DP46 Blind or deaf jurors

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TERMS OF REFERENCE

Blind or Deaf Jurors

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:

Hon Justice Michael Adams
Associate Professor Jane Goodman-Delahunty
Hon Justice David Ipp
Hon Justice Greg James
Hon Justice David Kirby
Hon Justice Ruth McColl
Hon Gordon Samuels AC CVO QC (Commissioner in charge)
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SUBMISSIONS

The Commission invites submissions on the issues relevant to this review, including but not limited to the issues raised in this Discussion Paper.

Making a submission

There is no special form required for submissions. If it is inconvenient or impractical to make a written submission you may contact the Commission and either direct your comments to a Legal Officer over the telephone, or arrange to make your submission in person.

THE CLOSING DATE FOR SUBMISSIONS IS 30 APRIL 2004.

All submissions and enquiries should be directed to:

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Confidentiality and use of submissions

In preparing further papers on this reference, the Commission will refer to submissions made in response to this Discussion Paper. If you would like all or part of your submission to be treated as confidential, please indicate this in your submission. The Commission will respect requests for confidentiality when using submissions in later publications.

Copies of submissions made to the Commission will also normally be made available on request to other persons or organisations. Any request for a copy of a submission marked "confidential" will be determined in accordance with the *Freedom of Information Act 1989* (NSW).

Other publication formats

The Commission is committed to meeting fully its obligations under State and Commonwealth anti-discrimination legislation. These laws require all organisations to eliminate discriminatory practices which may prevent people with disabilities from having full and equal access to our services. This publication is available in alternative formats. If you have any difficulty in accessing this document please contact us.

QUESTIONS

Refer to the pages indicated below for a discussion of the questions listed.

QUESTION 1 | **See page 66**

If reasonable accommodation can be made, should blind or deaf jurors who are able to discharge the duties of a juror in the circumstances of the particular case be liable for jury service?

QUESTION 2 | **See page 67**

If blind or deaf people are required to serve on juries, how should Schedule 2 item 12 of the *Jury Act 1977* (NSW) be amended?

QUESTION 3 | **See page 67**

If blind or deaf people are required to serve on juries, should they have the option to be excused from jury duty on account of their blindness or deafness?

QUESTION 4 | **See page 67**

Should the trial judge decide whether or not a blind or deaf person is capable of discharging the duties of a juror in the circumstances of the particular case?

QUESTION 5 | **See page 68**

Ought the availability of peremptory challenges to be the subject of further review?

QUESTION 6 | **See page 68**

What technologies would blind or deaf people need effectively to discharge their duties as jurors?

QUESTION 7 | **See page 68**

What are the cost implications of the provision of the technologies identified in Question 6?

QUESTION 8 | **See page 68**

Ought Auslan interpreters to be provided for deaf jurors and, if so, under what conditions?

1. Introduction

- Background to the reference
- Jury service, citizenship and equality
- Requirement of a fair trial
- Deaf and hearing impaired
- Blind and vision impaired
- Structure of this paper
- Submissions

BACKGROUND TO THE REFERENCE

1.1 In March 2002 the Commission received a reference from the Attorney General, the Hon R J Debus MP to inquire into and report on whether people who are deaf or blind or have significant sight or hearing loss should be able to serve as jurors in New South Wales.

1.2 The Attorney General's Department's Disability Strategic Plan Internal Steering Committee had explored the issue thoroughly before a reference was given to the New South Wales Law Reform Commission for inquiry and report. The Commission established a reference group to provide assistance to the review.

1.3 In mid-2002 the Commission wrote to relevant organisations and individuals, as well as issuing a media release, calling for preliminary submissions. Fifteen preliminary submissions were received. An introductory meeting of the Division was convened in December, and substantial work on the reference commenced in 2003.

