

# Do Deaf people have the right to serve as jurors in Australia?

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Different sign languages are used by deaf people in every country throughout the world.<sup>1</sup> Deaf sign language users are members of a linguistic and cultural minority group and identify with one another on the basis of using the natural signed language of their country. Deaf people are regarded as belonging to a community, with their own culturally accepted norms of behaviour based on shared experience.<sup>2</sup> The community of deaf signers in Australia is estimated at 6500,<sup>3</sup> and the sign language used is Auslan (Australian Sign Language).<sup>4</sup>

Auslan interpreters are required to obtain accreditation to practice from the National Accreditation Authority for Translators and Interpreters ('NAATI') at either Paraprofessional or Professional level.<sup>5</sup> Generally, interpreters for deaf sign language users access in the justice system should have NAATI Professional level accreditation, and ideally should have undergone specific legal interpreting training.

Although deaf signers are considered to be members of a linguistic and cultural minority group, the accommodations made to meet their linguistic needs are met through legal provisions under disability discrimination law. These provisions ensure that deaf people can access and *negotiate* the justice system.<sup>6</sup> Given the accommodations that can be made for deaf people to get access to, and participate in, justice, then the question has been asked why deaf people are not permitted to serve as jurors in Australia and also in other countries.

In their role of fact-finder, it is imperative that jurors comprehend the content of courtroom discourse. Various forensic linguistic research studies on jury comprehension have revealed that jurors generally find it difficult to comprehend courtroom proceedings and jury instructions even when jurors are accessing information directly in English.<sup>7</sup> The question then is if non-deaf ('hearing') people find it difficult enough to understand what is going on in court in order to make informed decisions as a juror, then can deaf people possibly understand enough when accessing information via a sign language interpreter?

This article reviews the role of deaf jurors in other jurisdictions such as the United States ('US') in order to contextualise the current situation in Australia, and to discuss research that has been conducted in Australia from linguistic and sociological, rather than legal, perspectives. The goal of this article is to bring this issue to the attention of legal practitioners and law reform experts throughout Australia, with a view to ensuring that all stakeholders are able to be informed of the issue and contribute to the debate.

## Deaf people as jurors

The majority of countries that adopt an adversarial court system do not permit deaf people to serve as jurors. In Australia, the relevant legislation generally exempts deaf people from serving as jurors if they are unable, because of sickness, infirmity or disability, to discharge the duties of juror. Technically none of these reasons applies to deaf people, as they can read and understand English, and if a sign language interpreter is present, they would be able to access the *language of the court* and discharge their duties as a juror. However, jurors do not just need access to the proceedings in a courtroom, they need to make decisions about a person's guilt in committing a crime based on the evidence presented by the lawyers, and need to be able to participate in jury discussions about whether someone is guilty or not. This means that it is essential that a deaf juror has full access to the court proceedings. In Ireland, deaf people can no longer be automatically exempted from acting as a juror, instead permission is granted on a case-by-case basis, but to date empanelment of deaf persons on a jury has been challenged by defence lawyers.<sup>8</sup>

In New Zealand, New Zealand Sign Language ('NZSL') is one of New Zealand's three official languages and therefore the courts are obliged to provide sign language interpreters when required. Under the *New Zealand Juries Act 1981*, deaf or blind persons may be jurors. In 2005, the first deaf juror was empaneled on a jury and was elected as foreman and had NZSL interpreters throughout the trial and jury deliberation.<sup>9</sup> Under section 16AA, a judge may exercise his or her discretion to reject a blind or deaf juror. The authors are not aware of whether any figures are kept on the frequency of, or the reasons when, this exclusionary discretion is exercised; and as far as we know the 2005 case is the only instance where a New Zealand deaf sign language user has successfully participated as a juror with interpreters.

## History of deaf jurors in the US

In the US, deaf people have been serving as jurors since 1979. Cases such as *Dempsey* and *Guzman*<sup>10</sup> have found very few impediments to allowing signing deaf people to serve as jurors, recognising the importance of civic responsibility in being called and

serving as a juror, and looking beyond the physical characteristic of deafness as an impediment. The US courts have further recognised that sign language interpreters should remain neutral in jury discussions; interpreters have been required to swear an oath to maintain confidentiality of jury proceedings, as any juror would be required to do so.

