Changing the international justice landscape: Perspectives on deaf citizenship and jury service

By Jemina Napier[1], David Spencer[2], Sandra Hale[3], Mehera San Roque[3], Gerry Shearim[3], and Debra Russell[4]

Heriot-Watt University[1], Australian Catholic University[2], University of New South Wales[3], University of Alberta[4]

Abstract

In Australia and other countries with adversarial court systems, such as Ireland and the United Kingdom, deaf people have not typically been permitted to serve as jurors because of a prohibition against having an interpreter in the jury room. The United States is one country where there is an exception, in that deaf people frequently serve as jurors in several states. We know that deaf people can understand courtroom discourse via sign language interpreters, but there has been no evidence as to how deaf people can participate in the jury deliberation process, or the impact of having a sign language interpreter present as 'stranger' in the jury room. This had never been tested until this study, funded by the Australian Research Council Linkage Program scheme, which is the first of its kind internationally to investigate whether deaf people can realistically participate as a juror in a trial and in the jury deliberation process. The project took the form of a simulated mock-trial in a District Court in Sydney with: a real jury; real police informants; current practising lawyers; and, a recently retired Judge of the Court. The results of this project will demonstrate whether the prohibition of a stranger (i.e., the interpreter) in the jury room should be overturned. It will also explore the extent to which a deaf person can participate in jury deliberations via sign language interpretation, and how this study has pioneered domestic and international law reform. This paper will: briefly track the prior research that led to this study; the current case law affecting the area; share the results of this study with a focus on the perspectives of the study participants and key stakeholders on the feasibility and rights of deaf people to serve as jurors as part of their civic duty; and, present recommendations for the inclusion of deaf people as jurors.

1. Introduction

> "*Modern citizenship is constructed historically from a set of contributory rights and duties that are related to work, public service (for example, military or jury service)… It defines belonging to a society through the entitlements associated with service*" (Isin & Turner, 2007, p.5).

In countries that have adversarial court systems, jury service is considered as a requirement of citizenship, and as part of civic engagement in a 'deliberative democracy' (Gastil & Weiser, 2006). Juries are made up of 6 to 15 lay people (typically 12), depending on the jurisdiction, who are randomly selected from the electoral roll. The role of jurors is to "select, organize, elaborate, and interpret the evidence, drawing inferences to connect the pieces to develop an explanation-based narrative (Diamond & Rose, 2018, p.13.1), and thus decide upon the guilt of a trial defendant. A jury reaches their decision through a deliberation process, which is an interactive discussion, where jurors engage in debate about the evidence presented in a trial[1]. Historically, jurors were made up of white, able-bodied men (Babcock, 2003), but there have been strategic attempts to achieve proportional representation of the general population on juries (Abramson, 2003). Thus, juries now typically feature more women and people from different minority groups (Guzy, 2012), however, under-representation of people from different racial and ethnic backgrounds is still prevalent (Rose, Casarez & Gutierrez, 2018). Similarly, disabled people still experience exclusion from jury service through the peremptory challenges of lawyers (Benson, 2018). It can be argued in order to achieve proportional representation deaf sign language users should be able to serve as jurors.

Despite the fact that in the United States, non-English (i.e. Spanish) speakers can successfully serve as jurors in the state of New Mexico (Chávez, 2008), and deaf people regularly serve as jurors in several states (Mather & Mather, 2003; Napier & McEwin, 2015), through the use of interpreters, many countries with adversarial court systems automatically exclude deaf people from performing their civic duty on the basis of not allowing interpreters into the jury deliberation room. This is likely due to the fact that the notion of 'citizenship' is based on the social construct of individuals that can hear and speak, and therefore social policies are constructed in such a way that exclude deaf people from civic participation (Emery, 2006, 2009).

[1] There are some exceptions to this, for example, in Brazil, where jurors cast an anonymous vote after the trial without any deliberation (Diamond & Rose, 2018).

A mock-jury study that systematically varied jury composition with Anglo and Latino jurors to include non-English speaking (NES) jurors that relied on Spanish-English interpreters across forty-four 6-person juries (Chavez, 2012, Chavez, et al, 2011) found that:

- the likelihood of a "guilty" verdict is independent of majority ethnicity and NES jurors;
- majority Anglo juries with a NES juror discussed more case facts than majority Anglo juries without an NES juror;
- there were no effects on perceived agreement among jurors;
- jurors of all ethnicities enjoyed deliberation on a jury that included NES jurors more than if there were no NES jurors present;
- there were fewer interruptions when a NES juror was present.

Thus they concluded that the evidence confirmed that the presence of NES jurors and their interpreters did not undermine the deliberations, and that the inclusion of NES jurors does not affect overall jury verdicts or destabilize the integrity of jury deliberations. We could assume, therefore, that the same could be said for the presence of deaf jurors and sign language interpreters.

However, there has been no evidence as to how deaf people can participate in the jury deliberation process, or the impact of having a sign language interpreter present as an additional person in the jury room. This had never been tested until the study reported in this article, which is the first of its kind internationally to investigate whether deaf people can realistically participate as a juror in a trial and in the jury deliberation process.

1.1 The current situation for deaf jurors

Historically, in Australia all deaf people have not been permitted to serve as jurors because of statutory prohibitions against having a "13th person" in the jury room namely, the interpreter. There are different reasons why deaf people have been refused the right to serve as jurors in Australia but all relate to the issue of a sign language interpreter being the 13th person in the jury room, and the potential negative impact on the integrity of the jury deliberations. This is a situation that ignites issues such as: the inability in some jurisdictions to swear in a person not empanelled as a juror; the breach of each juror's sworn promise to not discuss the matter before the court with anybody other than a member of the same jury; and, the global issue of

whether a deaf person can effectively serve as a juror leading to the concern that if a juror cannot so serve there is a risk that an accused person may not receive a fair trial. Article 29 of the United Nations Convention on the Rights for People with Disabilities seeks to guarantee the right for all disabled people to "effectively and fully participate in political and public life [and] in the conduct of public affairs". The Convention also mentions the right for deaf people to access professional sign language interpreters in all areas of life, so it can be argued that preventing deaf people from serving as jurors is a breach of the rights of citizenship and human rights (Spencer, et al, 2017a).