JURY SERVICE, CITIZENSHIP AND EQUALITY

1.4 The participation in juries by representatives of the community is a fundamental element of the administration of justice, and thus serves the interests of the State. Jury service, like voting, is a right and obligation of citizenship.[1] The preamble to the *Australian Citizenship Act 1948* (Cth) recognises that:

> Australian citizenship represents formal membership of the community of the Commonwealth of Australia; and Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity…

1.5 "Citizenship" is a legal relationship between the individual and the State, but it is also more than this, as hinted at in the preamble's reference to "a common bond" and the notion of unity. It has been said to "describe a sense of service to community in everyday life" and to "encompass ideals of civic life that can be seen as the public core values in a society whose people follow many different beliefs and ways of life [and] are of many different national and ethnic origins."[2] These extra-legal descriptions of citizenship

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* The Commission wishes to thank Lynn Anamourlis, of the Office of the Sheriff of NSW, for her assistance in this inquiry.

1. *Parliamentary Electorates and Elections Act 1912* (NSW) s 20, 34; *Jury Act 1977* (NSW) s 5.
2. Australian Citizenship Council, *Australian Citizenship for a New Century* (The Council, Canberra, 2000) at 6-7.

all contain the idea of connection between citizens for mutual benefit. Thus the citizen is an individual who not only has a legal status in respect of the State, but also shares in a community of such individuals.

1.6 One American commentator notes that the obligation of jury service, again like voting, "is a significant form of participation in our democratic and judicial systems; it is a badge of self-esteem, a mark of status and full citizenship".[3] Although sometimes thought of as a nuisance by those on whom the duty falls "jury service is most treasured by those citizens who have to challenge the system in order to sit in the jury box".[4] The US Supreme Court noted "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process".[5] It is conceivable that one person's "liability" for jury service is another's powerful symbol of acceptance and inclusion.

1.7 In New South Wales non-citizens are ineligible for jury duty. People who are blind or deaf, while not legislatively barred from participating in jury service are, nevertheless, prevented from so doing by policy determinations. This, it appears, is on the ground that they are ineligible under the *Jury Act 1977* (NSW) "because of … disability, to discharge the duties of a juror".[6] The view of People With Disabilities ("PWD"), a peak disability rights and advocacy organisation in this State, is that the exclusion of people who are blind or deaf from jury service amounts to a denial of citizenship.[7]

1.8 The denial of jury service to people who are blind or deaf is also an abuse of their human rights, according to PWD.[8] Prohibiting such persons from serving as jurors on the grounds of their disability is discriminatory, and contrary to notions of equality. In 1993 the United Nations adopted the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities.[9] Australia took an active role in their development and in promoting their adoption by other member countries.[10] They are not legally binding, but urge members to achieve equity in all areas of life for people

3. M A Lynch, "The Application of Equal Protection to Prospective Jurors With Disabilities: Will *Batson* Cover Disability-Based Strikes?" (1993) 57 *Albany Law Review* 289 at note 53.
4. Lynch at 297.
5. *Powers v Ohio* 499 US 400 (1991) at 407.
6. *Jury Act 1977* (NSW) s 6(b), Sch 2 item 12.
7. People With Disabilities, *Submission* at 1, 3.
8. People With Disabilities, *Submission* at 1, 3-5.
9. United Nations General Assembly resolution 48/96 of 20 December 1993 «www.un.org/documents/ga/res/48/a48r096.htm» (as at 15 December 2003).
10. Commonwealth Disability Strategy, "Fair treatment for all Australians – the Basis of Our Laws About Disability Discrimination" «www.facs.gov.au/disability/cds/fs/fs_01.htm» (as at 15 December 2003).

with disabilities. The purpose of the Rules is to ensure that all persons with disabilities:

> as members of their societies, may exercise the same rights and obligations as others. In all societies of the world there are still obstacles preventing persons with disabilities from exercising their rights and freedoms and making it difficult for them to participate fully in the activities of their societies. It is the responsibility of States to take appropriate action to remove such obstacles.[11]

1.9 The principle of equal rights implies that the needs of each and every individual be made the basis for the planning of society. Moreover, as people with disabilities achieve equal rights:

> they should also have equal obligations. As those rights are being achieved, societies should raise their expectations of persons with disabilities. As part of the process of equal opportunities, provision should be made to assist persons with disabilities to assume their full responsibility as members of society.[12]

REQUIREMENT OF A FAIR TRIAL

1.10 There is an overriding public interest in the due and proper administration of justice. Apart from defamation trials the overwhelming use of juries is in criminal matters. In a criminal trial both the defence and prosecution must have full opportunity to present their respective cases and test the evidence adduced by the other side. Each has the right to expect that a jury will be able adequately to understand and assess that evidence. The crucial question is, therefore, whether significant hearing or sight impairment prevents or considerably hinders an individual juror from doing so. Stating this another way, is the inclusion of a blind or deaf person on a jury likely to affect adversely the jury's consideration of the issues entrusted to it for determination? If it does, then the accused may have been denied a fair trial.

1.11 The right of an accused to a fair trial is fundamental to our criminal justice system, although, strictly speaking it should be characterised as a right not to be tried unfairly.[13] The right is manifested in rules of law and

11. United Nations, General Assembly, resolution 48/96, Annex, Introduction at para 15.
12. United Nations, General Assembly, resolution 48/96, Annex, Introduction at para 25, 27.
13. *Dietrich v The Queen* (1992) 177 CLR 292 at 299. The Commission has recently discussed the notion of a fair trial in the context of cross-examination of complainants by unrepresented accused in sexual offence proceedings: see New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials* (Report 101, 2003) at para 3.23-3.35.

practice governing trial process,[14] and in the Court's power to regulate proceedings.[15] With respect to jury selection:

> [e]very court of justice has an inherent power – a duty as well as a power – to take care that the machinery of justice is not abused in such a manner as to prevent justice being done, or allow a scandal to take place; and it would be a great scandal if a juryman, who was incapable of performing any of the duties of a juryman or understanding the nature of the evidence, were allowed to enter the jury-box and confer with the other jurymen in the consideration of issues they were all bound to try.[16]

1.12 Present policy is based on the assumption that people who are blind or deaf are incapable of properly performing the duties of a juror. This leads to the practical conclusion that, in order to prevent an unjust trial, they must be barred from the jury-box. Several of the preliminary submissions received agreed, sometimes regretfully, with this general proposition.[17] Is it correct? The authors of much of the recent literature do not believe so. It is, therefore, necessary to consider the tasks incumbent on a jury,[18] as well as the nature of visual and hearing impairment, including the technological and other means available to assist with such tasks.

DEAF AND HEARING IMPAIRED

1.13 It is important to understand that the terms "deaf" and "hearing impaired" are not interchangeable. "Deafness" is an inability to hear, whereas "hearing impairment" refers to a partial loss of hearing. The distinction is important for our purposes, as the terms of reference mention people who are "profoundly deaf" or who have a *significant* hearing impairment. Milder hearing loss is already accommodated in some courthouses through the provision of infra-red assistive hearing devices (sometimes referred to as a "hearing loop").[19]

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14. *Dietrich v The Queen* (1992) 177 CLR 292 at 299-300.
15. *Barton v The Queen* (1980) 147 CLR 75 at 96-97; *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 45-47.
16. *R v Burns* (1883) 9 VLR 191 at 193; see also *Mansell v The Queen* (1857) 8 El & Bl 54; 120 ER 20 and *R v Searle* [1993] 2 VR 367.
17. Cowdery, *Submission* at 1; Far West Law Society, *Submission* at 1; Legal Aid Commission of NSW, *Submission* at 1; New South Wales Police Service, *Submission* at 1-2; Scott, *Submission* at 1; Wood, *Submission* at 1. Some of these did indicate that the views they expressed were preliminary, and that their authors would give further consideration following the release of this Discussion Paper.
18. See ch 2.
19. New South Wales, Attorney General's Department, "Hearing Loops for People with Hearing Impairments" «www.lawlink.nsw.gov.au/lawlink.nsf/pages/disability_hearloop_index» (as at 8 October 2003).

