so occupied by the impending death of a near relation that he could not duly attend to the evidence, in which, although from there being no counsel employed on either side, or for some reason, there is no objection made to the juryman being sworn, it would be the duty of the Judge to prevent the scandal and the perversion of justice which would arise from compelling or permitting such a juryman to be

16. See also DP 46 at para 2.8 – 2.9.

17. *R v Abdroikov* [2005] 4 All ER 869 at 878 (CA).

18. *R v H* [2004] 1 All ER 1269 at 1275 (HL).

19. *Crofts v The Queen* (1996) 186 CLR 427 at 451; *Pemble v The Queen* (1971) 124 CLR 107 at 117; *Fingleton v The Queen* (2005) 216 ALR 474 at 503.

20. *Jago v District Court of NSW* (1989) 168 CLR 23 at 25.

21. (1857) 8 E & B 54 at 80-81; 120 ER 20 at 30; see also *R v Mason* [1981] QB 881 at 887; *R v Burns* (1883) 9 VLR (L) 191 at 193-194; *R v Greening* [1957] NZLR 906 at 915.

sworn, and to join in a verdict on the life or death of a fellow creature.

These observations were affirmed well over a century later in *R v Ford*:²²

At common law a judge has a residual discretion to discharge a particular juror who ought not to be serving on the jury. This is part of the judge's duty to ensure that there is a fair trial. It is based on the duty of a judge expressed by Lord Campbell CJ in *R v Mansell* as a duty "to prevent scandal and the perversion of justice". A judge must achieve that for example by preventing a juryman from serving who is completely deaf or blind or otherwise incompetent to give a verdict.

In *R v Staines*²³ one of the jurors, a Mr Daniells, informed the court after empanelment that he was hard of hearing. At the trial judge's suggestion Mr Daniells swapped places with juryman Number 12. The following exchange then took place:

Philp J: Mr Daniells, stand up. Can you hear me?
 Juryman Daniells: I could hear what you said then, but I could not get everything you said.
 Philp J: I think, in a murder trial, I should not carry on with a jury in which there is one man who seems to me not to understand everything that is said to him.

The jury was discharged. The other eleven jurors were immediately called, along with a new juror, and the trial proceeded.

1.15 A number of observations arise out of these cases. First, representativeness, a feature of the jury, is a notion that has changed over time.²⁴ In *Cheatle v The Queen*²⁵ the High Court stated:

The restrictions and qualifications of jurors which either advance or are consistent with [the feature of representativeness] may ... vary with contemporary standards and perceptions. The exclusion of women and unpropertied persons was, presumably, seen as justified in earlier days by a then current perception that the only true

22. [1989] QB 868 at 871.

23. [1942] QWN 49.

24. DP 46 at para 2.10 - 2.15.

25. (1993) 177 CLR 541 at 560-561.

representatives of the wider community were men of property. It would, however, be absurd to suggest that a requirement that the jury be truly representative requires a continuation of any such exclusion in the more enlightened climate of 1993. To the contrary, in contemporary Australia, the exclusion of females and unpropertied persons would itself be inconsistent with such a requirement.

As *Cheatle* shows, re-assessing the categories of persons excluded or granted exemption from jury service may reveal some to be inappropriate.²⁶ The Commission will examine these issues generally in the context of a reference on jury service, details of which are available on the Commission's website.²⁷

1.16 Secondly, the line of cases cited above from *Mansell* onwards does not appear to contemplate the use of reasonable adjustments. References in those cases to the situation of blind or deaf people and their assumed lack of comprehension cannot be fairly compared with that of today, in which sophisticated assistance is available, and in which there is greater awareness of the nature and effect of disabilities, such as blindness or deafness. It is no longer appropriate to rely on sweeping assertions as to the abilities of people who are blind or deaf to perform particular functions. Rather such judgments should be based on the facts with regard to both the nature of the disabilities and the range of available accommodations.

1.17 Thirdly, these cases clearly show longstanding recognition of the fact that the presiding judge has the power and duty to prevent a person sitting on the jury who is considered incapable, for whatever reason, of performing effectively the functions of a juror. The Act stipulates categories of ineligibility. A dispute arising as to eligibility, in terms similar to those of item 12 of Schedule 2, can be determined by the trial judge taking into account all the circumstances. The Sheriff performs an intermediate function, and it is to this we shall now turn.

26. In the United Kingdom, for example, acting on recommendations contained in the Auld Report (see ch 2 note 92), most categories of ineligibility were abolished, such that lawyers and others involved in the administration of justice can now serve on juries: see *Criminal Justice Act 2003* (Eng) s 321, sch 33; see also England and Wales, Home Office, *Justice for All* (The Stationery Office, London, CM 5563, 2002) at para 7.27.

27. See «www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref115».

ROLE OF THE SHERIFF IN JURY COMPOSITION

1.18 Section 14 of the Act provides that the Sheriff is under a duty to delete from the jury roll²⁸ the names of persons whom the *Sheriff determines* are ineligible to serve as jurors (or are disqualified or exempt from doing so). In essence, the Sheriff is performing an administrative function, weeding out those persons who are excluded from jury service. In most cases they are readily and objectively identifiable. Even in the case of people who are unable to read or understand English, informal criteria are applied by the Sheriff's Office to determine eligibility.²⁹ Item 12 is the odd one out, requiring a judgment to be made based on an individual's condition.

1.19 The Sheriff's determination must be based on information provided. Section 13(1) requires the Sheriff to send a notice to each person whose name is included on the supplementary jury roll. The notice must contain a questionnaire to be completed by a respondent claiming exemption from jury service.³⁰ Section 13(2) provides:

The sheriff may require the answers given to a questionnaire or any other information provided to the sheriff, *for the purpose of determining whether or not a person is disqualified or ineligible to serve as a juror*, or is to be exempted from serving as a juror, to be verified by statutory declaration. (emphasis added)

The respondent's answers (or other information provided) are, therefore, "for the purpose of determining whether or not a person" is, amongst other things, ineligible to serve. The current practice, is that information provided by the respondent that he or she is blind or deaf is sufficient basis to ground a determination of ineligibility. This blanket exclusion precludes any opportunity for an individual determination of the ability of an individual affected to discharge the duties of a juror. No consideration is thus given,

28. Technically this is a "supplementary" jury roll, which serves as a draft roll for a jury district pending the Sheriff's determination of disqualification, ineligibility or exemption (*Jury Act 1977* (NSW) s 12(4), 14), and which includes a roll used for the periodic updating of the jury roll: *Jury Act 1977* (NSW) s 15A.

29. Potential jurors are asked such questions as whether they can read an English language newspaper and understand television, how long they have been in Australia and the nature of their occupation: NSW Office of the Sheriff, information supplied 11 February 2003.

30. Section 13(1)(c).

for example, to the role that reasonable adjustments might play, or the nature of the trial for which the juror might be seated, or the evidence to be adduced.

1.20 The Commission takes it as fundamental that fairness of the trial takes precedence over the potential rights of a prospective juror. However, prospective jurors should not be lightly excluded from an important civic duty. It is important to ask whether the administration of justice is adversely affected by denying the contribution that some in the community would be willing and able to make, and whether thereby the representativeness of the jury is compromised.

2. Can people who are deaf serve as jurors?

- Introduction
- Deaf and hard of hearing
- Reasonable adjustments
- Issues
- The US experience
- New Zealand
- Conclusion

INTRODUCTION

2.1 The terms of this inquiry refer, in part, to “persons who are profoundly deaf or have a significant hearing ... impairment”. Essentially, the question to be determined in this chapter is whether deaf individuals are able to perform the duties entailed in jury service.

2.2 As stated in the previous chapter, people who are deaf are precluded from jury service as a result of an administrative determination that they are unable to fulfil the requisite duties. The Act itself contains no blanket exclusion. A decision resulting in one sector of society being excluded from rights and responsibilities conferred on the rest should be questioned. The right of an accused person to a fair trial¹ may justify such a decision, so long as the relevant administrative determination is soundly based in policy.

2.3 It is claimed that misunderstandings regarding their assumed inability to communicate continue to influence policies and actions that impact on the deaf.² E C Carney³ refers to “the deplorable tendency on the part of the average citizen to assume that lack of speech connotes feeble-mindedness”. Associated for centuries with words like “dumb” and “mute”, it is possible that deaf people are often mistakenly regarded as unable to comprehend and convey information. Among usages of “dumb”, the Macquarie Dictionary lists “without the power of speech,” “stupid” and “dull-witted”. “Mute” is defined as “silent,” “refraining from speech or utterance... incapable of speech,” “dumb.”

2.4 The Commission and Macquarie University (through its External Collaborative Research Grants Program) jointly funded a short pilot study, conducted by a team drawn from the Departments of Linguistics and Law,⁴ to investigate whether people who are deaf can effectively access court proceedings through sign language interpreters. The study used a judge’s summing up in a criminal trial to determine the accuracy of the interpretation and the level of

1. Para 1.11; see also DP 46 at para 1.10-1.12.

2. J Branson and D Miller, *Damned for Their Difference: the Cultural Construction of Deaf People as Disabled* (Gallaudet University Press, Washington DC, 2002) at 59.

3. Quoted in M J O’Callaghan, “Some Social Penalties of Impairment: the Extended Ramifications of Conflicting Role Obligations for People Born Profoundly Deaf” (1977) 3 *Unicorn* 36 at 42.

4. Jemina Napier, David Spencer and Joe Sabolcec.

comprehension of potential deaf jurors as compared with a control group of hearing jurors. Excerpts from the judge's summing up were interpreted into Auslan by an experienced legal interpreter, and filmed. Two versions of a comprehension test were developed in English and Auslan, according to established testing methodologies, to check understanding of the facts of the case and legal concepts. Six deaf and six hearing people acting as jurors watched or listened to the summing up and completed the comprehension test in English or Auslan. The Commission has received an Interim Report of the study, relevant findings of which are noted at paragraph 2.44. The final report of the research will be published after this Report. While more research is needed to investigate the issue in more depth, the preliminary results revealed in the Interim Report do not appear to be at odds with the Commission's recommendations, which have been arrived at independently of this study.

DEAF AND HARD OF HEARING

2.5 The population of individuals with a hearing loss comprises two main groups: the Deaf community and people who are hard of hearing or hearing-impaired.⁵ Members of these groups use different modes of communication.

Deaf community

2.6 Members of the Deaf community in Australia use Auslan (Australian Sign Language)⁶ as their primary or preferred means of communication. Most were born deaf or lost their hearing in infancy before acquiring a spoken language. They do not regard themselves as disabled but as members of a cultural and linguistic minority with "a shared culture and a strong tradition of social, sporting and

5. The following discussion of terminology and communication is compiled from the following sources: D Fried, Deaf Society of NSW, information supplied 4 July 2005; A Simon, "The Use of Interpreters for the Deaf and the Legal Community's Obligation to Comply with the ADA" (1993/1994) 8 *Journal of Law and Health* 155 at 159; Northern Melbourne Institute of TAFE (NMIT) Centre of Excellence for Students who are Deaf and Hard of Hearing, "FAQ: the Survival Guide to Sign Language and Deafness" (as at 10 May 2005) «online.nmit.vic.edu.au/deaf/pdf_file/survival_guide.pdf»; Australian Association of the Deaf Inc, N Sandon, "Making Libraries Accessible for the Deaf Community" (as at 10 May 2005) «www.aad.org.au/download/library.pdf».

6. For further information see para 2.17 below.

political networks at local, state, national and international levels”.⁷ The use of a capital D in “Deaf” reflects this. Many Deaf people whose primary or preferred language is Auslan, can also lip-read, and speak and/or read English with varying levels of competence.

2.7 It is estimated that the Deaf community in Australia numbers approx 6500.⁸ It is likely that this figure will contract, due to the combined effects of cochlear implantation, genetic screening, and control of diseases such as rubella.⁹

Hard of hearing/ hearing impaired

2.8 “Hard of hearing” is the term preferred by the International Federation of Hard of Hearing People for the group traditionally referred to in Australia as “hearing impaired”.¹⁰ The term “hard of hearing” applies to a diverse group, much larger than the Deaf community, with a range of hearing impairments. It is estimated that 22% of the Australian population aged over 15 has a hearing impairment, the prevalence increasing sharply with age.¹¹ Here we are including those individuals who regard themselves as “deaf” (with a small d), that is, people with significant hearing loss but who do not identify as members of the Deaf community. They are considered culturally “hearing”, and they do not associate chiefly with other deaf people. Many of these individuals lost their hearing in adulthood, mostly with advancing age or from work-related causes. While their main mode of communication is speech and lip-reading and/or use of residual hearing, writing may also be used. Auslan would not usually be used by members of this group.