There are some jurisdictions that are similar to Australia that do permit deaf people to serve as jurors. In the United Kingdom (UK) and Ireland, legal challenges to the preclusion of deaf people as jurors have established that deaf people have the capacity to serve on a jury (Farrell, 2011; Silas, 1993) and in fact a deaf person has served in an inquest in the British Coroner's Court (Napier & Spencer, 2007a). However, until this study, a deaf person still could not serve as a juror in a criminal trial in either country (Napier & McEwin, 2015).

In New Zealand (NZ) deaf people may serve as jurors and in 2005 the first deaf person was empanelled as a juror and elected as foreman of the jury, performing his function with the assistance of a sign language interpreter provided for by the NZ Ministry of Justice (Napier & McEwin, 2015). In some states of the United States of America (USA) deaf people have been serving as jurors since 1979 with interpreters swearing an oath like all jurors to maintain the confidentiality of jury deliberations (Napier & McEwin, 2015).

In the Australian states of New South Wales (NSW), Queensland and Victoria, deaf people have been refused the right to serve as jurors on criminal and civil trials. In Western Australia a deaf person was allowed to remain in the pool of people eligible for jury service but was not ultimately empanelled to serve on a jury. In the other states and territories of Australia the issue of a deaf person serving on a jury has yet to be tested. Since the research that is the subject of this paper was conducted in the Australian state of NSW, it seems appropriate to use NSW to discuss the legislative regime governing juries. In NSW the empanelment of juries is managed by the Office of the Sheriff, which is part of the Department of Justice whose responsible Minister is the Attorney-General. The process of empanelment is governed by the *Jury Act 1977* (NSW) (the Act) and the *Jury Amendment Act 2010* (NSW). Schedule 1 of the *Amendment Act* amends the *Jury Act* so that s 14(4) of the Act relevantly states:

> "The sheriff may exempt a person from jury service whether or not on the request of the person if the sheriff is of the opinion that there is good cause for the exemption."

Section 14A(b) defines what constitutes good cause for the purposes of an exemption from jury service:

> "For the purposes of this Act, a person has good cause to be exempted or excused from jury service if:
>
> (b) some disability associated with that person would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror, or …"

Despite being summoned for jury duty for the criminal jurisdiction of the Supreme and District Courts of NSW at the Sydney West Trial Courts in 2012, Ms Gemma Beasley was precluded from jury duty pursuant to s 14(4) of the Act.[2] Section 72A(1) of the Act requires a juror to swear or affirm that they will give a true verdict according to the evidence and does not allow a person who is not a juror to be sworn or affirmed as a juror, meaning that there is no legislative authority for an Auslan interpreter to participate as a member of a jury. Further, ss 68A and 68B prevent disclosure or any form of communication about jury deliberations with a person who is not a member of the same jury and carry a fine of 20 penalty units for a breach. However, s 68B(1) of the Act allows a judge to consent to a person disclosing information to a person who is not a juror. To date, no judicial officer has consented to an Auslan interpreter mediating a jury trial with a deaf juror.

Prior to 2012, there were no cases of a deaf person challenging their respective state or territory government for the right to sit on a jury. In 2012, Ms Gayle Lyons was selected for jury duty and upon presenting herself for jury duty on the prescribed day was advised by the Deputy Registrar of the Ipswich District Court that there was no capacity in the legislation for a person who was not a juror to be sworn or affirmed as one and to sit in the jury room. Therefore, she was excluded from being empanelled as a juror. Ms Lyons lodged a complaint with the Anti-Discrimination Commission of Queensland that was heard by a Member of the

[2] Committee on the Rights of Persons with Disabilities, Views: Communication No. 11/2013, UN Doc CRPD/C/15/11/2013 (25 April 2016) 2.1-2.7 ('*Beasley v Australia'*).

Queensland Civil and Administrative Tribunal on 3 and 4 June 2013 with a decision being handed down on 11 December 2013 dismissing the complaint.[3]

At first instance, the Tribunal found there was no evidence of direct or indirect discrimination, rather the Sheriff and the Deputy Registrar acted according to their interpretation of what was permissible under the relevant legislation. In other words, the *Jury Act 1995* (Qld) did not provide for the swearing in of a person who is not a juror and did not allow for an interpreter to have contact with the jury. Ms Lyons appealed the decision.[4]

Prior to the appeal, the Queensland Sheriff made application to the Supreme Court of Queensland Trial Division for a ruling by the Court on the eligibility of a deaf person to be empanelled as a member of a jury.[5] Douglas J found that a deaf person is incapable of effectively performing the functions of a juror and is therefore ineligible for jury service. His Honour's reasoning was that pursuant to the *Jury Act 1995* (Qld), jury deliberations must be conducted in private and although there is a discretion for the presiding judge to grant leave to permit the presence of an interpreter, according to Douglas J, that leave is, "… not well adapted to permitting an interpreter to sit in a jury room …".[6] Further, there is an absence of legislative provision to allow an interpreter to take an oath or make an affirmation to maintain the secrecy of jury deliberations within the jury room.

The Appeals Tribunal dismissed the appeal although for different reasons to the Tribunal at first instance, preferring to follow the reasoning of Douglas J on the application of the Queensland Sheriff. The Appeals Tribunal found that the Deputy Registrar acted on her interpretation of the law at the time while the Tribunal at first instance found on the basis of a lack of evidence of direct or indirect discrimination. The Appeals Tribunal preferred the view that the legislation at the time (and currently) prevents a deaf person from having an Auslan interpreter present in the jury room, and without the presence of a sign language interpreter would lead to an unfair trial.

Ms Lyons made application for leave to appeal to the Supreme Court of Queensland's Court of Appeal and on 28 August 2015 the Court refused the leave application citing that it lacked sufficient merit to warrant granting leave to appeal. Holmes JA delivering the judgment of

[3] *Lyons v State of Queensland (No.2)* [2013] QCAT 731 (11 December 2013).
[4] *Lyons v State of Queensland* [2014] QCATA 302 (21 October 2014).
[5] *Re: the Jury Act 1995 and an application by the Sheriff of Queensland* [2014] QSC 113 (14 May 2014).
[6] *Re: the Jury Act 1995 and an application by the Sheriff of Queensland* [2014] QSC 113 (14 May 2014), at [4].

the Court found that the legislation governing juries did not allow a juror to discuss their deliberations with a non-juror without breaking their oath or affirmation. Further, his Honour could not envisage how a trial judge could give leave for a juror to break their oath or affirmation. Given the legislative barriers, the Court doubted that Ms Lyons' argument had any real prospect of success.