1.14 In 1993 the Australian Bureau of Statistics reported that approximately 36,000 people nationwide had total hearing loss.[20] The NSW Association of the Deaf is the State peak body representing those people who identify as belonging to the Deaf community. The Association, together with the Deaf Society of NSW, provided the Commission with a preliminary submission pointing out that the Deaf community regards itself as just that, a community, and one that "identifies itself through the use of a common language, Australian Sign Language (Auslan), a shared culture and a strong tradition of social, sporting and political networks".[21] Furthermore, while the general community's perception of deaf people is associated with disability, "the Deaf community views itself as a language group".[22] It should be noted that not all people with hearing loss use sign language. For example, the organisation Self Help for Hard of Hearing People ("SHHH"), who also furnished us with a preliminary submission, serves hearing-impaired people whose preferred mode of communication is the spoken word.[23]

1.15 In its review the Commission is, therefore, concerned with those people whose impairment is of such a degree that they are unable to use their hearing or a hearing aid to communicate, and instead rely on their vision. Examples of the latter are sign language, lip reading and writing.

BLIND AND VISION IMPAIRED

1.16 The terms of reference also mention blind people and people with significant sight impairment. Blindness is the loss of vision, but even blind people may be able to perceive light or shadow, while others see nothing at all. Vision impairment denotes a partial loss of vision that is not corrected by glasses. Vision impairments may affect individuals in different ways. For example, some people may see light but are unable to recognise an object or a person's face, or may see during the day but are blind at night. There are also different ways in which documents are seen, depending on the viewer's particular condition. For the purposes of this review, the Commission is concerned with those people who, due to blindness or significant vision impairment, have no means by which to recognise a face or to read printed or handwritten documents.

1.17 The Australian Bureau of Statistics reported in 1993 that, nationally, 278,700 people reported a sight disability due to visual impairment,

20. Australian Bureau of Statistics, *Disability, Ageing and Carers Australia, 1993: Hearing Impairment* (ABS, Canberra, 1993) at 1.
21. Deaf Society of NSW and NSW Association of the Deaf, *Submission* at 1.
22. Deaf Society of NSW and NSW Association of the Deaf, *Submission* at 3.
23. University of Sydney, Nursing Research Centre for Adaptation in Health and Illness, "SHHH" «www.usyd.edu.au/rcahi/Links/SHHH.html» (as at 14 October 2003).

comprising an estimated 17,000 persons having total loss of sight, and a further 261,700 reporting partial loss.[24]

STRUCTURE OF THIS PAPER

1.18 In the following chapter we discuss various aspects of the jury system, including empanelment procedure and the features said to be embodied in the institution known as trial by jury. Chapter 3 explores the impact that the presence of deaf or blind jurors might have on the criminal justice system, for example in comprehending evidence presented at trial, in the use of interpreters, and regarding the rules about challenging prospective jurors. While Chapter 3 concentrates on legal issues, Chapter 4 examines the position of deaf or blind people wishing to serve as jurors in terms of anti-discrimination legislation and policy. Chapter 5 looks at the legislative position in jurisdictions outside New South Wales. In the final chapter we pose questions relating to the possible reform of the law.

SUBMISSIONS

1.19 It is hoped that the discussion contained in this paper will stimulate informed comment from individuals or groups with an interest in the subject matter of this inquiry. The Commission is very interested in receiving such comment and opinion on the matters herein or any other relevant issue. You are invited to make a submission, details of which appear at page **vii**. It is envisaged that a Report will be published in the latter half of 2004.

24. Australian Bureau of Statistics, *Disability, Ageing and Carers Australia, 1993: Visual Impairment* (ABS, Canberra, 1993) at 1.