2.9 Depending on the degree and nature of the hearing loss, some hard of hearing people may benefit from using a hearing aid. For those who have a profound hearing loss, hearing aids may provide

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7. Australian Sign Language Interpreters Association (“ASLIA”), *Submission* at 1.
 8. T Johnston, “W(h)ither the Deaf Community? Population, Genetics, and the Future of Australian Sign Language” (2004) 148 *American Annals of the Deaf* 358 at 366.
 9. Johnston (2004) at 369-370.
 10. The Deafness Forum, the peak body for deafness in Australia, is a member organisation of the IFHOH: see «www.ifhoh.org/members.htm» (as at 22 August 2005).
 11. This figure, obtained in a SA study conducted in 1998, is regarded as “a marker of the Australian situation”: SA Department of Human Services, “Hearing Impairment in an Australian Population” (as at 18 May 2005) «www.dh.sa.gov.au/pehs/PROS/hearing-impair-austpop98.pdf».

some assistance but not to a degree where speech can be completely understood. While cochlear implants may assist with communication,¹² for most of these people, no hearing aid or implant will make audible the range of signals available to a person with normal hearing.¹³

2.10 Hereafter we use the expression “deaf” to include both the Deaf and those with a significant hearing loss, unless otherwise stated.

REASONABLE ADJUSTMENTS

2.11 Reasonable adjustments, as explained in DP 46,¹⁴ are changes or modifications that allow an otherwise qualified person with a disability to participate in a process or perform a task. The Office of the Sheriff, a Departmental agency, administers jury service in NSW. The Office “will take all reasonable steps” to accommodate disability, so that a person eligible for jury duty may participate.¹⁵

2.12 The following are accommodations that can be used to assist the deaf in court. Lip-reading has not been included, as research has shown that only 30 to 40 per cent of speech is visible on the lips.¹⁶

Assistive hearing device

2.13 Courts in New South Wales currently offer portable infra-red assistive hearing devices that amplify court proceedings for a person

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12. Sydney Cochlear Implant Centre, “Possible Benefits From a Cochlear Implant” (as at 18 May 2005) «www.scic.nsw.gov.au/showarticle.asp?faq=2&fldAuto=20&header=header2».
 13. W Noble, “Are you Deaf?! What it Means to Have Impaired Hearing”, *The 2000 Lecture Series* (University of New England, Armidale, 2001) at 8.
 14. Para 4.15.
 15. NSW Office of the Sheriff, “People With Disabilities and Jury Duty” (as at 18 May 2005) «www.lawlink.nsw.gov.au/ots.nsf/pages/jury16».
 16. In the context of an actual trial, a deaf juror might “supplement” the interpreter’s signing by means of lip reading the speaker. Positioning the interpreter close to the speaker allows the deaf person to flick his/her vision between the two to better aid understanding; Northern Melbourne Institute of TAFE (NMIT) Centre of Excellence for Students who are Deaf and Hard of Hearing, “FAQ: the Survival Guide to Sign Language and Deafness” (as at 10 May 2005) «online.nmit.vic.edu.au/deaf/pdf_file/survival_guide.pdf»; Victorian Deaf Society, Information Resources Fact Sheet HT4.1999 “Lipreading/Speechreading” (as at 12 July 2005) «www.vicdeaf.com.au/informationResources/document/Fact-Lipreading@.doc».

with a hearing impairment.¹⁷ Prior notification must be given to the Sheriff's Office if this service is required. People who are assisted by the use of such devices are already eligible to serve as jurors.¹⁸ The device does not, however, help people who are deaf.

Interpreting

2.14 The Community Relations Commission ("CRC") provides courts with interpreting services in a large number of languages, including Auslan. Interpreters are already provided to defendants, witnesses and others.¹⁹ Auslan interpreters are far more likely to be used by those people who lost their hearing at a very young age, than by those who become deaf later in life.

Computer-aided real time transcription (CART)

2.15 CART is an alternative to using interpreters that is used in some US jurisdictions. The standard method of court reporting is by means of machine shorthand using computer-aided transcription (CAT).²⁰ CART²¹ uses the same equipment with the addition of real time software, so that a transcript of proceedings appears almost instantaneously on a computer monitor.²² It has been in use in Australian courts for several years, generally in complex civil and

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17. There are other systems available, namely induction loop systems and radio systems, but signals from these can "leak" outside the courtroom and so do not provide as secure a communication system.
 18. NSW Office of the Sheriff, "People With Disabilities and Jury Duty" (as at 18 May 2005) «www.lawlink.nsw.gov.au/ots.nsf/pages/jury16».
 19. NSW Local Courts and the CRC have arranged to provide interpreters on a fee-exempt basis to the following categories of clients from non-English speaking backgrounds: criminal defendants, all defence witnesses, parents/guardians of young people in both criminal and care matters, all applicants for apprehended violence orders, and all Chamber Magistrate interviews (except civil matters): L Schetzer and J Henderson, *Access to Justice and Legal Needs: a Project to Identify Legal Needs, Pathways and Barriers for Disadvantaged People in NSW Stage 1 Public Consultations* (Law and Justice Foundation of NSW, Sydney, 2003) at para 3.119.
 20. Shorthand Reporters Association of Australia (SRAA), "Reporting methods" (as at 23 December 2005) «www.sraa.org/technique.php».
 21. Sometimes known as Communication Access Realtime Translation or Communication Assisted Realtime Translation.
 22. Shorthand Reporters Association of Australia (SRAA), "Court reporting" (as at 23 December 2005) «www.sraa.org/court.php»; Caption It, "CART" (as at 23 December 2005) «www.captioning.com.au/pages/03_cart.html»; ComputerReporters "Realtime transcript" (as at 23 December 2005) «www.computerreporters.com.au/realtime.htm».

criminal trials.²³ Deaf individuals relying on CART must be able to read English, and also to *speak* it clearly in order to communicate, as there is no interpreter involved. CART therefore benefits mostly those with later onset deafness. As such, CART is a method having the potential to assist the majority of deaf people. If this method were to be used during jury deliberations, a court stenographer would be required in the jury room to transcribe the words of the other jurors so they can be read by the deaf juror. Otherwise it would provide a suitable means by which a deaf juror could follow the evidence during the trial.

ISSUES

2.16 The majority of submissions supported the general proposition that reasonable adjustments should be provided, and that, consequently, deaf people thereby able to perform the duties of a juror should be allowed to do so. Reservations remain, however, about the ability of deaf people to perform those duties, or the effect on the trial of their empanelment. They focus on the following concerns:

- accuracy of sign interpretation;
- the ability to evaluate evidence;
- comprehension of instructions;
- secrecy of the jury room;
- jury deliberation; and
- effects on length and cost of trial.

Accuracy of sign interpretation

Sign language

2.17 For the purpose of this discussion, some explanation of the nature of sign languages and how they are communicated is helpful.²⁴ Some people may think, erroneously, that sign language is simply a matter of spelling words out letter by letter using the sign alphabet, but this is actually finger-spelling.

23. Queensland, Department of Justice and Attorney-General, “Technology in Supreme Court Trials” (as at 23 December 2005)

«www.justice.qld.gov.au/lawyers/publications/law_fact3.htm».

24. See also DP 46 at para 3.29.

2.18 There is no universal sign language. As with spoken languages, each community of users has tended to develop its own.²⁵ However, common features include the use of the hands, body, facial expression, space and direction. All of these have a significant effect on meaning.²⁶ Sign languages are real languages with their own syntax, grammar and semantics. They are sophisticated, capable of expressing everything an oral language can. They are neither gesture nor pantomime, and “are not overwhelmingly iconic”.²⁷

2.19 In Australia, Auslan is generally recognised as a community language.²⁸ Unlike the great majority of community languages, however, it is uniquely Australian. A variant of British Sign Language, Auslan is over 200 years old and, in some families, has been handed down for more than five generations.²⁹

2.20 The *New Zealand Sign Language Act 2006* officially recognises New Zealand Sign Language (NZSL), in addition to the nation’s other official languages, English and Maori. During parliamentary debate it was stated³⁰ that:

historically, in New Zealand and around the world, the use of sign language was actively prohibited. This was a result of longstanding misconceptions that sign languages were not real languages and were inferior to spoken languages. Today, linguistic research confirms that sign language is a real language. ...[It is] a real and living language that is part of a culture and that has as much depth and validity as anyone else’s.

2.21 Auslan and other sign languages have the capacity to convey legal concepts, as attested to by, for example, the number of deaf people who are qualified lawyers. Even where Auslan contains no corresponding sign for a particular technical term, the spoken English can be conveyed precisely through using a form of language contact between English and Auslan, using English mouthing,

25. T Johnston (ed), *Signs of Australia* (2nd ed, North Rocks Press, Sydney, 1998) at 559.

26. Johnston (1998) at 558.

27. That is, being picture-like and resembling the word represented; La Trobe University, “National Institute of Deaf Studies and Sign Language” (as at 1 June 2005) «www.Latrobe.edu.au/hcs/nids».

28. J Lo Bianco, *National Policy on Languages* (AGPS, Canberra, 1987) at 14, 76.

29. Johnston (2004) at 373

30. New Zealand, *Parliamentary Debates (Hansard)* House of Representatives, 22 June 2004 at 13775, 13780.

signing in English word order, and finger-spelling. In *People v Guzman*³¹ the Court stated:

deaf persons are as capable as anyone else of understanding legal jargon or any other technical jargon used by expert witnesses; the deaf are found in many highly technical professions including medicine, engineering, and the law.

Accreditation of interpreters

2.22 In Australia the National Accreditation Authority for Translators and Interpreters (NAATI) has developed an accreditation system for translators and/or interpreters in a large number of languages including Auslan.³² This system recognises that the diversity of situations in which interpreters work requires varying skills levels, from general conversation to specialised knowledge.

2.23 The minimum standard for professional interpreters is known as Translator or Interpreter level (formerly level 3). NAATI describes interpreters accredited at this level as “capable of interpreting across a wide range of subjects involving dialogues at specialist consultations”,³³ and lists solicitor-client consultations and court interpreting as examples.³⁴

2.24 Court interpretation is, arguably, the most difficult form of interpretation.³⁵ Whether performed for foreign language speakers or for the Deaf and hearing impaired, it is a highly specialised form of interpreting, requiring training and skills. Professional court interpreters must possess mastery of English and a second language, as well as displaying wide general knowledge at a tertiary education level.³⁶ They must also be able to interpret both consecutively and

31 (1984) 478 NYS 2d 455 at 460.

32. See generally NAATI's website (as at 18 July 2005) «www.naati.com.au/index.htm».

33. NAATI, “Accreditation” (as at 18 July 2005) «www.naati.com.au/accreditation.htm#standards».

34. An advanced professional level of accreditation for interpreters exists, known as Conference Interpreter (formerly level 4). It is not yet available in Auslan, but is expected to be offered in the next few years: information supplied by J Napier (5 July 2005).

35. W E Hewitt, *Court Interpretation: Model Guides for Policy and Practice in the State Courts* (National Centre for State Courts, Williamsburg, 1995) at 16 (online at «www.ncsconline.org/WC/Publications/Res_CtInte_ModelGuidesPub.pdf»).

36. Hewitt at 37-38; see also NAATI, “Eligibility Criteria” (as at 18 July 2005) «www.naati.com.au/eligibility_criteria.htm».

simultaneously.³⁷ Traditionally, interpretation is carried out simultaneously because sign languages are silent so there is no auditory overlap.³⁸ In the context of interpreting court proceedings for a deaf juror, it would be the only feasible method.

Accuracy

2.25 Whether sign language interpretation of court proceedings can be regarded as accurate depends on what is meant by “accuracy”. Literalness, if this is what is meant, has little application here. Metzger refers to the “unending controversy”, begun millennia ago, regarding issues such as accuracy and equivalence in translations.³⁹ Two related issues arise: the goal of interpretation and the role of the interpreter.