Special leave to appeal to the High Court of Australia was granted on 11 March 2016, (Spencer, et al, 2017b) but five justices of the High Court unanimously dismissed the appeal on the basis that Ms Lyons was not unlawfully discriminated against when she was excluded from jury duty because the *Jury Act 1995* (Qld) did not allow disclosure of the jury's deliberations to a non-juror, namely a sign language interpreter. The Supreme Court of Queensland Court of Appeal decision in *Lyons* is representative of the approach by federal, state and territory courts in Australia who do not seek to discriminate because of a person's inability to hear, rather they argue, they rely on a lack of legislative power to provide a process for deaf people to discharge the role of a juror.

As noted earlier, in 2012 Ms Gemma Beasley was refused the opportunity to serve as a juror in NSW because the courts refused to provide an Auslan interpreter. In 2013, a complaint was lodged with the United Nations Committee for the Rights of People with Disabilities (UNCRPD), claiming that Australia had violated their rights pursuant to various articles of the UN Convention on the Rights of Persons with Disabilities.[7] In contrast to the outcomes in the *Lyons* cases, the UNCRPD found that the exclusion of deaf people from jury duty was discriminatory, and the failure of the NSW government to act to include deaf people on a jury constituted a breach of Australia's obligations under the Convention.

Now that we have considered the context for deaf people serving as jurors in Australia, we will give a brief account of the first three stages of research that led to the study reported in this paper; then we summarise the findings and legal issues arising from the fourth and final stage of research, with a focus on the perspectives of the study participants and key stakeholders on the feasibility and rights of deaf people to serve as jurors as part of their civic duty. Finally, we suggest a way forward to ensure that deaf people are not discriminated against when it comes to being selected for jury duty.

[7] *Lockrey v Australia*, CRPD/C/15/D/13/2013 and *Beasley v Australia*, CRPD/C/15/11/2013, respectively.

2. The first three stages research

The first stage of research was conducted in 2005[8], with a pilot study that examined whether deaf people, using an Auslan interpreter, could comprehend legal discourse in a courtroom setting (Napier & Spencer, 2007a, 2007b, 2008). Hearing people and deaf people via Auslan interpreters were read a jury direction from the then President of the NSW Court of Appeal case involving an appeal from a conviction of manslaughter. The segment of the direction chosen was the complex legal concept of causation and how proof of causation determines the jury's verdict. The interpretation was video-recorded and assessed for its accuracy by other Auslan interpreters not involved in the original interpretation. The original interpretation was assessed as 87.5 per cent accurate.

Six deaf and six hearing jurors were given a comprehension test which showed that both hearing and deaf jurors:

> … misunderstood some concepts, and that there was not a big difference between the number of correct responses from deaf and hearing participants, a 2.8 per cent difference. The responses made by deaf and hearing participants were similar, which suggests that some of the information may have been challenging for all the participants, regardless of whether they were deaf or hearing. Overall, the results showed that both deaf and hearing jurors equally misunderstood some terms and concepts, but that legal facts and concepts can be conveyed in sign language effectively enough for deaf people to access court proceedings and to understand the content of legal texts, to the same extent as hearing people (Napier & McEwin, 2015, pp.25-26).

The results of the first phase of research led to recommendations from the NSW Law Reform Commission to the NSW Government to, among other things, amend the *Jury Act 1977* (NSW) to allow deaf people to serve on juries (Napier & Spencer, 2007b, 2008). To date the NSW Government has not implemented the recommendations of the NSW Law Reform Commission.

To provide further evidence to support the first stage of research the comprehension test was replicated in a second stage, in various cities throughout Australia using 30 deaf and 30 hearing participants. The results confirmed the findings of the pilot study in that both deaf

[8] Funded jointly through the NSW Law Reform Commission and a Macquarie University External Collaborative Grant.

and hearing jurors misunderstood some of the content of the judge's summation, but there seemed to be no major statistical significance in difference in terms of age, gender, education or employment. Any significant difference tended to be influenced by whether the deaf person was a native sign language user, that is, native Auslan users had a better level of comprehension (Napier & Spencer, 2017).

The third stage of research was an international study designed to collect quantitative and qualitative data from legal professionals and sign language interpreters on their perceptions of the impact in having a deaf person on a jury and their effect on the outcome of the trial. Perceptions were gathered using an online survey that consisted of a number of open and closed-ended questions using a standard Likert scale to measure gradations of agreement or disagreement with factual, attitudinal and behavioural statements. Survey responses were received from 179 sign language interpreters and 97 lawyers from: Australia; Canada; USA; UK; Ireland; South Africa; and, New Zealand. Unsurprisingly, the survey disclosed higher levels of comfort and confidence in jurisdictions that already allowed deaf people to serve as jurors although:

> The pattern of responses revealed that, in principle, participants perceive that there is no problem with deaf people serving as jurors, and that with supportive and clear policies and guidelines, and sufficient training for interpreters and court staff/stakeholders it can work successfully. Some questions were raised by respondents about a monolingual deaf person's ability to serve as a juror, but those questions were generally paired with comments about hearing people who have poor language and/or literacy skills or are poorly educated, and their capacity to serve. There were also questions about the importance of *hearing* evidence. However, those respondents with experience of working with deaf jurors stated that clear policy and a commitment by judges to allow deaf people to serve usually involves selecting matters that have less reliance on oral evidence (Napier & McEwin, 2015, p.26).

The three stages of research left the research team comfortable about the ability for Auslan to accurately convey legal discourse in a courtroom setting but left open the question of whether the inclusion of deaf people using Auslan interpreters on a jury was logistically feasible. Therefore, a fourth stage of research that required a more "real-life" jury trial involving deaf people was called for.

3. The fourth stage of research: Current study

The current study sought to move beyond perceptions and begin exploring the real life impact, if any, by analysing actual and simulated cases involving deaf jurors in the US and Australia. These cases would enable observation and analysis of deaf jurors' participation and experience in empanelment, courtroom and deliberation processes, as well as documenting the experiences of other courtroom and deliberation room participants, including judges, legal professionals, jurors and administrators.