2. Trial by jury

- Jury empanelment
- Duties of a juror
- Features of trial by jury
- Juror competence

2.1 In the Supreme and District Courts of New South Wales criminal trials for indictable offences[1] are normally by jury.[2] The accused may elect to be tried by judge alone for a State offence,[3] but not for an indictable offence against the Commonwealth, since s 80 of the Constitution requires this be tried by jury.[4] The presumption in civil proceedings is that they will be tried without a jury unless the interests of justice otherwise require.[5]

JURY EMPANELMENT

2.2 The principal statute governing jury procedures is the *Jury Act 1977* (NSW) (hereinafter "the Act"). Every person enrolled as an elector for the New South Wales Parliament is, subject to exceptions, qualified and liable to serve as a juror.[6] These exceptions are for persons who are disqualified[7] or ineligible.[8] The latter, which includes "a person who is unable, because of sickness, infirmity or disability, to discharge the duties of a juror", is of relevance to this inquiry.[9] Another category of ineligibility, that of "a person who is unable to read or understand English",[10] may also be relevant.[11] The Act does not define "sickness", "infirmity" or "disability", nor does it define or list the "duties of a juror".

2.3 It is the task of the Sheriff to maintain jury rolls.[12] First a supplementary jury roll is compiled from names selected at random from current electoral rolls.[13] Each person whose name is included on a supplementary roll must be notified.[14] This notice includes a questionnaire to be completed if certain conditions apply, for example if the person is ineligible to serve as a juror. The Sheriff deletes from the supplementary jury roll the names of persons disqualified, ineligible or otherwise entitled to exemption from jury service.[15] It is left to the Sheriff's discretion to determine whether a person is ineligible. If a person claims ineligibility, but the Sheriff decides not to delete his or her name from the roll, the

1. *Criminal Procedure Act 1986* (NSW) s 7.
2. *Criminal Procedure Act 1986* (NSW) s 15.
3. *Criminal Procedure Act 1986* (NSW) s 16.
4. *Brown v The Queen* (1986) 160 CLR 171.
5. *Supreme Court Act 1970* (NSW) s 85; *District Court Act 1973* (NSW) s 76A.
6. *Jury Act 1977* (NSW) s 5; see also *Parliamentary Electorates and Elections Act 1912* (NSW) s 20(1).
7. *Jury Act 1977* (NSW) s 6(a), Sch 1.
8. *Jury Act 1977* (NSW) s 6(a), Sch 2.
9. *Jury Act 1977* (NSW) s 6(b), Sch 2 item 12.
10. *Jury Act 1977* (NSW) s 6(b), Sch 2 item 11.
11. See para 3.29-3.35.
12. *Jury Act 1977* (NSW) s 10.
13. *Jury Act 1977* (NSW) s 12.
14. *Jury Act 1977* (NSW) s 13.
15. *Jury Act 1977* (NSW) s 14(1).

person may appeal to the Local Court.[16] However, a person whose name the Sheriff deletes for ineligibility, but who wishes to remain on the jury roll, has no right of appeal by which to have his or her name reinstated, though the Sheriff's decision may, possibly, be amenable to judicial review.[17] The remaining names on the supplementary list are then added to the existing jury roll,[18] while those names that have been on the roll for 15 months are culled.[19]

2.4 In addition to the initial selection process involved in compiling a jury roll, at the commencement of the trial the parties themselves have a limited right to challenge, or object to, specific jurors. The underlying rationale and the significance of the challenge will be discussed in the following chapter.[20] The trial judge also has the power to stand down a juror who appears unfit to serve.[21] Jurors are selected by ballot,[22] a procedure that involves drawing from a box a number of cards, each of which bears an identification number corresponding with each person on the jury panel.[23] This continues, allowing for challenges, until twelve people have been empanelled and sworn.