Overall, the US has taken a proactive approach to the inclusion of deaf people as jurors. As the judge in the landmark case of *Guzman* stated:

The Deaf are not poor creatures to be patronized by us, congratulated on their individual efforts to overcome their handicaps and summarily brushed aside ... the Deaf are part of our community and must be considered, evaluated and finally either accepted or rejected for service as individuals just as any other citizen. The grounds for exempting the Deaf from jury service have vanished.<sup>11</sup>

Due to the constitutional and moral imperative that exists in the US not to exclude unreasonably a citizen with a disability from an activity that is the right and responsibility of all other citizens, various states have established guidelines for the provision of sign language interpreters for deaf jurors, for example, New Jersey. It can be seen therefore, that the US has come a long way in ensuring that deaf people have the right to perform their civic duty and participate in the administration of justice as jurors.

After legal challenges and enquiries in the UK and Ireland, it has been established that Deaf people have the capacity to make decisions as jurors, and Deaf people can sufficiently comprehend courtroom discourse and jury deliberations through a sign language interpreter.<sup>12</sup> The main concern has been that interpreters would inappropriately participate in confidential jury deliberations.<sup>13</sup>

However, upon qualification and when registering to practice, sign language interpreters in any country are expected to adhere to a Codes of Ethics, maintain impartiality and confidentiality, interpret faithfully and accurately, and uphold a professional distance.<sup>14</sup> Thus if sign language interpreters are not actually participants in the deliberation, and are bound to adhere to principles of confidentiality and impartiality, then there is no legitimate reason to exclude deaf people from jury service if the sign language interpreters uphold to maintain the confidentiality of the jury deliberation. Yet, the British and Irish advances have stalled on the basis of the long-held common law principle that there cannot be a non-juror *stranger* (an interpreter) as a 13th person in the jury room. This situation has also occurred in Australia.

#### *Deaf jurors in Australia*

To date, deaf Auslan users have not been able to serve as jurors in Australia. The legislation in each state typically exempts deaf people from jury service for different reasons. One recent situation of Drisana Levitzke-Gray in the Perth District Court of Western Australia (January 2014), however, highlighted that with the provision of appropriately qualified sign language interpreters a deaf sign language user can participate in the process of jury selection and voir dire. In Levitzke-Gray's situation, she remained on the selection panel until the final group of 40, but was not empanelled on to the jury. Her experience is the first of its kind in Australia, and made the news in many forms of TV and newspaper media. The fact that Levitzke-Gray got this far in the jury selection process reveals a potential willingness for consideration that the provision of an interpreter should not be a problematic accommodation for deaf sign language users in order to enable them to serve as jurors.

Yet in contrast, there are currently two different cases running in Australia, brought by deaf Auslan users, in asserting their right to serve as a juror. Alastair McEwin, one of the authors of this article, is a complainant in one of these cases. The reason that he decided to raise his complaint through the United Nations was because all domestic attempts to remedy the discriminatory practice of not allowing deaf people in NSW to serve as jurors had not produced any positive changes in NSW government policy. An attempt by the Australian Human Rights Commission to conciliate the matter between McEwin and the NSW government was not successful. McEwin is now seeking a remedy through a Communication to the United Nations, under the Optional Protocol of the UN Convention on the Rights of Persons with Disabilities ('CRPD'), which allows for allegations of breaches of the CRPD to be considered by the UN. McEwin has brought the Communication on behalf of himself and all deaf people in NSW.<sup>15</sup> In addition to other grounds, the Communication alleges that Australia has violated article 29 of the CRPD, which states that ratifying countries are to guarantee:

persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others ... [and to] promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs ...

It is argued that jury service is included in 'public affairs'.

The other case involves Gaye Lyons who accused the State of Queensland of discrimination as she was prevented as serving as a juror on the basis of her deafness and the fact that she had requested an Auslan interpreter. Jemina Napier, co-author of this article, was an expert witness in Lyons' case heard in the Queensland Civil and Administrative Tribunal ('QCAT') based on her research in this area. The Member of the QCAT who heard the case upheld the decision of the Deputy Registrar that Lyons was ineligible to serve as a juror.<sup>16</sup> Lyons has since appealed the ruling to the Appeal Panel of QCAT, and a hearing for the appeal took place in August 2014. The appeal was unsuccessful so now Lyons and her legal team plan to take her case to the UN.<sup>17</sup>

However, the debate on whether to permit deaf people to serve as jurors began in Australia long before the first of the cases began in 2012. Acting at the request of the Attorney General, the NSW Law Reform Commission ('NSWLRC') established a reference group in 2003 to investigate whether deaf and blind persons ought to be able to serve on juries in Criminal Courts.

In its final report the NSWLRC recommended to the NSW Attorney General that there was no reason that deaf people could not serve as jurors on the basis of consultation and a commissioned research study.<sup>18</sup> Yet the decision was made not to accept the recommendation based on continued concerns about having an interpreter as a 13th person in the jury deliberation room.