3.1 Method

In March 2014, a case study was carried out of deaf jury service at the Monroe County Courts in Rochester, New York in the United States. The data set includes 8 hours of non-participant ethnographic observation of a jury empanelment process involving a deaf juror and an American Sign Language interpreter, and another 7 hours of unstructured conversations and interviews with courtroom judges, lawyers and legal administrators, as well as deaf people who were prospective or experienced jurors. The results of this part of the study are reported elsewhere (see Napier, et al, in press; Napier & Russell, submitted), and provided insight into both the positive and challenging aspects of having deaf people serve as jurors in that court system. However, the data confirmed that it is feasible for deaf people to effectively serve as jurors as it happens on a regular basis in this US state.

In July 2014 a mock trial was conducted at Sydney West Trial Courts in Parramatta, NSW. The mock trial drew upon methodology from Russell (2002) to create a simulated courtroom scenario, using details from a previous real court case as the basis for the mock-trial. The simulation involved eight authentic legal practitioners: 1 retired District Court Judge (LAW1); 1 Crown Prosecutor (LAW2); 1 Defence Solicitor Advocate (LAW3); 2 instructing solicitors from Legal Aid NSW (LAW4-5); 1 serving NSW District Court Officer (LAW6); 2 serving NSW Police Officers who acted as informants (LAW7-8); and two actors as witnesses (ACT1-2). Two deaf jurors experienced the courtroom (DJ1-2), while only one deaf juror (DJ1) participated in deliberations alongside 11 other hearing jurors (HJ1-11). In order to abide by best practices for interpreter working conditions, two professionally qualified Auslan-English interpreters were present throughout the whole trial and deliberation (INT1 & INT2). Interviews were carried out post-trial with all courtroom and deliberation participants, in order to inductively explore their experiences of the trial and deliberations,

and their perspectives on the efficacy of the trial and deliberations with the presence of a deaf juror and interpreters. The trial, jury deliberations and interviews were captured on film to allow for in-depth discourse and thematic analyses. A detailed analysis of the deaf juror's level of participation in the jury deliberation and interaction (turn-taking) patterns is presented in Hale, et al (2017) and demonstrates that: the deaf juror actively participated in the deliberations by giving his opinion; that the juror had deliberate strategies to ensure that he could take the floor; and that the hearing jurors were comfortable with the presence of the deaf juror and the Auslan interpreters.

Following the mock-trial and participant interviews, stakeholder focus groups were conducted in May 2016. Two sessions of two hours each were held, the first involving deaf stakeholders from: World Federation of the Deaf; Deaf Australia; Deaf Society of NSW; and, lay Deaf community members. The second session was attended by: two NSW Supreme Court Justices; jury managers, ministerial advisers and others from the NSW & Victoria Departments of Justice; practising solicitors and barristers from the NSW Bar Association and Law Society; representatives from the NSW Director of Public Prosecutions and NSW Public Defenders; and, a sign language interpreter with experience of court interpreting. Focus group participants were presented with the preliminary findings from analysis of the mock-trial and jury deliberations, in order to elicit perspectives on the feasibility of deaf sign language using citizens serving as jurors. Key issues noted from the post-trial interview participants were categorized for discussion in the focus groups, as seen in Table 1.

Table 1: Key issues noted for discussion in stakeholder focus groups

Issue	Hearing Jurors	Deaf Jurors	Interpreters	Legal Players
Preconceptions about deaf people/jurors	✓			
Interpreters': role; performance; preparation; briefing; trust	✓	✓	✓	✓
Logistical challenges: positioning in court & jury rooms; distractions; court etiquette (eg speaking over each other)	✓	✓	✓	✓
Impact of interpreter in jury room				✓
Problems with oral/recorded evidence	✓	✓	✓	✓
Complex vs. simple trial		✓		✓

Peremptory challenge				✓

The focus of this paper is on the results of the interviews with mock-trial participants and the stakeholder focus groups, and in particular their perspectives on the feasibility of deaf people serving as jurors.

4. Can deaf people serve as jurors? Perceptions of mock-trial interviewees

4.1 Courtroom Issues

While a number of courtroom issues were explored during the post-trial interviews, this section of the paper will address three issues; empanelment and pre-emptory challenges[9], pre-trial preparation and the physical layout of the courtroom.

Analyses of interviews demonstrated general agreement about deaf jurors requiring cognitive and English language competency in order to serve and that this would, and should, be challenged during the empanelment and peremptory process if they did not have that capacity.

> *...first question is what kind of level of understanding do you require any jury person to have? That's a mystery. Then secondly, given that, are deaf people any different in their level of understanding? It may be that they've got a heightened sensitivity that another jury person doesn't have, an awareness, or their life has forced them to search more thoroughly for meaning, they've a heightened memory… So it's all those prejudices you see that have to be [overcome] don't they… But what kind of intelligence do they require? I wouldn't think they'd need - bearing in mind we don't know what type of intelligence and what level of intelligence we need from jurors. We presume that they're not Einsteins and very often you need to be an Einstein to follow the evidence that's being led and that many judges don't even follow it and don't have to because they're not deciding.* (LAW1)

> *So if I had a deaf juror and I wanted to challenge them, I wouldn't be wanting to go into the explanation, I'd just challenge them for no reason, as in for a reason that's not expressed. But it would be for the same reason as I might challenge, again*

[9] Empanelment is the process where each legal team asks questions of prospective jurors and selects jurors. A peremptory challenge is the right to challenge a juror (and therefore exclude them from the jury) without having to give any reason for the challenge.

without knowing at all, someone who I think might not have English language skills. (LAW3)

It is about an individual's educational background. Not necessarily literacy skills but rather cognitive understanding. There should not be barriers to communication if they have good cognitive skills but if not, then I don't think they should be permitted to serve. (DJ2)

I think, depending on the deaf person selected to be a juror, that could be really tricky. It could be more tricky to manage than it was for us today because we had pretty bilingual, well-educated deaf people that we were working with. (INT1)

However, it was clear that deaf people should not be excluded just on the basis of being deaf:

Well I would have, as a barrister, objected to anyone that I knew was profoundly deaf being on a jury that I was running. Having run this case I wouldn't be the least bit concerned now. (LAW1)

Deaf jurors and interpreters felt that the deaf jurors were able to sufficiently access the information through the interpretations, but there was still a question from the legal personnel regarding evidence that is largely audio based: some felt that the information could be conveyed, but others felt they would be more likely to challenge a deaf juror if there was a reliance on audio evidence.