2.5 A person with a disability is not automatically ineligible for jury service. The Sheriff's Office will undertake certain steps to accommodate such persons,[24] such as equipping some courts with hearing loops and arranging inspections of the court house prior to jury service so that a prospective juror may become familiar with its layout. However, the advice given by the Sheriff's Office to the public is that it is not always possible for everyone to participate in jury service,[25] and, as already stated, the final decision as to eligibility rests with the Sheriff.[26]

16. *Jury Act 1977* (NSW) s 14(2), 15(1).
17. Consider *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 585-586 (scope of judicial review of statutory powers and functions). Consider further *Subritzky v Circosta* (1996) 127 ACTR 1 (Sheriff's decision possibly amendable to judicial review under ADJR Act).
18. *Jury Act 1977* (NSW) s 15A(1).
19. *Jury Act 1977* (NSW) s 15A(2).
20. See para 3.36-3.53.
21. Eg *R v Rawcliffe* [1977] 1 NSWLR 219 at 246.
22. *Jury Act 1977* (NSW) s 48.
23. *Jury Act 1977* (NSW) s 28(3), 29.
24. New South Wales, Office of the Sheriff, "People with Disabilities and Jury Duty" «www.lawlink.nsw.gov.au/ots.nsf/pages/jury16» (as at 6 December 2003).
25. New South Wales, Office of the Sheriff, "People with Disabilities and Jury Duty" «www.lawlink.nsw.gov.au/ots.nsf/pages/jury16» (as at 6 December 2003).
26. *Jury Act 1977* (NSW) s 14(1) gives the Sheriff discretion to determine whether a person is disqualified from or ineligible for jury service.

DUTIES OF A JUROR

2.6 The Act deems a person ineligible for jury service if unable, due to sickness, infirmity or disability, "to discharge the duties of a juror".[27] Provisions to similar effect operate in every State and Territory.[28] The jury's function is to decide questions of fact, and the judge's to decide questions of law.[29] However, neither the Act nor Australian case law further particularises a juror's function. The English legislation contains a provision that refers to the ability of a person "to act effectively as a juror".[30] There is scant reference to this provision in the case law. In *Osman*[31] it was noted that there was little authority on the requisites for acting effectively as a juror, and this was perhaps because the concept was readily understood.[32] The Court stated that there were two aspects: the duties in court and duties in retirement (when the jury considers its verdict). The former requires that, in fairness to the defendant, "every juror should have a similar opportunity to listen to the evidence and to assess the reliability of a witness." In retirement all jurors may make a contribution.[33]

2.7 In the American case *People v Guzman*[34] the Court stated:

> At a minimum, a juror must be able to understand all of the evidence presented, evaluate that evidence in a rational manner, communicate effectively with the other jurors during deliberations, and comprehend the applicable legal principles, as instructed by the court.

In their role of fact-finder, the jurors should understand and weigh up the evidence presented, assess the credibility of witnesses and decide on the

27. *Jury Act 1977* (NSW) s 6(b), Sch 2 item 12.
28. *Juries Act 1967* (ACT) s 10; *Juries Act 1962* (NT) s 10, 11, Sch 7; *Jury Act 1995* (Qld) s 4; *Juries Act 1927* (SA) s 13; *Jury Act 1899* (Tas) s 7 (*Juries Act 2003* (Tas) s 6, Sch 2, not yet proclaimed); *Juries Act 2000* (Vic) s 5, Sch 2; *Juries Act 1957* (WA) s 5.
29. *Australian Iron & Steel Pty Ltd v Luna* (1969) 123 CLR 305 at 319. See also *District Court Act 1973* (NSW) s 77(2), (5). Other functions may include acting as "the conscience of the community, a safeguard against arbitrary or oppressive government, an institution which legitimises the criminal justice system, and an educative institution": New Zealand, Law Commission, *Juries in Criminal Trials Part 1: A Discussion Paper* (PP No 32, 1998) at para 57.
30. *Juries Act 1974* (Eng) s 9B.
31. *In re Osman* [1995] 1 WLR 1327.
32. *In re Osman* [1995] 1 WLR 1327 at 1328.
33. *In re Osman* [1995] 1 WLR 1327 at 1328; see also *R v Guildford Crown Court, Ex parte Siderfin* [1990] 2 QB 683.
34. *People v Guzman* 76 NY 2d 1 (1990) at 5.

likelihood of certain events having occurred in the light of the jurors' personal experiences.[35]