There is actually no evidence of the impact an interpreter may have in a jury room on the sanctity of jury deliberations, either negatively or positively. The only empirical research on deaf jurors to date has been conducted in Australia, and has been an on-

going research agenda for ten years since the NSWLRC commissioned the first study.

## Research on deaf jurors and interpreting

Four different research projects have been conducted or are being conducted in Australia to explore the issue of deaf jury service from linguistic and sociological perspectives, to provide evidence to balance against the legal arguments.

In 2005, in order to inform their inquiry and subsequent report, the NSWLRC jointly funded a pilot research study with Macquarie University to examine whether deaf sign language users could sufficiently comprehend the content of jury instructions in order to function as jurors. That initial pilot project triggered the subsequent research projects. The following research questions have driven the projects:

Is there a difference between deaf and hearing jurors' levels of understanding of a judge's summation at the end of a court case?

What are the perceptions of legal professionals and sign language interpreters about the feasibility of deaf people serving as jurors?

Are deaf jurors disadvantaged by relying on sign language interpreters to access information in court?

What is the capacity of deaf jurors to participate in jury deliberations through sign language interpreters?

The research has focused on four key areas: (i) accuracy, (ii) comprehension, (iii) perceptions, and (iv) participation (sociolinguistic).

### *Accuracy*

The initial pilot study had two components: (1) to analyse the 'translatability' of legal concepts in a judge's summation taken from a real trial; and (2) to examine six hearing and six deaf jurors' level of comprehension of the same summation in English or the interpretation into Australian Sign Language (Auslan) respectively.

In relation to the translatability of legal concepts, two extracts from an authentic judge's summation (selected by the NSWLRC) were read out in spoken English and interpreted into Auslan, under controlled conditions. The interpretation was video-recorded so that assessment of the accuracy of the translation of legal concepts could be carried out by the linguists and legal experts involved in the study; and also so that the interpretation could be used as part of the comprehension test.

The results of the legal concept content-equivalence analysis of the interpretation showed that it was 87.5 per cent accurate, and therefore it was determined that:

[g]iven that candidates who sit the NAATI Interpreter Level test are required to achieve a pass mark of 70 per cent for successful accreditation and to be considered safe to practice, 87.5 per cent accuracy is more than acceptable.<sup>19</sup>

Thus it was recommended that '[l]egal concepts are translatable from English into Auslan, but interpreters need to be adequately skilled so as not to skew the legal definitions or to bias the text with subtle shifts in the interpretation'.<sup>20</sup>

### *Comprehension*

The level of understanding of the hearing and deaf jurors was assessed through the administration of a comprehension test, which involved participants listening to, or watching the Auslan interpretation of, the judge's summation extracts, and then answering twelve open, closed and multiple-choice questions about the content of the summation (in the same language of their access to the summation, ie hearing jurors were asked questions and responded in English, and deaf jurors were asked and responded in Auslan). The participants represented a demographic spread across age, gender, educational background and employment status.

Results of the comprehension test 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. When interviewed post-test about their experience, and their thoughts about serving as a juror, it was found that:

[a]lthough anecdotally it seems that members of the general public attempt to avoid jury duty, it is worthy of note that the deaf people involved in this study expressed the desire to carry out their civic duty, and participate in the judicial system on an equal footing with hearing people.<sup>21</sup>

To ensure greater reliability of the results, the second component of the pilot study (ie, the comprehension test) was then replicated with a larger number of participants in various cities throughout Australia (30 hearing, 30 deaf), and so any statistical significance could be examined.

The results confirmed the findings of the pilot study in that both deaf 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, or employment.<sup>22</sup> Any significant difference tended to be influenced by educational background, in that the better educated they were, the more they understood; which would be expected of any lay-person serving as a juror.

Although the NSWLRC made a recommendation to the NSW Department of Attorney General and Justice that deaf Auslan users should not be excluded from serving as jurors on the basis of the pilot study and comprehension test results, deaf people in NSW still cannot serve as jurors in criminal trials. Even though the research provided evidence that deaf people can sufficiently comprehend and access courtroom discourse in order to perform their duty as juror, deaf people in NSW are still not permitted to serve as jurors.