Yes [access can be achieved] but how access is achieved is a more interesting question. In terms of the objective, can a deaf person make a good judgment based on the information received throughout the trial and deliberations? Yes. But how a person receives that information is varied. Any juror, deaf or hearing, needs to be attentive. As a deaf person I know that we need to remain focused on the interpreter in order to receive information. We're unable to look away from the interpreter in fear that we would miss out on information. That could be an added benefit to deliberations. This realisation was quite profound for me and it shows that deaf people can contribute due to the focus we need to give in order to receive information. (DJ1)

I think I was just more conscious of [conveying tone] because of [the judge's instructions]… I think it did make me [more aware to convey tone], because the judge had instructed it, it made me even more conscious of what I was doing in terms of my choices and how I interpret things… (INT1)

So I don't think there's ever a concern about audio-visual evidence for deaf people, except if there's a poor quality soundtrack behind it where it has to be played over and over again or enhanced. But that would be the same for all jurors.(LAW2)

I was just going to go back to the audio-visual exhibits, and the nuances and things like that. There really is so much in that. Like let's take an interview from an accused where things are said in a particular way, the accused might be being dubious about something or might say something very hesitantly or whatever it is. The jury may well get a transcript of that evidence, and they're told that that's and told [unclear]. But the interview itself, the video is the exhibit, but unfortunately the deaf person whilst they can have - they may be able to read that transcript, they may be able to have an interpreter. They can't, I would have thought, pick up the nuances of the replies. (LAW3)

It was also commented on by the prosecution lawyers that the ability to watch counsel when they are doing their closing means that jurors pick up on non-verbal information, which a deaf juror might miss out on if they are watching the interpreter. However, they suggested that this could be resolved if the interpreters could move around the court room, and this was also suggested by one of the deaf jurors.

So if we take the example of closing addresses. Well I like to think that when I did my closing address, there were things that were non-verbal, which were going on, which might have given the jury - which might persuade the jury one way or another. That's one thing that the deaf jurors aren't getting, because they're having to spend 100 per cent of their time looking at the interpreter. (LAW2)

I think all of the lawyers made that observation… But see [X]'s final address, he was showing exhibits, he was turning and pointing to the accused in the dock. Look at this young man and this accused, [X] tended to move a bit more than [Y] did, and the point is well made. If the jurors, the deaf jurors had of been looking there, they could have taken some of that in as well as having the words interpreted to them… That they couldn't give their undivided attention to the bar table. Yeah they're looking at the judge, yeah they're looking at the witnesses, but I made in the very beginning, a note about well could the interpreters be a little bit mobile in some way. [LAW2]

> *I'd like to see some flexibility around the interpreters positioning i.e., standing beside the barristers while they deliver their summations… My preference would be for the interpreters to move around the courtroom throughout the trial. It would give me more information about who was speaking… I know interpreters moving around the courtroom is not feasible but I think being positioned in the centre of the courtroom would help. That way I would have sightlines to the barristers as well. It was awkward sitting the way we were and I had limited sightlines to speakers. I think the interpreters being centrally located in the courtroom, at a distance from the jurors, would give us better sightlines to all speakers. That would be my preference.* (DJ2)

Participants were united in their observations about the positioning of the interpreters in the courtroom. Even without prior experience communicating with deaf people, the non-deaf participants concluded that poor sightlines to the accused, witnesses and counsel, would impact a deaf juror's ability to make their own assessment about communication styles and affect and that 'turning heads' would be laborious. One of the deaf jurors indicated that following who was talking in this trial was manageable in this instance as it was a short trial, but held concerns for a longer trial.

> *During the proceedings there was generally a good line of sight between interpreters and witnesses however there was a need to turn heads to see other speakers e.g., counsel*. (DJ1)

> *When it came to the summing up at the end and that was the one situation where we needed to stay where we were, near the witness box, which was not the ideal location because that was not where the summing up was happening. (Int2)*

The experience of all courtroom participants supports our previous research findings, in that the pre-trial preparation led by the judge is integral to the effective running of a case with a deaf juror and sign language interpreters. An explanation of the interpreting process and the role of the interpreters allayed any doubts and put the participants at ease.

> *The hearing jurors were clear on our role because of the judges instructions… I think they took the judge's instructions as okay they're [the interpreters] going to be confidential, they're not going to say anything, they're not going to take part in this decision…* (INT1)

There was some discrepancy about the amount and type of pre-trial preparation material or evidence to be shared with interpreters. Interpreters and other participants acknowledged that information like names (accused, witnesses, counsel), maps, indictment, drug names etc should be made accessible to the interpreters. However, counsel felt that pre-trial briefings could lead to perceived and actual advantage, which could skew the results.

> *It would've been helpful to have a copy of] the indictment.* (INT1)

> *And maps and anything physical that we need to see..* (INT2)

> *We had that very big difference of opinion between lawyers and the Legal Aid office and the academics… who saw in an ideal world [the interpreters] would be briefed with everything. That to us was quite a - not horrific idea but it was quite an out there idea, because no one else is. It leads to issues about well, would the deaf juror then be possibly at an advantage or be exposed to information that the hearing jurors didn't. By virtue of the interpreter having been exposed to all of the concepts of the trial and the evidence… Or would it purely assist to bring the deaf juror to the same level as the hearing. I mean I don't know, but it's an anathema to lawyers to think that a group or someone has this head start or has this access to more information, that other people don't. So it's separating those worries from the idea that actually it's just to assist in the communication process*. (LAW3)

4.2 Deliberation Issues

In terms of deliberation issues, this section will address three; deaf juror's participation, interpreters as active participants and whether the hearing jurors were comfortable with the deaf juror and interpreters.

The hearing jurors felt confident with the interpreting 'accuracy' as the deaf juror was engaging and contributing to the deliberation with the same information as everyone else. In fact, several commented on his attention to detail.

> *I thought [DJ1] had greater attention to detail probably than most of us*. (HJ1)

As evidenced by the number of turns (see Hale, et al, 2017), the deaf participant was a main contributor to the deliberation. His level of effective participation was also supported in post-trial interviews by all involved.