FEATURES OF TRIAL BY JURY

2.8 The institution of trial by jury, although not without critics, has been regarded for centuries as a fundamental part of the administration of justice. Its features are credited with helping to secure the protection of the community from the tyranny of absolutism and the self-interest of the powerful, while reflecting democratic ideals and representing current social values and attitudes. The jury was probably introduced to England by the Normans, and comprised a group of men of the neighbourhood who could provide answers on oath as to facts within their knowledge.[36] It evolved into an increasingly complex legal institution, and has come to be described in such heroic terms as "the bulwark of liberty, the shield of the poor from the oppression of the rich and powerful".[37] While such lavish praise now seems exaggerated, the theory underpinning it is clear:

> [T]he jury prevents the state from manipulating the strings of justice to its own ends in cases having direct political significance; the jury prevents judges from imposing the views of the class of society from which they are drawn; the jury prevents liaison between judges and the police; and the jury prevents private citizens from exerting improper influence over judges. [38]

The jury is thus a group of "ordinary" people, disinterested in the outcome of the trial, and independent of powerful and influential social forces.

35. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, Melbourne, 1994) at 1; New Zealand, Law Commission, PP No 32 at para 62.
36. D M Walker, *The Oxford Companion to Law* (Clarendon, Oxford, 1980) at 686.
37. *Ford v Blurton* (1922) 38 TLR 801 at 805 (Atkin LJ); see also Blackstone quoted in W R Cornish, *The Jury* (Penguin, Harmondsworth, 1970) at 138.
38. Cornish at 138.

2.9 A number of decisions of the High Court have enumerated the essential, often interconnecting, features of trial by jury.[39] These are:

- representativeness;
- unanimous verdict;[40]
- random selection;[41] and
- Impartiality.[42]

2.10 The first of these features – representativeness – is perhaps of most interest to this inquiry. The High Court has referred to the jury's "representative character and … collective nature",[43] and to its being "assembled as representative of the general community".[44] The Sheriff's Office in this State describes the jury as "a link between the community and the justice system", ensuring "that the legal system reflects the general will of the people of New South Wales".[45] The composition of the jury has, over time, become more inclusive and diverse, especially since 1947, when the right to serve on a jury was extended to women, and property qualifications abolished.[46] As the above quotations illustrate, juries are idealised as a democratic microcosm of society.

2.11 In *Cheatle* the High Court said:

> 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 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

39. *Cheatle v The Queen* (1993) 177 CLR 541 at 552, 560-561; *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375; *Kingswell v The Queen* (1985) 159 CLR 264 at 301; *Brownlee v The Queen* (2001) 207 CLR 278 at 289; *Ng v The Queen* (2003) 77 ALJR 967 at 974-975.
40. See also *Jury Act 1977* (NSW) s 56.
41. *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375.
42. *Brownlee v The Queen* (2001) 207 CLR 278 at 327; *Brown v The Queen* (1986) 160 CLR 171 at 202.
43. *Cheatle v The Queen* (1993) 177 CLR 541 at 552.
44. *Brown v The Queen* (1986) 160 CLR 171 at 202.
45. New South Wales, Office of the Sheriff, "Jury Duty in New South Wales" «www.lawlink.nsw.gov.au/ots.nsf/pages/juryindex» (as at 29 May 2003).
46. *Jury (Amendment) Act 1947* (NSW) s 2(3)(a), amending *Jury Act 1912* (NSW) s 3.

> Australia, the exclusion of females and unpropertied persons would itself be inconsistent with such a requirement.[47] (Emphasis added)

2.12 The truth is that juries are not, and are never likely to be, "truly representative". Randomness of selection is no guarantee of representativeness.[48] In any event most systems of jury selection are not entirely random, beginning with a process of exclusion or exemption, whether due to profession, language or literacy levels, or a prior criminal record. Nor does it end there. The selection of the "ultimate jury" from a panel of potential jurors "is a process which is calculated to impinge upon the randomness, representativeness and impartiality of the wider panel."[49] The representative character of juries is thus qualified. Indeed, can a person seen as representing a particular group in the community be considered impartial in any event? Justice Kirby has considered this question,[50] concluding that these notions can be reconciled, adopting the statement of the Supreme Court of Canada that "[t]he surest guarantee of jury impartiality consists in the combination of … representativeness with the requirement of a unanimous verdict".[51]