2.26 *Goal of interpretation.* Submissions from those groups or individuals who might be regarded as defending disability rights reacted positively to the suggestion that Auslan interpreters be provided to deaf jurors. Submissions from representatives of the legal profession made little mention of interpreters or interpreting. This may have been due to a lack of knowledge or expertise in this area. The Law Society of NSW stated:⁴⁰

While an Auslan interpreter could certainly properly convey the meaning of testimony or jury deliberations to a deaf juror, the ability for testimony to be conveyed “word for word” in signed English and understood would, in the view of the [Law Society’s Criminal Law] Committee, be essential.

2.27 A layperson might believe intuitively that a literal or word for word interpretation is the most accurate. This assumption is, however, unfounded.⁴¹ Languages do not operate according to uniform rules of grammar, syntax and style. Word order is flexible in some languages, while in others it denotes meaning. Thus words are

37. Consecutive interpreting is the interpretation of the speaker or signer’s language into the receiver’s language intermittently, as the speaker pauses after completing a statement. Simultaneous interpretation is interpreting continuously, while the person speaks or signs.

38. M Metzger, *Sign Language Interpreting: Deconstructing the Myth of Neutrality* (Gallaudet University Press, Washington DC, 1999) at 20.

39. Metzger at 2, 4.

40. Law Society of NSW, *Submission* at 5.

41. See further Australian Law Reform Commission, *Evidence* (ALRC 26 Interim Report, 1985) at para 284 and following: “The reluctance [to allow a witness the use of an interpreter] also stems, however, from a lack of appreciation of the process of interpretation. It is assumed that the interpreter should give only a literal translation; this is all that is said to be involved.”

not automatically interchangeable. Vocabularies vary greatly in size between languages.⁴² A single word in one language may be translatable only by a phrase in another, for example “Schadenfreude”.⁴³ Idiomatic expressions (“she hit the roof”, “he went nuts”) make readily apparent the nonsense that can result from slavish adherence to word for word interpretation. Interpreters do not simply translate words but rather concepts from one cultural context into another.⁴⁴ This is as true of sign languages as it is of spoken languages.

2.28 According to the Director of the US Federal Court Interpreter Certification Project and her colleagues, the goal of professional court interpreters is to maintain “legal equivalence”.⁴⁵ In order to do this the interpreter must:

interpret the original source material without editing, summarising, deleting, or adding while conserving the language level, style, tone, and intent of the speaker or to render what may be termed the legal equivalence of the source message.

2.29 The National Centre for State Courts in the US has developed a model code for professional court interpreters.⁴⁶ The code has been adopted by a number of States.⁴⁷ It articulates a core set of principles,⁴⁸ the first of which is:

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42. Eg, “the compendious Oxford English Dictionary lists about 500,000 [English] words; and a further half million technical and scientific terms remain uncatalogued. According to traditional estimates, neighbouring German has a vocabulary of about 185,000 words and French fewer than 100,000...”: R McCrum, W Cran and R MacNeil, *The Story of English* (Faber, London, 1987) at 19. In DP 46 we noted that Signed English was not a feasible alternative to Auslan for use in court, for a number of reasons including its small vocabulary (about 2500 words): at para 3.33.
43. Defined by the Oxford English Dictionary as “malicious enjoyment of the misfortunes of others”.
44. K Laster and V Taylor, *Interpreters and the Legal System* (Federation Press, Sydney, 1994) at 115.
45. R D Gonzalez, V C Vasquez and H Mikkelson, *Fundamentals of Court Interpretation: Theory, Policy and Practice* (Carolina Academic Press, Durham, North Carolina, 1991) at 16.
46. Model Code of Professional Responsibility for Interpreters in the Judiciary: see Hewitt at 197.
47. Eg Alaska («www.state.ak.us/courts/intcode.pdf»), Arkansas («courts.state.ar.us/pdf/0223ci_code.pdf»); Colorado («www.courts.state.co.us/chs/hr/interpreters/interpret_code.pdf»); Iowa («www.judicial.state.ia.us/district/court_interpreters/Code_of_Conduct/»); Nebraska («court.nol.org/rules/Interpreter.10.pdf»); Oregon («www.ojd.state.or.us/osca/cpsd/interpreter/documents/ethicscode.pdf»);

Accuracy and completeness

Interpreters shall render a complete and accurate interpretation or sight translation, without altering, omitting, or adding anything to what is stated or written, and without explanation.

The accompanying commentary states in part:

... interpreters are obligated to apply their best skills and judgment to preserve faithfully the meaning of what is said in court, including the style or register of speech. Verbatim, “word for word”, or literal oral interpretations are not appropriate when they distort the meaning of the source language, but every spoken statement, even if it appears non-responsive, obscene, rambling, or incoherent should be interpreted.

2.30 Minnesota’s Best Practices Manual on Interpreters⁴⁹ contrasts “literal interpretation” with “proper interpretation”. The latter is defined as follows:

To interpret/translate properly means to convey the real meaning of the source [ie original] language communication, preserving all aspects of meaning, with the natural grammar of the target language. To interpret/translate properly, one has no concern for literal meanings or following the word order (or even the number of words) of the source language. The goal is to enable the recipient of the interpretation/translation to hear (or see, in the case of deaf or hard-of-hearing recipients) the source message as if it had been communicated in the recipient’s language in the first place.

2.31 In Australia a similar view has been expressed regarding the goal of interpretation. The Code of Ethics of the Australian Sign Language Interpreters Association (“ASLIA”),⁵⁰ states with respect to accuracy:

interpreters shall render the message faithfully, always conveying the content of the message and the spirit of the speaker, using language most readily understood by the person(s) whom they serve.

Utah («www.utcourts.gov/resources/rules/ucja/append/h_intprt/apph.htm»);
 Virginia («www.courts.state.va.us/interpreters/code.html»);
 Wisconsin («www.wicourts.gov/services/interpreter/ethics.htm»).

48. Hewitt at 200.

49. Minnesota Supreme Court, “Best Practices Manual on Interpreters in the Minnesota State Court System” (as at 17 August 2005) «[www.courts.state.mn.us/documents/courtInterpreters/forJudgesAttnysCourtStaff/BPM_Complete\(chp_6_amended_2-13-03\).pdf](http://www.courts.state.mn.us/documents/courtInterpreters/forJudgesAttnysCourtStaff/BPM_Complete(chp_6_amended_2-13-03).pdf)».

50. Australian Sign Language Interpreters Association, “Code of Ethics” (as at 29 March 2004) «www.aslia.com.au/national/ethics.htm»

Another commentator⁵¹ urges lawyers to insist on “meaningful, accurate interpretations rather than mechanical, literal ones. They should ascertain what is meant rather than exactly what was said word for word.”

2.32 Accuracy of interpretation cannot be measured objectively. Interpretation is not simply a mechanical process that converts a source language word into its precise target language equivalent. However, the goal of interpretation is to provide a target version that is complete, accurate and unedited. A skilful interpreter will transcend the limitations of literalness to produce an interpretation faithful to the original in meaning and intent. In recent times the interpreter has been characterised as a bilingual and bicultural specialist, who regards situational and cultural factors as relevant to the task of interpreting.⁵²

2.33 *Role of the interpreter.* In the early phase of professionalisation, the interpreter was seen as a conduit, through whom the interpretation flowed as if through a device. The analogy suggests an objective, neutral, impersonal process. The “conduit model” was accepted by the High Court in *Gaio v The Queen*,⁵³ for the purposes of rejecting the argument that a confession made through an interpreter was inadmissible as hearsay.⁵⁴

2.34 However, as a complete explanation of what the interpreter does, the conduit model is at best simplistic. It gives little hint of the “complex human interaction”⁵⁵ involved, or the choices necessary to turn utterances from one language into another. As Berk-Seligson writes:⁵⁶

51. S Karas, “The Interpreter’s View: Training, Accreditation and Registration,” paper presented at the conference *Interpreting and the Law* (Sydney, 28 July 1988) at 59.

52. Metzger at 22.

53. (1960) 104 CLR 419.

54. The then newly retired Chief Justice of the High Court, Sir Harry Gibbs expressed the opinion that the Court “was endeavouring to martial (sic) intellectual arguments to counter the argument that the evidence of the interpreter should be excluded altogether”: see P M Martin (ed), *Interpreting and the Law* (conference held in Sydney, 28 July 1988) at 54.

55. K Laster and V Taylor, “The Compromised ‘Conduit’: Conflicting Perceptions of Legal Interpreters” (1995) 6(4) *Criminology Australia* 9 at 10.

56. S Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process* (University of Chicago Press, Chicago, 1990) at 96.

[the court interpreter] is an intrusive element, far from being the unobtrusive figure whom judges and attorneys would like her to be. Her intrusiveness is manifested in multiple ways: from the introduction of the interpreter to the jury by the judge, to the common practice resorted to by judges and attorneys of addressing the interpreter rather than the witness when they ask their questions, to the need on the part of interpreters to clarify attorneys' questions and witnesses' answers. Included as well are the tangential side-sequence conversations engaged in by interpreters and testifying witnesses, interpreter silencing of witnesses who have begun to verbalise their answers, and interpreter prodding of witnesses when they are not responding appropriately to a question. Together, these intrusions make for judicial proceedings of a different nature.

2.35 Thus, an interpreter for a Deaf or non-English-speaking witness (or defendant) conveys information to the Court. Judge, jurors, parties, counsel and others are all reliant on the interpreter for the testimony. It is not the witness's or party's direct words but rather their interpretation that is conveyed to the courtroom audience. The Court has little alternative but to accept it as a faithful rendition. To this extent the interpreter participates significantly in the trial process. In *Gaio*, for example, a murder conviction rested almost entirely on the interpreter's testimony as to the defendant's confession. Contrast this with the interpretation made for the benefit of a deaf juror. It does not become part of the record of proceedings and is relied on only by that juror.⁵⁷ In contrast with the scenario Berk-Seligson describes above concerning an interpreter who is assisting a witness, in the courtroom an Auslan interpreter for a deaf juror *is* a quiet and unobtrusive figure. But there is no reason why the interpreter should be seen in this way. Like a court reporter, an interpreter may ask that the evidence be given slower or that something be repeated. In the jury room the interpreter might need to ask jurors to speak one at a time or slower. In either case this is likely to benefit the proceedings or the deliberation process.⁵⁸

2.36 *Confidence in the interpretation.* One argument opposing the use of deaf jurors is "it will be impossible for any one not themselves very competent in sign language to know whether there has been an accurate translation of evidence given."⁵⁹ If this is an issue it is not

57. S Mather and R Mather, "Court Interpreting for Signing Jurors: Just Transmitting or Interpreting?" in C Lucas (ed), *Language and the Law in Deaf Communities* (Gallaudet University Press, Washington DC, 2003) at 69.

58. See para 2.73.

59. R S Hulme, *Submission* at 2.

unique to sign language interpretation. Prior to acting as an interpreter (in any language) in a proceeding, the *Evidence Act 1995* (NSW) requires a person to take an oath or make an affirmation that he or she “will well and truly interpret the evidence”.⁶⁰ Professional responsibilities are also outlined in detail in the code of ethics of the Australian Institute of Interpreters and Translators (“AUSIT”).⁶¹ In addition the ASLIA Code of Ethics⁶² for professional sign interpreters includes the principle of impartiality, which it defines as not counselling, advising or interjecting personal opinions. Guidelines published and designed to be read in conjunction with the Code state “interpreters shall not omit or add information during an interpreting assignment even when asked to do so by any party.”⁶³ The principle of accuracy,⁶⁴ receives elaboration in the Guidelines, including the statement “interpreters shall accept responsibility for the accurate transfer of message meaning between parties involved in an interpreting assignment.”⁶⁵

2.37 There are a number of other factors to bolster confidence in the use and effectiveness of sign language interpretation. A juror who uses Auslan must also be proficient in reading and understanding English.⁶⁶ The role of an interpreter in these circumstances is to enable a deaf person to “hear” the proceedings. The interpreter does not translate them from a language foreign to the juror. If it were necessary to interpret a particular English word that has no precise Auslan equivalent, the word can be spelt out in English by means of finger-spelling or written down. For example, a single sign denotes judicial officer, judge, magistrate, president or chairman.⁶⁷ If it were necessary to specify which was intended, this can be spelt out, literally. Similarly, if a case were to turn on whether someone had said certain words, finger-spelling and/or English mouthing and

60. *Evidence Act 1995* (NSW) s 22, Sch 1. See also *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414 at 418.