> *In the end I think, for me, when we came to deliberate, Alex was so specific of what he heard, but he didn't hear anything. It was what was interpreted to him. So everything that had got interpreted was spot on. (HJ7)*

One of the main research questions in this project was to address whether the interpreters were active participants. Overwhelmingly, non-deaf jurors reported that they did not sense interpreters' engagement in the process and were completely unaware of any opinions or observations held by the interpreters about the case.

> *I was surprised, it was just so easy and even after just one day, you're so comfortable with the people and the interpreters that you start looking at the people rather than the interpreters and I was surprised how well it worked and how easy it was … It was so natural.* (HJ1)

In the analysis of turn taking, one interpreter held a turn with the purpose of reminding the non-deaf jurors to speak one at a time. This came early in the deliberation process and the chair took responsibility for any further reminders.

> *One of the interpreters did interrupt. She had to because it was clear that there was more than person speaking at a time. Then one woman [the chair] said, "please, one person at a time".* (DJ1)

> *We tried to just see how that would go at first and it didn't go. Everybody had an opinion and everybody wanted to say something and… [INT2] actually said, "I'm sorry foreperson, please can you make one person speak at a time".* (INT1)

For the non-deaf jurors, the mock-trial was their first interaction with a deaf person. Several indicated initial fascination with sign language and the interpreting process, but it was short lived and they were quickly put at ease. There was general agreement that despite communication being mediated through interpreters, the interpreters were 'forgotten' and felt that were communicating directly with the deaf juror.

> *Whenever [DJ1] put his hand out to say something they all stopped and looked at him… Like they got into this habit of knowing when he wanted to say something and they would just stop and look at him.* (INT1)

Although the deaf juror did acknowledge that he felt it was harder for him to participate:

> *They let me participate although every time I wanted to say something I needed to raise my hand. I guess that's cultural. Every one else can speak up and talk over one another, whereas I needed to raise my hand so that they knew I wanted to say something. I had to be assertive in that sense… [so] I started to use my voice to interject, to get their attention, which helped with turn taking* (DJ1)

But he still felt that he had an advantage:

> *I actually think I was advantaged because I was the only deaf person there. They seemed to listen to me more. I mean I had a lot to say. I wanted to comment and I was encouraged to do so. For me it was good. Maybe because the interpreters were there I tended to dominate.* (DJ1)

5. Should deaf people be able to serve as jurors? Perceptions of stakeholders

Here we present a summary of the discussion of the issues that were presented in Table 1, which were raised in the focus groups and based on preliminary analyses of the trial and deliberation data.

5.1 Preconceptions about deaf people/jurors

There were numerous issues raised in the sessions including discussion about the perception of hearing people that deaf people cannot communicate as effectively as hearing people and how that would impact on the work of a jury. While the first and second stages of research dispelled that perception, its existence in a courtroom setting is damaging to the process. Both the participants and the stakeholder groups were comfortable with the fact that perceptions can be negated in this setting through education and demonstration prior to the trial commencing.

5.2 Interpreters' role

Similarly, there was discussion around the process of interpreting and the qualifications and ability of Auslan interpreters. A misconception was that the role of the interpreter was to interpret every single word faithfully rather than to interpret the meaning of the evidence accurately. Again, education and demonstration prior to commencement of the trial can dissolve these sorts of issues.

5.3 Logistical challenges

The stakeholder groups had no difficulty with the physical layout of the courtroom and the importance of establishing site-lines between the deaf juror(s) and the witness and the

advocates particularly during their opening and closing submissions. It was accepted that Auslan interpreters may have to move to different positions during different parts of the trial to establish appropriate site-lines that make the process of communication more effective for deaf jurors.

5.4 Impact of interpreter in jury room

Interestingly, although the deaf stakeholder group confirmed that in principle deaf citizens should have the right to perform their civic duty and serve as jurors, they expressed concern about the necessary qualifications and experience that interpreters would need to have in order to effectively manage the deliberations. They agreed that the evidence from the mock-trial demonstrated the capacity for interpreters to accurately convey information, but pointed out that the most experienced legal interpreters would be ideal in this context, and they might not always be available. They debated whether deaf jurors should be able to select their preferred interpreters (as this would mean higher likelihood of comprehension), and how this might impact on the integrity of the deliberation or the ability of the interpreter to remain completely neutral.

Both the legal and deaf stakeholder groups were comfortable with the data and analysis of the impact of the deaf juror and the interpreters in the jury room and acknowledged that the deaf juror grasped the evidence in a way that led to constructive deliberations in the jury room. However, another concern raised by the stakeholders was the ability of the deaf juror(s) to engage in the social aspects of jury duty that contribute to building trust between jurors. Stakeholders were of the view that juries build trust among their membership that plays out in their deliberations. They argued that trust is built through all of the interactions experienced by jurors including the social elements of jury service such as in meal and coffee breaks. The stakeholders were concerned that if the deaf juror were left alone without the interpreters, who need their break, they would miss some of the important social and trust building opportunities afforded members of a jury.

5.5 Problems with oral/recorded evidence

Another issue raised discussed in the stakeholder groups was the issue of oral evidence, as found commonly in criminal trials involving phone tapping and other audio recordings of

conversations. The legal stakeholders were largely lawyers, many of whom are involved in the conduct of criminal trials. Their concern was that such evidence often is not clear, given the nature of how it is often collected and the difficulty an Auslan interpreter would have in interpreting muffled conversation.

They also had concerns about the transmission of non-verbal communication that simultaneously occurs with the verbal evidence tendered in court. Concern was raised that non-verbal communication is very important as it influences the assessments of the credibility of the witness and therefore, the weight of their evidence, and that such non-verbal elements could not be communicated via Auslan interpretation. While an explanation of how an Auslan interpreter can convey such non-verbal language was discussed, the legal stakeholder participants were not entirely convinced of the ability of Auslan interpreters to successfully convey such meaning to the language being used in court. As before, education and demonstration prior to proceedings commencing would assist in this misconception.