### *Perceptions*

In order to follow up the concern about the feasibility of deaf people serving as jurors, the next study was an international study designed to collect quantitative and qualitative data from legal professionals and sign language interpreters with experience of

working in the court system. It sought to ascertain their perceptions of the impact of having a deaf person as a juror on the outcome of a trial, and the feasibility of providing deaf jurors with access to courtroom discourse.<sup>23</sup> Perceptions were gleaned through an online survey that included a range of open and closed questions, and using Likert scales for agreement with factual, attitudinal and behavioural statements in relation to whether deaf people should be excluded from jury service and the role of legal interpreters in meeting the needs of deaf jurors. Survey responses were received from 179 sign language interpreters and 97 legal professional survey respondents, predominantly from English-speaking countries: Australia, Canada, the US, UK, Ireland, South Africa and New Zealand.

In sum, the survey results revealed slightly different perceptions of sign language interpreters and legal personnel based on their experience. Respondents from the US were overwhelmingly more positive as deaf people have been permitted to serve as jurors for over 30 years in various states. 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.

The sign language interpreter respondents were generally more supportive of the idea of deaf people serving as jurors, but obviously are more likely to have more of a bias towards supporting this notion based on their affiliation with the deaf community. Legal professionals were generally less supportive, but would not necessarily exclude deaf people from jury service based on their deafness. One of the main concerns still appeared to be the notion of the interpreter as the 13th person in the jury room, as illustrated by one legal professional's response to the question as to whether they would challenge a deaf juror during the empanelment process, '[I would challenge them on the basis that] there needs to be an interpreter in the jury room for deliberations'.

Follow-up, semi-structured interviews were also conducted with some survey respondents in the United Kingdom, New Zealand, the US and Australia that had agreed to be contacted when they submitted their survey, and other key stakeholders that were contacted about the study.

Interviews were conducted with three American Sign Language interpreters who have worked with deaf jurors, two hearing lawyers who have also worked previously as sign language interpreters, one deaf lawyer, two hearing lawyers with expertise in disability discrimination, and two deaf people (one who had experience of serving as a juror, and one who appealed the decision not to allow him to serve as a juror). The lawyers interviewed all agreed that from an equity point of view, deaf people should be able to serve as jurors. The US-based hearing lawyer with prior experience of working as an interpreter with deaf jurors had no concerns about the involvement of deaf people. However, the Australian-based hearing lawyer, who had previously been a sign language interpreter, emphasised the importance of oral evidence and concerns with the variation in skills among interpreters.

The interpreters in the US with experience of interpreting for deaf jurors were confident that if protocols are well established, deaf people can effectively participate as jurors. They acknowledged that it can be challenging, but no more than court interpreting generally, and that the biggest hurdle was the logistics of organising teams of interpreters to be on stand-by in case a deaf person is empanelled.

Both the deaf people interviewed felt strongly that they should be permitted to serve as jurors, as they are tax-payers and want to contribute to the administration of justice and perform their civic duty.

It can be seen that the US is leading the way in terms of allowing deaf people to serve as jurors. In Australia, the UK and Ireland at present, it appears that the rights of the victim and defendant overrule the right not to be discriminated against. This series of research projects confirms that deaf people can sufficiently comprehend the content of courtroom discourse when accessing the information through an interpreter, that the majority of legal professionals and interpreters agree that deaf people should not be excluded from jury service, and that the administration of justice is a shared responsibility.<sup>24</sup> Yet there is still disagreement about the extent of impact that the presence of a deaf juror would make on the outcome of a trial. The real sticking point is the lack of evidence for what *actually* happens in the jury deliberation room, and whether the assumption that the presence of an interpreter could impact negatively on the deliberation process is valid. Thus, more research is needed to analyse what actually happens in a jury deliberation in terms of providing legal interpreters, in order to make an informed decision about whether deaf people should be permitted to serve as jurors.

### The future for deaf jurors in Australia

In recognition of the need for further research in this area, the Australian Research Council has funded a project through the Linkage Project Scheme.<sup>25</sup> The project is a mixed-methods study, involving non-participant observations on the empanelment of deaf jurors in real cases in the US, an in-depth qualitative analytical case study of a simulation of a trial and jury deliberations with a deaf juror and interpreters, and follow-up interviews and surveys with relevant stakeholders. The goal of the study is to focus specifically on the analysis of interactions in the jury deliberation room to determine the level of impact from having an interpreter as 13th person in the jury deliberation room.

This last stage of the on-going deaf juror-interpreting research will provide the final set of evidence required to either support or refute the argument whether deaf people can serve as jurors. The outcomes of this research have the potential to pioneer law reform not only in Australia, but also in other countries such as the UK and Ireland. Law reform is possible in relation to jury service. The key is to determine whether the interpreter as 13th person in the jury room serves as a barrier to them being able to perform that right. In the US, the barrier is overcome with civil rights legislation; in Australia this barrier is still to be explored.

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