61. AUSIT Code of Ethics (as at 31 August 2005) «www.ausit.org/eng/showpage.php?id=650».

62. See para 2.31.

63. Principle 4, Guideline 4(b)(iii).

64. See para 2.31.

65. Guideline 5(a)(i).

66. *Jury Act 1977* (NSW) s 6, Sch 2.

67. Laster and Taylor (1994) at 117.

signing in English word order could be used to give a more literal representation of the English words spoken at trial.⁶⁸

2.38 A deaf juror is one of twelve. Like any other juror, and as a normal part of the deliberation process, he or she can, through the services of the interpreter, discuss, argue or seek to clarify with fellow jurors any point not understood. There may also be the possibility of checking the transcript, which is in English and should therefore be comprehensible by all jurors.

Evaluating evidence

2.39 We do not propose dealing at length with credibility and demeanour issues here as they are discussed in DP 46⁶⁹ and in the following chapter of this Report.⁷⁰ It is sufficient to note, at this point, that deaf jurors would generally have no difficulty in relation to those aspects of demeanour that involve the visual presentation of the witness.

2.40 Otherwise, it may be accepted that demeanour has a bearing on the meaning of what is being communicated and, by extension, the way in which we relate to each other and make judgments. At the same time it should not be assumed that everyone relies on the same cues in order to do this. In the case of the deaf juror the precise meaning will be relayed by the interpreter, and in any event, uncertainty can be pursued in cross-examination or re-examination. So far as hesitations or verbal mannerisms can sometimes be suggestive of anxiety or dissembling, these too can be conveyed by interpretation and where appropriate explained in cross-examination.

Juror comprehension

2.41 Juror comprehension, or imperfect comprehension, of judges' instructions is documented in numerous studies conducted during the past 30 years.⁷¹ Darbyshire⁷² comments "if there is one point upon

68. R Lee, "Equal Protection and a Deaf Person's Right to Serve as a Juror" (1989/1990) 17 *New York University Review of Law and Social Change* 81 at 100.

69. Para 3.2-3.22

70. Para 3.9.

71. Eg V P Hans and N Vidmar, *Judging the Jury* (Plenum, NY, 1986) at 121; P M Tiersma, "Reforming the Language of Jury Instructions" (1993) 22 *Hofstra Law Review* 37 at 41-42, 52; W W Steele and E G Thornburg, "Jury Instructions: a Persistent Failure to Communicate" (1988) 67 *North Carolina Law Review* 77 at 78.

which nearly every commentator agrees it is that juries have a great deal of difficulty understanding and applying judicial instructions.”

2.42 The New Zealand Law Commission, in its research into criminal juries found⁷³ that:

despite the fact that jurors generally found the judge’s instructions on the law clear and helpful, and conscientiously attempted to apply them, there were widespread misunderstandings about aspects of the law which persisted through to, and significantly influenced, jury deliberations. Indeed, there were only 13 of the 48 trials [studied by the Commission] in which fairly fundamental misunderstandings of the law at the deliberation stage did not emerge.

2.43 An expectation that a deaf juror will have a near faultless understanding of the instructions, when all indications are that the average juror does not, carries the risk of demanding more from a deaf juror than from his/her hearing counterparts.

2.44 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 the deaf and hearing ‘jurors’ equally misunderstood some terms and concepts.

2.45 Despite awareness of hearing jurors’ likely lack of comprehension of judicial instructions, most commentators do not call for the abolition of the jury, but cite other factors as correctives, such as the provision of written instructions, encouraging jury questions to

72. P Darbyshire, A Maughan and A Stewart, “What can the English Legal System Learn from Jury Research Published up to 2001?” (research paper commissioned for the Criminal Courts Review, “the Auld Report”) «www.kingston.ac.uk/~ku00596/elsres01.pdf» at 25.

73. New Zealand, Law Commission, *Juries in Criminal Trials Part 2: a Summary of the Research Findings* (PP37 1999) vol 2 at para 7.12. Steele and Thornburg (at 92) carried out an exercise to gauge the accuracy of comprehension on the part of (hearing) jurors. They were requested to paraphrase accurately each instruction after it has been read out just once. The results obtained were “proof once again that comprehension by jurors of the instructions given them is dysfunctionally low.”

iron out individual misunderstandings, and respect for an application of common sense to allow the ultimate decision to “end up at the same place as the law intended it to be”.⁷⁴ The New Zealand Law Commission also reached this conclusion:⁷⁵

Since misunderstandings about the law were fairly widespread, they did affect the way in which individual jurors, and sometimes the jury as a whole, approached the decision-making task; they undoubtedly prolonged deliberations and they sometimes led individual jurors to agree to a verdict on an erroneous basis. However, by and large, errors were addressed by the collective deliberations of the jury and did not influence the verdict of the majority of cases. Our assessment is that legal errors resulted in either hung juries or questionable verdicts in only four of the 48 trials, and in two of these, the questionable verdicts were acquittals in respect of only a proportion of a large number of counts.

2.46 Possibly the most effective measure to remedy any difficulty caused by lack of comprehension on the part of both hearing and non-hearing jurors is to issue them with written instructions. This is widely accepted as standard practice in NSW courts.⁷⁶ The New Zealand Law Commission concluded that there is “a strong case for arguing that written summaries of the law ought to be provided as a matter of course”.⁷⁷ Darbyshire recommends⁷⁸ that, in addition to written and verbal instructions on the law after the trial, where possible juries be given a pre-trial summary of the issues and pre-trial instructions.

74. Hans and Vidmar at 121.

75. New Zealand, Law Commission at para 7.25.

76. Section 55B of the *Jury Act 1977* (NSW) provides that any direction of law to a jury by a judge or coroner may be given in writing if he/she considers it appropriate to do so. The NSW Criminal Trial Courts Bench Book states at [7-010] “It is now accepted practice for the trial judge to give to the jury a document which sets out the relevant directions of law: *R v Savvas* (1989) 45 A Crim R 38 at 38. The principle benefit from doing so is that there can then be no doubt in the minds of the jury as to what those directions are.” To serve as a juror, a person must be able to read and understand English: *Jury Act 1977* (NSW) sch 2.

77. New Zealand, Law Commission at para 7.60.

78. Darbyshire et al at 61 (Rec 21).

The secrecy of the jury room

2.47 Juries deliberate in secret. This is a principle of common law⁷⁹ supported by statute.⁸⁰ It is designed to preserve the integrity of the deliberative process, shielding jury members from the influence of non-jurors, and creating an environment conducive to frank and uninhibited discussion. It also promotes the finality of the fact-finder's verdict.⁸¹ Following a trial's conclusion, the court will almost never hear evidence of what took place within the jury room.

2.48 In DP 46 we discussed English and US decisions regarding the presence of strangers in the jury room.⁸² The general rule, enunciated in *Goby v Wetherill*,⁸³ and followed in *R v McNeil*,⁸⁴ is:

that the jury are entitled, and bound, to deliberate in private. If a stranger, whether an officer of the Court or not, is present for a substantial time during their deliberations, then the verdict is vitiated.

In *Re Osman*⁸⁵ the summons of a prospective juror who would have required the services of an interpreter was discharged, as the general rule was held to apply to exclude interpreters from the jury room.

2.49 In *R v A Juror (Jeffrey McWhinney)*⁸⁶ Mr McWhinney, who is Deaf and was at the time the Chief Executive of The British Deaf Association, appealed against a decision, based on *Osman*, to discharge his summons for jury service. Like Mr Osman, he would

79. *Vaise v Delaval* (1785) 99 ER 944; *Ellis v Deheer* [1922] 2KB 113 at 121; *R v Minarowska* (1995) 83 A Crim R 78 at 86-87; *R v Laws* (2000) 50 NSWLR 96 at 102.

80. *Jury Act 1977* (NSW) s 68A, 68B.

81. An earlier report of the Commission contains a summary of arguments advanced by McHugh JA (as he then was) both for and against jury secrecy: see NSW Law Reform Commission, *Criminal Procedure: the Jury in a Criminal Trial* (Report 48, 1986) at para 11.17-11.23.

82. Para 3.23-3.28.

83. [1915] 2 KB 674 at 675. Compare *R v Lamb* (1974) 59 Cr App R 196, in which the jury communicated to the court clerk via the jury bailiff that it was unable to reach a unanimous verdict. The clerk obtained the judge's authority to enter the jury room and instruct the jury that they had to continue to try and reach a unanimous verdict. The appeal court found that the clerk delivered this direction in the secrecy of the jury room, when it was for the judge to do this in open court. This was a material irregularity. However, no miscarriage of justice resulted and this ground of appeal failed.

84. [1967] Crim L R 540.

85. [1995] 1 WLR 1327.

86. Woolwich Crown Court, U19990078, Anwyl J, 9 November 1999, unreported.

have required the assistance of an interpreter or stenographer. The appeal was dismissed.

2.50 The appellant had submitted⁸⁷ that the approach taken by the court in *Osman* to the presence of an interpreter in the jury room was wrong, and that *Osman* should have been distinguished from the earlier cases of *Goby v Wetherill* and *McNeil*. In the latter two cases, court officers mistakenly retired with the jurors. Counsel for Mr McWhinney submitted that these cases should have been distinguished in *Osman* because they involved unauthorised persons, and persons whose presence may well have inhibited jury deliberation, whereas a sign language interpreter would be authorised by the court to retire and would have facilitated the discussion.⁸⁸

2.51 Justice Anwyl rejected this submission, stating she was bound by the earlier decisions that had not limited themselves to the presence of unauthorised strangers.⁸⁹ She also made the following findings:

I am satisfied that on a practical basis, sensible positioning of the interpreter can minimise the distraction caused by any signing and I do not see that there are practical hurdles to there being a sign interpreter assisting a juror in court. There is nothing in the law to prevent a deaf juror from being assisted in court by a [stenographer] or a Sign Interpreter. ...

I ... do not find that there would be any difficulty about Mr McWhinney being able to follow, and be allowed to follow, what was going on in the courtroom. ... It is quite plain from the experience of the American Courts, where deaf people have been allowed to sit on juries and be aided by a thirteenth person in the jury room, that far from being a hindrance it has been felt in many cases to be of assistance.

2.52 As noted in DP 46,⁹⁰ Lord Justice Auld, in his English criminal courts review,⁹¹ stated in respect of interpreters:

87. Woolwich Crown Court, U19990078, Anwyl J, 9 November 1999, unreported (transcript).

88. "The rule which excludes persons other than jurors from the jury room during deliberations in reality pertains to officers of the court such as bailiffs, Judges, or counsel. The presence of the signer is a different matter entirely": *People v Guzman* 478 N Y S 2d 455 (1984) at 466.

89. For a critique of this judgment see A Majid, "Jury Still Out on Deaf Jurors" (2004) 154 *New Law Journal* 278. See also DP 46 para 3.24 n 53.

90. Para 3.24.

There is understandable caution about the prospect of such a 13th person in the jury room. But accredited interpreters work to agreed professional standards that should preclude any attempt to intrude on or breach the confidence of juries' deliberations.

2.53 The Disability Committee of the Bar Council of England and Wales, in its submission to the Auld Review,⁹² made the following observations:

The thirteenth person in the jury room on the authorities is never permitted and it is this question that requires fresh thinking through to take account of the way that society is evolving towards including the disabled person.

So far this has proved a fatal objection to an interpreter or any other person assisting the disabled person going with the disabled person into the jury room. The cardinal principle is that a jury must be allowed to deliberate in private. It is unlikely that this approach could be altered judicially and it would require legislation.

In our submission the anxieties about an interpreter are met if the interpreter takes an oath when first taking office in the jury box

(i) To act as an interpreter as per the standard oath

(ii) Not to communicate with any other member of the jury except to communicate the deaf juror's words to them, and their words to the deaf juror

(iii) Not to discuss the case with the deaf juror

(iv) Not to communicate with any other person about what was said by any member of the jury unless ordered to do so by the judge, or unless the deaf person is foreman and he is asked to deliver the jury's verdict to the Court.

2.54 The risk of disclosure by an interpreter can be dealt with by administering an oath requiring secrecy in relation to all that takes place in the jury room or by a statutory restriction.⁹³ There is no

91. R E Auld, *Review of the Criminal Courts of England and Wales: Report* (The Chancellor's Department, London, 2001) at 153.

92. Bar Council of England and Wales, "Disability Committee Submissions to Auld Review" (as at 6 December 2005) «www.barcouncil.org.uk/document.asp?documentid=611&languageid=1&highlight=deaf%20juror».