The above issues led the legal stakeholders to the conclusion that deaf people should not be members of a jury in complex trials. Some stakeholders went further and stated that because of the frequent use of oral evidence in modern day trials that deaf people could not properly assess such evidence and should be excluded on the basis of ensuring the accused receives a fair trial. Discussion reverted to the fact that hearing jurors suffer the same problem in relation to non-verbal nuances in communication that can be interpreted differently or missed completely and can also fail to hear muffled or ambiguous oral evidence. While acknowledging this fact, the legal stakeholders made the point that unlike hearing jurors, deaf jurors do not hear "primary evidence", that is, the evidence tendered directly from the mouth of the witness (whether via witness testimony or via a phone tap for example).[10]

5.6 Complex vs. simple trial

The issue of primary versus secondary evidence occupied some time in the legal stakeholder focus group and created doubts about the participation of deaf people as members of juries for any trial. While not all of the legal stakeholder participants were of the same view in relation to this issue, discussion did not take account of the fact that where a witness does not

[10] The term, "primary evidence" was used by a member of the judiciary attending the legal stakeholders focus group. The term is generally used to describe for example, the tendering as evidence of the original of a document as opposed to a copy and in this case, the evidence given directly by a witness to the court as opposed to the evidence interpreted to the court via an Auslan interpreter. The authors believe that the participant's use of the term in the case of evidence led by a witness in court illustrates the veracity of the two types of evidence.

speak English and foreign language interpretation is used in court, jurors who speak the foreign language receive primary evidence while jurors that do not speak the foreign language and rely on the interpretation into English, receive secondary evidence. This is the exact situation that caused a mistrial in the Parramatta District Court some years ago when two members of the jury in a criminal trial spoke the foreign language of the witness and alerted the presiding judicial officer to the fact that the interpreter was not accurately interpreting the evidence.[11] The legal stakeholder focus group did not resolve this issue – and they were not really required to. However, it is probably inevitable in our multicultural and diverse society that not all jurors will receive solely or jointly the primary evidence in any given trial and that it comes down to the competence, experience and qualifications of spoken language and Auslan interpreters to insure the accuracy of the interpretation.

In sum, much of the discussion in the legal stakeholder group returned to the premise that, even if they agreed with the principle that deaf people should be able to serve as jurors as part of their civic duty, the rights of the defendant and the integrity of the court are more important. As noted by one group participant:

> *I think it becomes less about the capacity of the juror - of the deaf juror to serve as a juror and their capacity to understand what's going on and comprehend and able to keep up but more about the impact on the proceedings and the right of the person that is standing trial and the impact on the legal profession and all the other players rather than the juror… I mean, the juror is there to perform a civic duty. They're not there to get service for themselves, you know? So I think it becomes more about the more general admin issues, like how do we actually facilitate this in a way that's going to be practical, that's not going to impact on the proceedings themselves. It's always going to have an impact.*

6. Conclusion

Our findings support the work of Chavez (2012) and Chavez et al (2011) with respect to non-English speaking jurors who access courtroom discourse and jury deliberations through interpreters, in that the presence of a deaf juror and his interpreters did not undermine the deliberations, and that the inclusion of a deaf juror did not destabilize the integrity of the jury deliberations.

[11] This incident was mentioned by the Legal Aid Solicitors and the Court Officer in interviews after the mock trial in 2014.

As highlighted earlier, the emphasis of this current study was to move past perception and instead explore the real impact, if any, of deaf people on juries. Although the post mock-trial interviews revealed positive attitudes towards deaf people serving as jurors, nevertheless, the issue of perceptions about deaf people and interpreters still coloured discussion in the stakeholder focus groups. The two cases, one actual and one simulated, involving deaf jurors in the USA and Australia indicated that in the experience of all participants, including: judges, legal professionals, jurors, and, administrators; deaf jurors can participate in and do not appear to negatively impact the processes of empanelment, the trial or deliberations.

There appear to be some reservations about the cognitive and language skills of prospective deaf jurors, the logistics in engaging and arranging interpreters in court, and quality or standard of interpreters. Notwithstanding this, the standard of interpreting in the mock trial was deemed to be high by all jurors, given the quality and effectiveness of the deaf juror's contributions. Most importantly, the impact of the deaf juror and the Auslan interpreter in the court and jury rooms seemed to be minimal and juror engagement in jury deliberations was apparent.

There are concerns by some lawyers involved in this research about the accuracy of the evidence when interpreted via Auslan. The notion of deaf jurors not having the benefit of "primary evidence" concerned some and was a contributing factor to some lawyers stating they would use their peremptory challenges during jury selection to dismiss a deaf person from serving on a jury with one advocate stating in the post mock trial interview, "… but the problem you've got with … any trial is just that so many different things can go wrong. By introducing a deaf juror, you increase the potential for that".

The key observations from the research include:

Observation 1. In principle deaf people should be able to serve as jurors;

Observation 2. Right to fair trial should override right to do civic duty as a juror; and

Observation 3. Standards, quality and logistics of interpreting would be the primary potential barrier.

Therefore our specific recommendations resulting from this project are as follows:

Recommendation 1. Amendments should be made to the respective legislation governing the composition of juries in each Australian state, and in other countries, to allow deaf people to serve as jurors using the services of qualified and accredited sign language interpreters;

Recommendation 2. Specific to Australia: recommendations already made by the NSW Law Reform Commission Report No.114 of 2006 and the decision of the UN Committee on the Rights of People with Disabilities in April 2016 be implemented; and,

Recommendation 3. Courtrooms housing juries should be modified to logistically allow deaf people to serve as jurors.

We are pleased to note that as a consequence of this research, there has been a shift in the international justice landscape, in that: a Member of the South Australian (SA) State Parliament submitted a Bill in 2017 to revise the SA Juries Act to allow deaf people to serve as jurors (but at time of writing it had not yet been considered yet); the Australian Capital Territory State government changed its legislation in 2018 to allow deaf people to serve as jurors; a deaf man was selected onto a jury for the first time in Ireland in December 2017 (Carolan, 2017); and the office of a Welsh Member of Parliament in the UK in 2017 made enquiries of the research team about findings in order to consider a proposal for legislative change.

This research is the final step in a decade-long journey that establishes that deaf people can serve as jurors, thereby paving the way for the elimination of a discriminatory practice that excludes deaf citizens from participating in the administration of justice. The various stages of research prove that deaf people can comprehend legal discourse found in the judicial system and that their presence in the court and jury deliberation rooms is not detrimental to the delivery of a fair trial for the accused. There are clearly some substantive and logistical hurdles to overcome. However, much of this can be achieved by the introduction of educative programs and system changes. The real issue is whether the political will exists to ensure proportionally representative juries and systematically treat deaf citizens the same as their hearing counterparts and give them the right to sit on a jury in Australia and in other parts of the world.