93. For the US position see *US v Dempsey* 830 F 2d 1084 (1987); *De Long v Brumbaugh* 703 F Supp 399 (1989) at 405; *Saunders v Texas* 49 S W 3d 536 (2001); *Wisconsin v McCann* 384 NW 2d 368 (1986); Office of the Attorney General, "Opinion No DM-392 Re: Whether an interpreter for a deaf juror

reason to suppose that interpreters would not respect this obligation to any less degree than jurors who are subject to a similar non-disclosure obligation arising under the *Jury Act 1977* (NSW).⁹⁴

2.55 If a deaf juror were permitted to use real time transcription during deliberations, court stenographers would require access to the jury room in a manner similar to that of interpreters, that is, by swearing an oath. At present while not subject to express confidentiality provisions or oaths court reporters are present when evidence of a sensitive nature is given, for example in closed court. There is similarly no reason why they should not be trusted to comply with a non-disclosure obligation arising following the taking of an oath or arising under a similar statutory obligation to that binding jurors.

Jury deliberations

2.56 Two concerns arise in the present context. The first is that the presence of an interpreter in the jury room will influence jury deliberations directly or indirectly. Interpreters would be required to swear an oath and take care not to participate. Problems have not been reported in those jurisdictions where this is already the practice.⁹⁵

2.57 The other problem that may arise in the jury room if one juror is unable to hear, is several jurors speaking at once making interpretation of all dialogue impossible. This, however, would cause difficulties for any juror and can be mitigated by their agreeing to speak one at a time. The trial judge could make a suggestion to this effect prior to the jury's retirement. So long as the threshold issue regarding the presence of non-jurors in the jury room can be resolved, the Commission does not consider that the deliberation process in itself need pose any obstacle to the inclusion of deaf jurors.

Length and cost of trial

2.58 If reasonable adjustments were factored into the existing trial system so that people who are blind or deaf could serve on juries, the concern would naturally arise that this might add to the cost and

may accompany the juror into the jury room during deliberations" (as at 11 January 2005) «www.oag.state.tx.us/opinions/op48morales/dm-392.htm»)

94. Section 68B.

95. Para 2.73.

duration of a trial. A delay in proceedings could also add to any financial outlay.

2.59 Submissions from the Law Society of NSW⁹⁶ and Justice Hulme⁹⁷ express concern at the potential expense of making available a range of adjustments to accommodate blind or deaf jurors. It would be a costly exercise “to provide a wide range of supports that may be utilised only rarely” as well as their ongoing maintenance.⁹⁸

2.60 In the case of deaf jurors, as noted above,⁹⁹ the supports in question are Auslan interpreters and CART. Use of the former entails the hire of two interpreters per day, both of whom would be present throughout proceedings. Due to the physical demands of the role, they would take it in turns to interpret for about 40 minutes at a time. No technology is required, and the interpreters are paid only for the days booked. For this reason, and also because of the practical difficulty that might arise in securing two sufficiently qualified Auslan interpreters for the duration of proceedings, it would be likely that Deaf people would only be empanelled as jurors in short trials.

2.61 CART, as mentioned above, is already used in NSW courts, generally in the case of complex trials involving lengthy transcripts and numerous documents.¹⁰⁰ Benefits of using real time technology generally in place of traditional reporting methods¹⁰¹ include:

96. Law Society of NSW, *Submission* at 4.

97. R S Hulme, *Submission* at 1, 3.

98. Law Society of NSW, *Submission* at 4.

99. Para 2.14 – 2.15.

100. In *R v Schlittler* (NSW, Gosford District Court, No 0479/03, Williams J, 7 May 2004, unreported) CART was used successfully to assist a deaf defendant. In Australia the first real time transcript was taken in Melbourne in 1990, in proceedings between the National Australia Bank and Bond Brewing Holdings Limited: V Harris, “Overview of Computerised Transcript”, paper presented at the conference *Technology for Justice* (Melbourne 23-25 March 1998) «www.aija.org.au/conference98/papers/vharris/VHARRIS.htm». Recent major cases have been held in technologically enhanced courtrooms using CART facilities eg Australian Securities and Investments Commission’s civil proceedings against former directors of One.Tel Ltd, the Seven Network’s action in the Federal Court against some of the country’s biggest companies, the Snowtown murder trial in South Australia in 2003: G Dyer, “Lachlan Murdoch’s Selective Memory” *Crikey* (23 November 2005) at «www.crikey.com.au/articles/2005/11/23-1513-8611.htm»; E Sexton, “Stokes Finds Himself in the Crosshairs” *Sydney Morning Herald* (29 October 2005) at 39, 42; S Moran, “E-Court Goes on Trial in Seven Case” *Australian Financial Review* (7 September 2005) at 7; SolutionCity Adelaide, EDS (as at 10 January 2006)

- allowing anyone with hearing difficulties to understand proceedings, whether judge, counsel, a party or a juror;
- providing speedy access to the transcript;
- enabling efficient viewing, on monitors, of other documents in electronic form (eg evidence);
- allowing indexing and easier location of particular documents or passages of transcript; and
- eliminating the need for note-taking.

2.62 As investment in the technology has already taken place, minimal ongoing expense is incurred in using CART to assist a deaf juror. In addition, real time transcription actually uses fewer reporting staff than the traditional method. The cost of hiring Auslan interpreters for a deaf juror is similarly insignificant. People with Disability (“PWD”), a peak disability and advocacy organisation, estimates¹⁰² that accommodations for deaf or blind jurors are unlikely to be required more than two or three times a year. The Commission agrees with PWD’s assessment that “the costs of these adjustments as a proportion of the total cost of court administration is marginal and therefore no cause for concern.”

2.63 The costs argument must, in any case, be seen in the context of public policy. The Commission agrees with the view advanced by the Law Society of NSW,¹⁰³ which is:

of the firm view that blind or deaf people ought not be excluded from sitting on juries for budgetary reasons alone. The only consideration ought to be whether blind or deaf individuals, given the proper services and facilities, are able to properly discharge the important duties with which they are entrusted as jurors in a trial in terms of assessing evidence, whether it be oral, visual, documentary or in some other form.

«www.solutioncity.com.au/SolutionCity/Members/Foundation/EDS.htm».

The Royal Commission inquiring into the failure of the HIH Insurance Group used real time technology to record proceedings: Australia, The HIH Royal Commission, *Final Report* (National Capital Printing, Canberra, 2003) vol 1 at 28.

101. V Harris, “Overview of Computerised Transcript”, paper presented at the conference *Technology for Justice* (Melbourne 23-25 March 1998)

«www.aija.org.au/conference98/papers/vharris/VHARRIS.html».

102. People with Disability Australia Inc, *Submission* at 3-4.

103. Law Society of NSW, *Submission* at 4.

THE US EXPERIENCE

2.64 While the fundamental tasks of juries in both countries are the same, differences exist between Australian and US jury systems, for example in the procedures laid down for juror selection, and rules pertaining to the disclosure of information relating to deliberations.¹⁰⁴

2.65 The general legislative context is also different in the US, because courts must allow people with disabilities to serve as jurors if they meet other eligibility requirements. The *Americans with Disabilities Act* (“ADA”) of 1990¹⁰⁵ provides that:

No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

2.66 Courts are public entities within the meaning of the ADA.¹⁰⁶ As automatic exclusion from jury duty of a person with a disability has been held to be a violation of the ADA,¹⁰⁷ “services, programs, or activities” must be taken to include the jury selection process. There cannot be a blanket exemption from jury duty of people who are deaf or blind, and US States no longer statutorily exclude them.¹⁰⁸ Some States have published reports and guidelines on how to implement the ADA provisions within the court system.¹⁰⁹

104. *Jury Act 1977* (NSW) s 68B.

105. 42 United States Code §12132.

106. *Galloway v Superior Court of the District of Columbia* 816 F Supp 12 (1993) at 19.

107. *People v Caldwell* 603 NYS 2d 713 (1993) at 714.

108. K Bleyer, K S McCarty and E Wood, “Access to Jury Service for Persons with Disabilities” (1995) 19 *Mental and Physical Disability Law Reporter* 249 at 250.

109. For example, a paper published in 2002, outlining the experience in New Jersey, expressed the view that judge and staff training was critical, with the topic for that year’s workshops being service by jurors with disabilities: E J Comer, “Implementation of the Americans with Disabilities Act in the New Jersey Judicial System” (2002) National Centre for State Courts «www.ncsconline.org/WC/Publications/CS_AmeDisActNJPub.pdf». That State also developed guidelines specific to trials involving deaf jurors, in which it addresses such practical matters as positioning of the juror and interpreters within the courtroom: New Jersey, Administrative Office of the Courts, “Guidelines for Trials Involving Deaf Jurors Who Serve With the Assistance of Sign Language Interpreters” (rev 2004) «www.judiciary.state.nj.us/interpreters/wrkgdeafjur.pdf». See also North Carolina, “Guidelines for Accommodating Persons who are Deaf or Hard of Hearing in the Courts” (2004)

2.67 With regard to case law, the response of the courts has evolved over time. Judges have had wide discretion to determine the competency of jurors. However, while in earlier cases courts were quite willing to exclude jurors for disability, more recently they have tended to consider cases on an individual basis and with a view to the need for accommodations.¹¹⁰ Peremptory challenges, discussed in DP 46,¹¹¹ can still be used by counsel to exclude deaf jurors.¹¹²

General

2.68 The American courts that we consulted appear to regard the inclusion of deaf people on juries as an infrequent but unremarkable occurrence.¹¹³ Generally, both interpreters and CART are offered as

«www.nccourts.org/Citizens/CPrograms/Foreign/Documents/guidelinedeaf_hardhearing2004.pdf»; “Improving Interpretation in Wisconsin’s Courts” (2000) «www.courts.state.wi.us/about/pubs/supreme/docs/interpreterreport.pdf»; “Best Practices Manual on Interpreters in the Minnesota State Court System” (1999) «[www.courts.state.mn.us/documents/courtInterpreters/forJudgesAttnysCourtStaff/BPM_Complete\(chp_6_amended_2-13-03\).pdf](http://www.courts.state.mn.us/documents/courtInterpreters/forJudgesAttnysCourtStaff/BPM_Complete(chp_6_amended_2-13-03).pdf)»; Arizona Supreme Court, Committee on More Effective Use of Juries “Jurors: the Power of 12” (1994) «www.supreme.state.az.us/jury/Jury/jury.htm»; Supreme Court of Texas, Jury Task Force “Final Report September 8, 1997” «www.courts.state.tx.us/commtask/juryf2.PDF».

110. K Bleyer, K S McCarty and E Wood, *Into the Jury Box: a Disability Accommodation Guide for State Courts* (ABA, Washington DC, 1994) at 11.

111. At para 3.40-3.55.

112. On this subject the Texas Jury Task Force observed “efforts by Texas legislatures, counties, and courts to accommodate and include persons with disabilities will be wasted if attorneys are allowed free reign to eliminate them at the last moment”. If there were no ban on peremptory strikes based on disability “the vital policies protected by the ADA will be illusory in the context of jury service”: Supreme Court of Texas, Jury Task Force “Final Report September 8, 1997” at 49-50 «www.courts.state.tx.us/commtask/juryf2.PDF».

113. Wisconsin empanels approximately 4 or 5 deaf jurors each year. District of Columbia calls up 3 or 4 disabled (mostly deaf or hard of hearing) prospective jurors per month; until June 1 2005 a total of 4 deaf jurors had completed service on felony trials. The Superior Court of California, County of Sacramento, while not keeping records of the actual numbers of deaf jurors serving, reports receiving approximately 50 requests annually for special assistance including sign language interpreters and CART. Information supplied by S Gervasi, Supreme Court of Wisconsin (23 March 2005), S Bailey-Jones, District of Columbia Superior Court (30 March and 16 June 2005), and P Meraz, Sacramento Jury Commissioner (18 May 2005).

accommodations.¹¹⁴ Apart from a chronic shortage of suitably qualified interpreters, no problems were reported.¹¹⁵ Court policies have developed to deal with disabled jurors, and the guidelines focus on individual assessment rather than blanket exclusion.¹¹⁶

Courtroom adaptations

2.69 Judge John Payne¹¹⁷ of the Massachusetts District Court was defence counsel in a medical malpractice case in which a deaf juror was empanelled, and accommodated by means of both interpreters and CART. This juror was seated in the front of the jury box farthest from the witness stand. Notwithstanding the diligence of that juror, Judge Payne has misgivings about her inclusion:

In my experience one of the most important parts of any trial is the interaction of the witnesses and the jurors. What do the jurors see? How do they react to the appearance, manner and visual presentation of the witness? The deaf juror could not hear

114. Bailey-Jones (30 March 2005); M Garrahan, New Jersey Courts (30 April 2005); Meraz (18 May 2005); Gervasi (23 March 2005); A Paxton, Louisiana Courts (5 April 2005).

115. Michael Garrahan, who co-ordinates jury services for New Jersey, was involved in each case since the first deaf juror served in 1984 and in the years immediately following. He states that such service has become “a fairly routine practice” and although not common, there is no longer any need for him to be directly involved, as the local staff see to the necessary accommodations. He has overseen two decades of service by deaf jurors. He notes that since 1984 “we have had many deaf persons serve as jurors, including the first juror serving a second time a number of years later, and have not had any legal or practical difficulties with such service – other than the normal issues that sometimes affect the scheduling of the sign language interpreters or the advance notice needed if real time transcription or some other service will be provided:” Garrahan (30 April 2005).

116. For example in Louisiana, a document entitled “Court Policies for Accommodating Jurors with Special Needs” commences: “Persons with Disabilities are encouraged to serve as jurors in this Court. The Court shall not offer to excuse a juror on the basis of a disability:” Paxton (5 April 2005); Garrahan notes that “a good deal of information ...has been developed in order to guide our efforts – including oaths and judicial instructions that relate to interpreting at trial and during deliberations.” Thomas Munsterman (5 April 2005) US National Centre for State Courts, observes “in general we are seeing a shift from the exclusion from service of any person to a more case specific finding. ... This places the decision on the judge rather than based on an administrative and perhaps very subjective basis. ... The exclusion is not from jury service but from a particular case.”

117. Chicopee District Court, Massachusetts (6 May 2005).

the witness and she could not even visually observe the witness for the most part because she needed to be focused on the signer or the computer.

2.70 While it is not entirely clear, in this case it appears from the location of the deaf juror that the interpreter may also have been positioned some way from the witness stand. If so, this practice has been improved upon. In New Jersey¹¹⁸ for example:

we have found that the deaf juror can be positioned in a way that [he or she] can observe both the witnesses, the trial judge, and the interpreter or the computer screen, and that the other jurors quickly adapt to the novelty of the accommodation. Service by deaf persons has not proven to be a distraction that interferes with the trial. If there is an issue with the layout of a particular courtroom, it is possible to move the trial to another courtroom that does not present an issue.

This is embodied in the State's guidelines¹¹⁹ that include the following:

4. Interpreter's Positioning in the Jury Assembly Room

A. Sign Language Interpreter

The ideal location for the sign language interpreter is next to the person who addresses the jurors. This is so that the Deaf or hard-of-hearing person can view the speaker peripherally while following the interpretation.

2.71 The effectiveness of this in practice is borne out by Sheila Conlon Mentkowski¹²⁰ who is Deaf and works as an attorney in Sacramento. She has twice served as a juror. In one of these trials

[t]he judge had the interpreter move to a better spot in the courtroom so I could see the interpreter clearly during the trial proceedings. The interpreters had the skills necessary to convey the witnesses' and attorneys' statements and demeanours. The interpreters were positioned so that I could see the interpreters and be able to glance at the attorney or witness to actually see their demeanour during the trial.

2.72 Another perspective is that of Justice Bertha Josephson,¹²¹ who presided over a case in which a deaf juror was empanelled. In that case:

118. Garrahan (30 April 2005).

119. New Jersey, Administrative Office of the Courts, "Guidelines for Trials Involving Deaf Jurors Who Serve With the Assistance of Sign Language Interpreters" (rev 2004) «www.judiciary.state.nj.us/interpreters/wrkgdeafjur.pdf».

120. S Conlon Mentkowski (5 May 2005).

[a]s I do with all jurors, I instructed that if at any time a juror is not able to see a witness or misses any testimony or remarks to immediately tell me. Frankly, most jurors are not riveted on the witnesses the whole time they testify anyway, as jurors often take notes, review documents, or look at evidence, while witnesses are testifying. I assume that the same as hearing people must rely upon their own methods used in everyday life to evaluate credibility, deaf people have developed the same skill despite their difference.

Deliberations

2.73 Those respondents who addressed the issue of jury deliberations made no adverse report. The absence of problems was attributed to different causes. A jury manager's perspective¹²² was that this is due to the preparation and instruction of all jurors regarding their responsibilities. However Conlon Mentkowski, as a former Deaf juror,¹²³ saw the presence of an interpreter in the jury room as helpful. In her view "all the jurors appreciated having the interpreter there as that was a constant reminder to speak one at a time and to give the matters pending before the jurors the due weight needed to decide the matters in the trial." Further, she reports that in all the literature she has read on this subject she has never come across a claim that the interpreter's presence could be disruptive or influential, nor was it her experience. Rather, "the court proceeding always impresses on the jurors and interpreters the seriousness of the matter so we all observe the protocol and requirements very carefully." Justice Payne,¹²⁴ who expressed reservations over the empanelling of deaf jurors, observes that in the case in which he was involved, both a stenographer and an interpreter accompanied the jury into the jury room:

The jury was instructed to try not to speak over each other and the signer was able to speak for the [deaf] juror in addressing any comments or questions she had. ... [T]he jury deliberated over two days and there was no sense that there were any problems during the deliberations.

2.74 Justice Peter Lauriat's¹²⁵ experience with the use of CART by deaf jurors led him to conclude that:

121. Massachusetts Superior Court (25 June 2005).

122. Garrahan (30 April 2005).

123. Conlon Mentkowski (5 May 2005).

124. Payne J (6 May 2005).

125. Massachusetts Superior Court (5 May 2005).

the deliberations part is apparently a bit cumbersome at the start, but once the reporter gets used to identifying the speaker, it goes well. I've learned this from post-trial interviews of the jurors and the [CART] reporters. At the start of deliberations, we will swear the reporter to faithfully and impartially report and present the jury's deliberations to the deaf juror, and to maintain the confidentiality of the jury's deliberations.

Fairness to the accused

2.75 The crucial question to consider is whether an accused person can receive a fair trial if one of the jurors is deaf. Can such a juror properly comprehend the proceedings in their entirety? Is a deaf juror even experiencing the same proceedings as the other eleven, when he or she must receive it through the medium of an interpreter? The responses of Justices Josephson and Lauriat indicate their satisfaction with the inclusion of deaf jurors in the Massachusetts trial system.

2.76 Justice Lauriat states:¹²⁶

I have always been impressed by the commitment of the deaf jurors to being fair and impartial. Indeed, they appear to be paying even more careful attention to the evidence and the judge's instructions on the law. Whenever possible, although certainly not always, we encourage the trial judge to give a written copy of his final jury instructions to the jury for reference in their deliberations. This has obviously been of great assistance to the deaf juror – but all jurors have greatly appreciated their availability.

I do not believe that justice has been compromised by use of aids for deaf jurors, even the use of an interpreter. First and foremost, the deaf juror is one of six or twelve deliberating jurors, and we take pains to tell all jurors that they have an equal voice and an equal vote in their deliberations. Second, I have learned that the other jurors have always been willing to assist and accommodate the deaf juror – by writing down comments or thoughts, and by sharing with the deaf juror their notes taken during the trial. ... Third, we emphasise that jurors must assess the credibility of each witness, and that this requires close observation of the witness's demeanour and behaviour while testifying. I am told by other jurors that hearing impaired jurors are often better and more careful observers of the witnesses, and can provide their own insights to the deliberating jurors. ... I think that deaf jurors, with or

126. Lauriat J (5 May 2005).

without interpreters, can understand the rhetoric and techniques of persuasion employed by counsel, and can often filter out the hyperbole from the meat of an argument or examination better than other jurors because they are not distracted by that verbal hyperbole.

2.77 In Justice Josephson's view:¹²⁷

It is not uncommon for jurors not to receive communication directly from the witnesses. We have many witnesses who do not speak English and must rely upon a translator. We also have many criminal defendants – and who could have a greater interest in the integrity of the communication during a trial? – who must rely upon a translator to interpret every aspect of the trial, including his or her own communications with his or her lawyer. ...

I...think, frankly, that some of the concerns [regarding the inclusion of deaf jurors] stem from a hearing person's projection of what it must be like to be deaf. I trust that we all come into the process with strengths and weaknesses that may be less obvious. I also trust the deaf juror to honestly tell me his or her limitations, as most prospective jurors do. In summary, I think if we flawed humans are to best approximate justice, it is by having a broad cross-section of human experience represented in the jury room. I felt having the deaf juror moved us closer to that.

NEW ZEALAND

2.78 In 2005 a deaf person assisted by sign language interpreters served as a juror during a two day hearing in a tax matter at Wellington District Court. His fellow jurors also selected him foreman. It is believed to be the first and only such case in New Zealand.¹²⁸ The *Juries Act 1981* (NZ) does not include physical disability as a category of ineligibility for jury service.¹²⁹ A registrar¹³⁰ or judge¹³¹ may excuse a person with a physical disability from jury service on the grounds that hardship or serious inconvenience would otherwise result. A judge may also, on his or her own motion, discharge the summons of a person if the judge is satisfied that,

127. Josephson J (25 June 2005).

128. "First Deaf Person to Serve on Jury" *Dominion Post* (Wellington) (4 November 2005) at 2.

129. *Juries Act 1981* (NZ) s 8.

130. *Juries Act 1981* (NZ) s 15(1)(aa).

131. *Juries Act 1981* (NZ) s 16.

because of a physical disability, the person is not capable of acting effectively as a juror.¹³²

2.79 Judge Bridget Mackintosh, who presided, advised the Commission that the trial proceeded smoothly.¹³³ It was a relatively straightforward tax fraud case involving many documents, and in which demeanour was a negligible factor. Counsel did not seek to use their right of peremptory challenge to exclude the deaf juror. The deaf juror used the service of sign language interpreters who swore an oath. Jurors received a transcript of the proceedings.

2.80 At the outset the Judge gave directions that the other members of the jury should not allow themselves to be distracted by the presence of the interpreters. The initial novelty of the situation wore off, and the jury appeared to be comfortable and not to be experiencing problems with the presence of a deaf juror.

CONCLUSION

2.81 In this Report and the earlier Discussion Paper the Commission has given detailed consideration to the concerns raised at the prospect of deaf people being allowed to serve as jurors. It has also looked at the experience in the US and New Zealand, and notes that what are sometimes claimed to be insurmountable obstacles here, seem to have caused little impediment to reform there, and with no evident ill effect.

2.82 The Commission is concerned, foremost, with maintaining confidence in the administration of justice in NSW. However, it does not regard the removal of the general prohibition on deaf people serving on juries as undermining the fairness of the trial. The Commission's inquiry leads it to conclude that the practice of not allowing deaf people to serve is most likely based on unfounded assumptions about the nature of deafness and the ability of deaf people to comprehend and communicate. There is no reasonable basis for the conclusion that a person, by virtue of deafness alone, is incapable of discharging the duties of a juror. They should not therefore be subject to blanket ineligibility. Whether such a person should be ineligible for service for a particular trial should depend upon the particular circumstances of the trial, including its length and the nature of the evidence and issues involved, and the extent to which suitable adjustments can be made. For example, it would be

132. *Juries Act 1981* (NZ) s 16AA(1).

133. Mackintosh J, information supplied 25 July 2006.

inappropriate to have a deaf juror where the issue before the jury is voice or word identification from an intercepted communication whose sound quality is poor.

3. Can people who are blind serve as jurors?

- Introduction
- Blind and vision impaired
- Reasonable adjustments
- Issues
- Conclusion

INTRODUCTION

3.1 Blindness, because it has much less effect on the ability to communicate, is less prone to the negative stereotyping that has at times been associated with deafness. Issues that arise in regard to whether the blind should serve as jurors are comparatively straightforward.