Acknowledgments

The funding for this study was provided by the Australian Research Council Linkage Program 2012, Round 2 (LP120200261) in partnership with the Australian Sign Language Interpreters Association, the Deaf Society of NSW and Deaf Australia, for the project entitled *Participation in the Administration of Justice: Deaf citizens as Jurors.* The project obtained Ethics approval from the University of New South Wales Research Human Ethics Committee.

References

Abramson, J. (2003). *We the jury: The jury system and the ideal of democracy* (3rd ed.). Cambridge, MA: Harvard University Press.

Babcock, B. A. (1993). A place in the palladium: Women's rights and jury service. *University of Cincinnati Law Review, 61*(4): 1139-1180.

Bauman, H. D. L. & Murray, J. M. (2009). Reframing: From hearing loss to Deaf Gain. *Deaf Studies Digital Journal*, 1. Available: http://dsdj.gallaudet.edu/assets/section/section2/entry19/DSDJ_entry19.pdf

Benson, J. (2018). Stricken: The need for positive statutory law to prevent discriminatory peremptory strikes of disabled jurors. *Cornell Law Review, 437*: 438-464.

Diamond, S. S., & Rose, M. R. (2018). The contemporary American jury. *Annual Review of Law and Social Science, 14:* 13.1-13.20.

Carolan, M. (2017). *'Historic' day as first deaf juror serves on jury*. Available: https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/historic-day-as-first-deaf-juror-serves-on-jury-1.3331199. Accessed: 20 December 2017.

Chávez, E. (2008). New Mexico's success with non-English speaking jurors. *Journal of Court Innovation, 1*(2): 303-327.

Chavez, H. L. (2012). *Examining the effects of the inclusion of non-English speaking jurors on jury verdicts and juror experiences*. Unpublished doctoral dissertation: University of Nevada, Reno.

Chavez, H. L., Kemmelmeier, M., Richardson, J. T., & Vargas, J. H. (2011). The bilingual jury: The effect of non-English speaking jurors on jury deliberation and jury verdicts. Paper presented at the American Psychology-Law Society/Fourth International Congress on Psychology and Law, Miami, FL, March 2011.

Emery, S. D. (2006). *Citizenship and the Deaf community*. Unpublished doctoral dissertation, University of Central Lancashire.

Emery, S. (2009). In space no one can see you waving your hands: Making citizenship meaningful to Deaf Worlds. *Citizenship Studies, 13*(1): 31-44.

Farrell, M. (2011). Allowing deaf people to serve as jurors: An Irish perspective. *Discrimination Law Association Briefings 42*, 30-31.

Gastil, J. & Weiser, P. J. (2006). Jury Service as an Invitation to Citizenship: Assessing the civic value of institutionalized deliberation. *The Policy Studies Journal, 34*(4), 605-627.

Guzy N. (2012). Citizen participation in juries. In W. R. Miller (Ed.), *The social history of crime and punishment in America* (pp.256-257). Los Angeles, CA: Sage.

Hale, S., San Roque, M., Spencer, D. & Napier, J. (2017). Deaf citizens as jurors in Australian courts: Participating via professional interpreters. *International Journal of Speech, Language & the Law*, *24*(2), 151-176.

Isin, E. F., & Turner, B. S. (2007). Investigating citizenship: An agenda for citizenship studies. *Citizenship Studies, 11*(1), 5-17.

Mather, S., & Mather, R. (2003). Court interpreting for signing jurors: Just transmitting or interpreting? In *Language and the law in deaf communities,* ed. C. Lucas, 60 - 81. Washington, DC: Gallaudet University Press.

Napier, J. (2013). Legal interpreting, deaf people and jury service: A happy union? In *Newsli: Magazine of the Association of Sign Language Interpreters of the UK* 6 (December Issue).

Napier, J. & McEwin, A. (2015). Do deaf people have the right to serve as jurors in Australia? *Alternative Law Journal* 40(1): 23-27.

Napier, J., & Russell, D. (submitted). The presence and impact of interpreters in court: An ethnographic sociolinguistic case study of sign language interpreting for a deaf juror.

Napier, J., & Spencer, D. (2007a). A sign of the times: Deaf jurors and the potential for pioneering law reform. *Reform, 90*: 35-37.

Napier, J., & Spencer D. (2007b). *Deaf Jurors' Access to Court Proceedings via Sign Language Interpreting: An Investigation*. Sydney: NSW Law Reform Commission, Research Report No.14, March 2007.

Napier, J. & Spencer, D. (2008). Guilty or not guilty? An investigation of deaf jurors' access to court proceedings via sign language interpreting. In *Interpreting in Legal Settings*, eds. D. Russell & S. Hale, 71-122. Washington DC: Gallaudet University Press.

Napier, J., & Spencer, D. (2017). Jury instructions: Comparing hearing and deaf jurors' comprehension via direct or interpreter-mediated communication. *International Journal of Speech, Language & the Law*, *24*(1). DOI: https://doi.org/10.1558/ijsll.30878

Napier, J., Russell, D., Hale, S., Spencer, D. & San Roque, M. (in press). Evidence-based training for legal interpreters to work with deaf jurors. In C. Monikowski, E. A Winston & R. G. Lee (Eds.), *Proceedings of the Conference of Interpreter Trainers, Salt Lake City, October 2018*. CIT Press.

Rose, M. R., Casarez, R. S., & Gutierrez, C. (2018). Jury pool underrepresentation in the modern era: Evidence from federal courts. *Journal of Empirical Legal Studies, 15*: 378–405.

Russell, D. (2002). *Interpreting in legal contexts: Consecutive and simultaneous interpretation*. Burtonsville, MD: Sign Media.

Silas, D. (1993). Deaf jurors. *New Law Journal* (896).

Spencer, D., Napier, J., San Roque, M., & Hale, S. (2017a). Justice is blind as long as it isn't deaf: Excluding deaf people from jury duty - an Australian human rights breach. *Australian Journal of Human Rights*, *23*(3): 332-350.

Spencer, D., San Roque, M., Hale, S., & Napier, J. (2017b). The High Court considers participation of deaf people in jury duty. *Law Society Journal, 33*(May), 80-81.