BLIND AND VISION IMPAIRED

3.2 The terms of this inquiry refer to people who are blind or have significant sight impairment. Approximately 300,000 Australians are estimated to have some degree of vision impairment. Low vision is a term used to refer to significantly reduced vision that may be severe enough to affect performance, and that cannot be corrected by eyeglasses.¹ The majority of people who are legally blind are included within this classification. A legal definition of blindness exists for the purposes of establishing eligibility for government benefits, but its technical nature does not assist this inquiry.² The Commission is concerned here with people with low vision or total blindness who are unable using any means to recognise a face or read printed or handwritten documents.

REASONABLE ADJUSTMENTS

3.3 In DP 46 we discussed the kinds of reasonable adjustments that could be used to assist a blind juror.³ Professor Ron McCallum,⁴ Dean of Law at the University of Sydney and himself blind since infancy, stated:

First, much of the documentary evidence could be read out in open court. Second, it would be possible to have the documentary evidence printed in Braille. Computer programs

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1. Association for the Blind of Western Australia, Resources, “Understanding Blindness” (as at 16 January 2006) «www.abwa.asn.au/understandingblindness.html»; Low Vision Online, “Low Vision – definitions” (as at 16 January 2006) «www.lowvisiononline.unimelb.edu.au/LowVision/LowVision_def.htm».
 2. Australia, Department of Family and Community Services, *Guide to Social Security Law*, “3.6.2.40 Assessment of Blindness for DSP” (as at 16 January 2006) «www.facs.gov.au/guide/ssguide/36240.htm».
 3. DP 46 at para 3.7, 4.17-4.18.
 4. R McCallum, *Submission 2* at 2-3.

exist which virtually instantaneously translate printed documents in electronic form into braille documents in electronic form which can be printed out in braille by a braille printer. Second, most printed documents are to be found in electronic format, and through the use of computer-based adaptive technology these documents can be read out to blind jurors using high quality synthetic speech. Third, documents (other than handwritten documents) which are not in electronic form can be scanned by programs such as the Kurzweil reading program, and read out in high quality synthetic speech. Finally, documentary evidence could be read onto tape, perhaps by the Judge's Associate, and the tape could be given to a blind juror to listen to, and if the documents went into the jury room, the tape recording could go in as well.

3.4 The Royal Blind Society ("RBS") states that the provision of reasonable adjustments by courts would be appropriate and, in its view, "less of an issue than most people perceive".⁵ In most cases, according to the RBS, the only support required will be a sighted guide within the vicinity of the court, the provision of written material in an appropriate format, and descriptions of visual evidence. Where assistive technology is required, such as for reading documents or taking notes, most people would prefer using their own equipment. On occasion it might be necessary to accommodate guide dogs in the courtroom but this is unlikely to cause a problem.

3.5 Correspondence with personnel working within various US courts, cited in the previous chapter, dealt almost entirely with issues relating to jury service by people who are deaf. However some mention was made of accommodations for the blind. These include the provision of juror handbooks and information sheets in braille and audio format, and people acting as assistants to blind jurors, for example as readers or guides.⁶

3.6 In chapter 2 we referred to the New Zealand case in 2005 in which a person who is deaf successfully completed jury service.⁷ Since then a blind juror has also been empanelled, without

5. Royal Blind Society, *Submission* at 1.

6. S Bailey-Jones, District of Columbia Superior Court, information supplied 30 March 2005 and 16 June 2005; P Meraz, Sacramento Jury Commissioner, information supplied 18 May 2005; R Miller, Indiana Supreme Court, information supplied 18 May 2005.

7. Para 2.78.

challenge from counsel.⁸ According to a newspaper account, the presiding judge:

asked [the juror] if there was anything the court could do to help accommodate him and his guide dog, but the man says that all the visual exhibits presented to the jury were described verbally in detail. A female juror volunteered to sit next to the man throughout the four-day trial, offering minor assistance such as telling him the number of an exhibit. ... The man said he had “no problems whatsoever” carrying out his jury duty.

ISSUES

3.7 A juror who is blind or has low vision has the same access to oral testimony, instructions, discussion and deliberation as any other hearing juror. The receiving and comprehension of evidence and instructions, discussed in the previous chapter, are irrelevant here except to the extent they are relevant to any juror, with or without hearing or sight. Furthermore, a guide dog could not be regarded as a stranger in the jury room. The main issues are, therefore, confined to the inability to observe visual evidence effectively and the demeanour of witnesses.

Visual evidence

3.8 The point has been made previously⁹ that there will be trials in which crucial evidence will be visual in nature, thus precluding a blind person from sitting on the jury. However, the mere fact that there is evidence in the form of documents, diagrams, photographs and so on need not result in automatic exclusion of a blind juror, as in many cases there will be no issue as to its interpretation, and the content can be conveyed successfully through description or using technology. In the Commission’s view the use of reasonable adjustments provide scope for facilitating the inclusion of a person who is blind or has low vision on the jury panel.

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8. M Cummings, “Justice Truly Blind in Manawatu Case” *Manawatu Standard* (20 February 2006) «www.stuff.co.nz/stuff/print/0,1478,3578566a12855,00.html»
 9. DP 46 at para 3.4-3.5.

Demeanour

3.9 In DP 46 we discussed the meaning of demeanour and the importance it has been accorded in common law.¹⁰ We also noted that a number of judicial pronouncements have downplayed its significance as a determinant of credibility in favour of more objective evidence.¹¹ In Australia recent cases continue this trend. In *Fox v Percy*¹² the High Court noted that while it is true that for a very long time judges in appellate courts have given deference to decisions of trial judges because of their opportunity to assess the appearance of witnesses:

...it is equally true that, for almost as long, other judges have cautioned against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses. ... Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events.

3.10 Demeanour includes not only observable phenomena but also aspects of speech. For example there may be difficulties in relation to the significance of hesitations in speech,¹³ while facial tics, speech impediments, Tourette's syndrome and so on may also give rise to misleading conclusions. Where these do exist as inherent medical conditions, competent counsel will establish that fact when calling the witness, without leaving it to uncertain speculation, a course that is as desirable for sighted jurors as it is for the blind. Speech may convey a meaning other than the literal, for example where inflexions or facial gestures turn a "yes" into a "no".¹⁴ However competent cross-examination should detect any such indication and pursue it to determine what the witness is, in fact, intending to convey.

10. See para 3.11-3.12.

11. See para 3.15-3.17.

12. (2003) 214 CLR 118 at 128-129. See also *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 348 (NSW CA).

13. *Coombe v Bessell* (Tasmanian Supreme Court, A40/1994, Zeeman J, 17 and 31 May 1994, unreported) at 1-2.

14. DP 46 at para 3.13.

3.11 A recent amendment¹⁵ to the *Criminal Procedure Act 1986* (NSW) accepts that the principles concerning the capacity of jurors to assess demeanour visually and aurally can be relaxed in some circumstances without necessarily impinging on the fairness of the trial. In a retrial of sexual assault proceedings the prosecutor may now tender as evidence in the new trial a record of the complainant's original evidence.¹⁶ If such a record is admitted, the complainant is not compellable to give further evidence.¹⁷ The record of evidence must be the best available,¹⁸ that is:

- (a) an audio visual recording of the evidence, or
- (b) if an audio visual recording of the evidence is not available, an audio recording of the evidence, or
- (c) if neither an audio visual recording nor an audio recording of the evidence is available, a transcript of the evidence.

In the recent case of *R v Skaf*¹⁹ the best available evidence was the transcript of the original hearing, read to the jury by two representatives of the Director of Public Prosecutions, one as questioner and the other as witness.²⁰

3.12 Scientific research has also investigated demeanour in terms of what it reveals regarding truthfulness and deception. Psychologists Vrij and Easton²¹ state that:

[m]ore than 30 years of deception research convincingly demonstrates that there is no such thing as a typical deceptive response. In other words, there is nothing as simple and obvious as Pinocchio's growing nose, so lie detection is difficult and research also demonstrates that people generally are poor lie detectors.

The authors note that even in studies in which judges were invited to try and detect truth and lies told by people not known to them,

15. *Criminal Procedure Amendment (Evidence) Act 2005* (NSW).

16. *Criminal Procedure Act 1986* (NSW) s 306B(1).

17. *Criminal Procedure Act 1986* (NSW) s 306C.

18. *Criminal Procedure Act 1986* (NSW) s 306E(1), (2).

19. [2006] NSWSC 394.

20. In her judgment Matthews AJ commented that to her observation the process went very smoothly: [2006] NSWSC 394 at para 12.

21. A Vrij and S Easton, "Fact or Fiction? Verbal and Behavioural Clues to Detect Deception" (2002) 70 (20 Feb) *Medico-Legal Journal* 29.

the total accuracy rate was 56.6%, or “only just better than chance”.²²

3.13 According to one view, people who deliberately lie attempt to control their verbal and nonverbal responses by focusing on those cues that fit cultural stereotypes.²³ For example Vrij and Easton note the:

surprising finding that gaze behaviour is unrelated to deception. “Surprising” because both lay persons and professional lie catchers tend to hold strong beliefs that liars typically look away. They don’t. Most liars are as likely to look away as truth tellers. ... The great communicative potential of the eyes means that people are relatively highly practised at using and therefore controlling gaze.

Additionally, it is well recognised that it is regarded as impolite in Aboriginal culture to maintain fixed eye contact.

3.14 The argument that an inability to observe demeanour should disqualify a blind or deaf person from jury service contains at least three assumptions; first, that demeanour always conveys information that aids in the interpretation of what has been consciously communicated; secondly, that the witness to another’s demeanour can interpret it accurately; and thirdly, that blind and deaf jurors are deprived of the opportunity of detecting demeanour.

3.15 As the foregoing discussion shows, the first two assumptions are questionable. While it can be important, the value of observable demeanour evidence, according to a substantial body of research, appears to have been overstated and, as such, accorded too much value as a tool for judging credibility. In any event judges usually give a general direction to the jury that while demeanour can be taken into account the reliance placed upon it must be kept in balance with other considerations. Consequently it is an inappropriate determinant in the issue of eligibility for jury service.

3.16 Finally, as the RBS stated:²⁴

[o]ne of the main misconceptions ... is that people who are blind will not be able to observe the demeanour of witnesses. We accept that people who are blind will not be able to observe all visual aspects of a witness’s demeanour but we

22. Vrij and Easton at 29.

23. J E Hocking and D G Leathers quoted in Vrij and Easton.

24. Royal Blind Society, *Submission* at 4.

assert that there are many aspects of a person's demeanour which are non-visual and which are just as important and relevant.

As DP 46 pointed out, the deaf or blind juror will, like most others, have found ways of encountering, and coping with, everyday life, including the attempt to assess the truthfulness of what people say to them.²⁵

Cost of trial

3.17 Additional expense occasioned by the use of blind jurors would likely be minimal.²⁶ In any event, the public policy issues mentioned in relation to deaf jurors²⁷ would also apply here.

CONCLUSION

3.18 In those trials where an individual's unaided ability to access visual evidence is not crucial, it is difficult to understand why people who are blind should be precluded from serving as jurors. In most cases it is highly likely that such visual evidence as is adduced can be made accessible through using reasonable adjustments. Accordingly, the blind should not be subject to blanket ineligibility from jury service. Ineligibility should be considered on a case-by-case basis, depending on the particular circumstances of the trial, including the nature of the evidence to be presented, the issues arising, whether a view of the crime scene or a demonstration is critical to an evaluation of the evidence and whether sufficient accommodation can be made to compensate for the juror's lack of sight. This could include the printing of documents in Braille, or their conversion into audio format, or even to the provision of readers.

25. Para 3.10.

26. Para 3.3-3.4.

27. Para 2.63.

4. Recommendations

- Eligibility
- Exemption from jury service
- Procedure
- Offences
- Legislative action
- Professional awareness

ELIGIBILITY

4.1 At the heart of this reference is the question whether blind or deaf people can perform the functions of a juror. The Commission finds that, so long as all appropriate and reasonable adjustments are made available, neither blindness nor deafness is inherently inimical to jury service. It may be that, in individual cases, it is inappropriate to empanel a blind or deaf juror. A blanket prohibition however, as currently exists, is excessive and unnecessary. It mandates the exclusion of a class of citizens from participating in one of the rights and responsibilities of citizenship purely on the basis of a disability, and precludes any enquiry as to the actual *ability* of a member of that class to effectively perform in that role. This, in the Commission's view, is unacceptable. While the Commission understands that practical difficulties may at times hamper implementation (eg unavailability of interpreters), this is a separate matter that does not have any bearing on the principles at stake.

4.2 Nearly all submissions supported the view that eligibility for jury service should depend on an individual's ability to carry out the task.¹ The Law Society of NSW² suggested that an appropriate model might be found in New Zealand legislation, which removes automatic disqualification for people with physical disabilities, thereby focusing "on a person's ability to serve on a jury, rather than on categories of disability". Indeed, as noted earlier,³ a deaf juror and a blind juror have completed successful service in recent New Zealand trials.

4.3 The Commission's principal recommendation is, therefore, that a person who is either blind or deaf be eligible and qualified for jury service, and that any exclusion be considered on an individual basis, taking into account the person's ability to discharge the duties required in the circumstances of the particular trial, and the availability of reasonable adjustments, if required. There should be a presumption favouring the provision of reasonable adjustments, unless doing so would be unduly impractical for court administrators.⁴

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1. Para 1.4.
 2. Law Society of NSW, *Submission* at 3.
 3. See para 2.78 and 3.6.
 4. This is supported by the NSW Attorney General's Disability Strategic Plan 2006-2008 (as at 29 August 2006)

EXEMPTION FROM JURY SERVICE

4.4 In DP 46 we asked whether blind or deaf people, if allowed to serve on juries, should be required to do so, or whether they should be given the option to be excused.⁵ The following views emerged in submissions.

4.5 The Disability Council of NSW opposed giving blind or deaf people the choice whether to serve on juries,⁶ stating:

People who are blind or deaf should not have the option to be excused from jury duty because of their disability. They have an obligation to serve as jurors, and the justice system has a responsibility to facilitate such service.

People With Disability Australia took a similar position,⁷ expressing the view that blind or deaf people should have the option to be excused in circumstances where they are unable to fulfil the inherent requirements of the position. They should not, however, be excused merely because they are disabled. Their participation should be on the same basis as other citizens “who do not have the right to avoid jury service without good reason”.

4.6 Others favoured giving blind or deaf individuals the choice whether to serve on a jury.⁸ The Royal Blind Society (“RBS”)⁹ agreed with the above-mentioned submissions that blindness should not, of itself, be grounds for exemption. However, the RBS cautioned that other circumstances should be taken into account in individual cases:

1. Where the onset of blindness or sight loss is recent enough that the person has not dealt with the loss in an emotional or practical sense. That is, that the person may still be suffering emotionally from the loss and will not be able to focus effectively on all aspects of a trial by jury. Also that the person may not have developed sufficient compensatory skills such as orientation and mobility information access or use of assistive technology.
2. Where a person may feel that they are more vulnerable because of blindness. That is, that a person may feel that

«www.lawlink.nsw.gov.au/Lawlink/Corporate/ll_corporate.nsf/vwPreviousActivePages/attorney_generals_department_disabilitystrategicplan».

5. DP 46 para 6.2.

6. Disability Council of NSW, *Submission* at 3.

7. People with Disability Australia Incorporated, *Submission* at 2.

8. N R Cowdery, *Submission* at 1; Law Society of NSW, *Submission* at 3.

9. Royal Blind Society, *Submission* at 2.

their blindness makes them more readily identifiable or that as a consequence of blindness they are less safe in the community....

Professor McCallum expressed similar concerns:¹⁰

The disabilities of hearing and/or visual impairment are overwhelmingly disabilities which manifest themselves amongst elderly Australians. ... Given that blindness and deafness are aging diseases and that the majority of blind or deaf persons on the electoral rolls are citizens of senior years ... blind or deaf persons should have the right to be exempted from jury service. Many older Australians who suffer the onset of blindness or deafness have difficulties in adjusting to these conditions, and having regard to these circumstances, it would be inappropriate not to allow such persons a right of exemption from jury service.

4.7 The Commission agrees with the view of Professor McCallum that people who are blind or deaf should have an unqualified right to be exempt from jury service. Schedule 3 of the Act should be amended to allow a person who is blind or deaf to claim exemption from jury service.

PROCEDURE

4.8 A person who is blind or deaf and whose name has been included on the supplementary jury roll should complete a form accompanying the notice from the Sheriff disclosing his or her disability. The person should either claim exemption or, if prepared to serve, nominate the facilities that would assist him or her in participating as a juror. If summoned, the Sheriff's Office would be responsible for ensuring, in conjunction with the court of trial, that reasonable adjustments could be made available. Forewarned of potential problems, the trial judge could deal with the capacity of the juror to serve in the particular trial in the presence of counsel and prior to commencing empanelment. Otherwise the usual position would apply unchanged, that is that the juror could be stood aside by consent, or the prospective juror could be challenged either peremptorily or for cause.¹¹

10. R McCallum, *Submission 2* at 2.

11. Challenges are discussed in DP 46 at para 3.36.

OFFENCES

4.9 The sanctity of the jury room is of the utmost importance and for that reason anyone in the jury room should be subject to the same prohibitions and protections as jurors. Interpreters and stenographers or any other person permitted by the trial judge to assist a deaf or blind juror during deliberations should be prohibited, on the pain of committing an offence, from disclosing information pertaining to those deliberations. Soliciting information from such persons about the deliberations should also be an offence.

LEGISLATIVE ACTION

4.10 The Act should be amended to make it clear that people who are blind or deaf should not be prevented from serving on juries solely because of that disability. They should only be excluded when the nature of the evidence is such that they cannot fulfil the functions of a juror or where they request exemption.

Recommendation 1

The *Jury Act 1977* (NSW) should be amended to reflect the following:

- (a) that people who are blind or deaf should be qualified to serve on juries, and not be prevented from doing so on the basis of that physical disability alone;
- (b) that people who are blind or deaf should have the right to claim exemption from jury service;
- (c) that the Court should have power to stand aside a blind or deaf person summoned for jury duty if it appears to the Court that, notwithstanding the provision of reasonable adjustments, the person is unable to discharge the duties of a juror in the circumstances of the trial for which that person is summoned. This power should be exercisable on the Court's own motion or on application by the Sheriff;
- (d) that interpreters and stenographers allowed by the trial judge to assist the deaf or blind juror should swear an oath faithfully to interpret or transcribe the proceedings or jury deliberations;
- (e) that interpreters or stenographers allowed by the trial judge to assist the deaf or blind juror should be permitted in the jury room during deliberations without breaching jury secrecy principles, so long as they are subject to and comply with requirements pertaining to the secrecy of jury deliberations;
- (f) that offences be created, in similar terms to those arising under s 68A and 68B of the Act, in relation to the soliciting by third parties of interpreters or stenographers for the provision of information about the jury deliberations, and in relation to the disclosure of information by such interpreters or stenographers about the jury deliberations.

Recommendation 2

The Sheriff should develop guidelines for the provision of reasonable adjustments, including sign language interpreters and other aids for use by deaf or blind jurors during the trial and deliberation.

Recommendation 3

A blind or deaf person receiving a notice of inclusion on the jury roll or a jury summons should be required to complete a form either claiming exemption from jury duty or notifying the Sheriff of the reasonable adjustments required by that person to participate as a juror.

PROFESSIONAL AWARENESS

4.11 People with Disability Australia¹² commented:

...there will need to be significant judicial education to ensure that trial judges do not themselves make decisions that unreasonably discriminate against people who are blind or deaf on the basis of disability.

The Royal Blind Society expressed a concern that, without clear guidelines, determinations by judges as to the eligibility of blind individuals would result in “high levels of exclusion” from jury duty.¹³

4.12 The issue of education, not only for judicial officers, but also for staff of the courts and Sheriff’s Office is an important one. Past exclusion from jury service has led to limited experience in accommodating blind or deaf individuals. It is unlikely, therefore, that there is much knowledge or expertise within the court system relating to either the disabilities themselves or the reasonable adjustments that can be provided to facilitate the participation of deaf or blind people on juries. While ongoing professional awareness for judicial officers is already provided through such organisations as the Judicial Commission of NSW¹⁴ and the National Judicial College of Australia,¹⁵ and disability awareness training is offered to staff of the Attorney General’s Department,

12. People with Disability Australia Incorporated, *Submission* at 2.

13. Royal Blind Society, *Submission* at 3.

14. The Judicial Commission’s website can be viewed at «www.judcom.nsw.gov.au/index.php».

15. <http://www.njca.com.au/index.asp>

training workshops should be designed specifically to accomplish the goal of these Recommendations.

4.13 These would provide a valuable opportunity for court personnel and judicial officers to be exposed to working with sign language interpreters and adaptive technologies, as well as with blind or deaf people themselves.

4.14 A foreseeable development within this process is the formulation of new procedures and guidelines, together with the publication of in-house manuals, so that all relevant personnel can be equipped with the resources necessary to understand and implement the recommended reform.

Recommendation 4

All relevant personnel, including judicial officers and court staff, should be given the opportunity to participate in professional awareness activities that focus on practical measures to facilitate the inclusion of blind or deaf persons as jurors. The Judicial Commission should develop supporting materials and procedural guidelines as part of this process.

Appendix

- Submissions
- Consultants

Submissions

Association of Blind Citizens of NSW Inc, 27 April 2004

Australian Sign Language Interpreters Association, 30 April 2004

N R Cowdery AM QC, NSW Director of Public Prosecutions, 28 April 2004

Disability Council of NSW, 28 April 2004

J Hogan, 6 April 2004

Justice Hulme, Supreme Court of NSW, 20 May 2004

Law Society of NSW, 27 May 2004

Professor R C McCallum, Dean, Faculty of Law, University of Sydney, 5 May 2004

People With Disabilities Australia Incorporated, 21 June 2004

Royal Blind Society, 30 April 2004

Consultants

Robert Altamore, Blind Citizens Australia
Lynn Anamourlis, NSW Office of the Sheriff
Suzanne Bailey-Jones, District of Columbia Superior Court
Dorne Boniface, Faculty of Law, University of NSW
Susan Dye, New Mexico Courts
Phillip French, People With Disabilities
Danielle Fried, Deaf Society of NSW
Michael Garrahan, New Jersey Courts
Bridget Gernander, Minnesota Courts
Sheryl Gervasi, Supreme Court of Wisconsin
Alison Herridge, National Disability Advisory Council
Graeme Innes, Human Rights and Equal Opportunity Commission
Neil Iversen, Sheriff's Office, South Australia
Justice Bertha Josephson, Massachusetts Superior Court
Justice Peter Lauriat, Massachusetts Superior Court
Phyllis Launius, Missouri Courts
Robert Joe Lee, New Jersey Courts
Professor Greg Leigh, Royal Institute for Deaf and Blind Children
Mark Linneman, California State Law Library
Professor Ron McCallum, University of Sydney
Maria McDonald, NZ Ministry of Justice
Alastair McEwin, NSW Association of the Deaf
Sheila Conlon Mentkowski
Patricia Meraz, Sacramento Jury Commissioner
Ron Miller, Indiana Supreme Court
Rudy Monteleone, Victorian Juries Commissioner
Thomas Munsterman, US National Centre for State Courts

Jemina Napier, Department of Linguistics, Macquarie University

Lisa Pantano, Reporting Services Branch, NSW Attorney General's Department

Anna Paxton, Louisiana Courts

Judge John Payne, Massachusetts District Court

Brian Rope, Deafness Forum

Joseph Sabolcec, Macquarie University

Kathy Schiflett, Kentucky Courts

Michael Simpson, Royal Blind Society

Anne Skove, US National Centre for State Courts

David Spencer, Department of Law, Macquarie University

Pamela Wood, Massachusetts Jury Commissioner

Judge Michael Yarnell, Phoenix School of Law

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<i>Goby v Wetherill</i> [1915] 2 KB 674	2.48, 2.50
<i>Gradidge v Grace Bros Pty Ltd</i> (1988) 93 FLR 414.....	2.36
<i>Jago v District Court of NSW</i> (1989) 168 CLR 23	1.14
<i>Mansell v The Queen</i> (1857) 8 E & B 54; 120 ER 20	1.14
<i>Osman, Re</i> [1995] 1 WLR 1327.....	2.48, 2.50
<i>Pemble v The Queen</i> (1971) 124 CLR 107	1.14
<i>People v Caldwell</i> 603 NYS 2d 713 (1993)	2.66
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<i>R v Burns</i> (1883) 9 VLR (L) 191	1.14
<i>R v Ford</i> [1989] QB 868	1.14
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<i>Criminal Procedure Amendment (Evidence) Act 2005</i>	3.11
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Evidence Act 1995

s 22	2.36
Sch 1	2.36

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