2.13 While complete representativeness may not be attainable, it is argued that representativeness is a goal worth aspiring to. As a court in the United States put it "the notions of a fair trial prohibit systematically excluding any one group of individuals from a specific jury".[52]

2.14 Both from a policy point of view and in applying the *Jury Act*, the starting premise should be that, unless it can be shown that there is a real or significant risk that they are incapable of discharging the duties of jurors, people who are blind or deaf should be able to serve on juries. This position is, arguably, in the interests of the justice system. It is also consistent with the general trend towards eliminating unlawful and unnecessary discrimination against particular groups in society. Several of the preliminary submissions received by the Commission share this view.

2.15 In his submission Chris Puplick, former President of the Anti-Discrimination Board of New South Wales, stated:

> It is an important principle of our judicial system that an accused person shall be determined guilty or otherwise only by a jury of their peers. If it is truly an objective of the justice system that juries be peer-based and reflective of the community, then the automatic

47. *Cheatle v The Queen* (1993) 177 CLR 541 at 560-1.
48. See M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, Melbourne, 1994) at 3.
49. *R v Ng* (2002) 5 VR 257 at 271.
50. *Brownlee v The Queen* (2001) 207 CLR 278 at 327.
51. *R v Biddle* [1995] 1 SCR 761 at 788.
52. *Jones v New York City Transit Authority* 126 Misc 2d 585 (1984) at 586.

> disqualification of people who are deaf or blind would seem to be at odds with this objective.[53]

People with Disabilities, a peak disability and advocacy organisation, argues that the jury is "intended to apply the values and standards of the community as a whole", and that excluding people who are blind or deaf, an important population group and part of the community's diversity, "narrows the base of people who can give effect to these values and standards".[54] The submission from the Equity and Diversity Unit of the University of Technology, Sydney says that "much community faith in the [legal] system is drawn from the fact that all have the chance to be represented", and that people who are blind or deaf should be given this same opportunity.[55] Professor Ron McCallum, Dean of the Faculty of Law at the University of Sydney,[56] described "a blanket administrative ruling which excludes all blind and deaf persons from jury service in New South Wales [as] outmoded, unfair, arbitrary and discriminatory", and called for its abolition.[57] He called on the Commission to recommend the establishment of procedures for determining the circumstances in which, having regard to the administration of justice, it would be inappropriate for a blind or deaf person to undertake jury service.

2.16 The right of an accused to a fair trial clearly takes precedence over any entitlement of a deaf or blind person to serve as a juror. As was said in Chapter 1, the issue is whether that entitlement is compatible with the notion of a fair trial or whether there is a point at which they become mutually exclusive. Many of the submissions we received take the view that, despite the desirability on equity or citizenship grounds of having blind or deaf people serving on juries, it is clear that they would experience practical difficulties in so doing.[58]

JUROR COMPETENCE

2.17 It is not the role of this Reference to consider the virtues or shortcomings of the jury system.[59] Nevertheless, to avoid the risk of requiring a higher standard of blind and deaf persons than others, some

53. Puplick, *Submission* at 5.
54. People with Disabilities, *Submission* at 3.
55. University of Technology Sydney, Equity and Diversity Unit, *Submission* at 1.
56. Professor McCallum is himself blind.
57. McCallum, *Submission* at 2.
58. Cowdery, *Submission* at 1; Far West Law Society, *Submission* at 1; Legal Aid Commission of NSW, *Submission* at 1; New South Wales Police Service, *Submission* at 1-2; Scott, *Submission* at 1; Wood, *Submission* at 1.
59. The Commission has previously considered the jury in detail: see New South Wales Law Reform Commission, *The Jury in a Criminal Trial* (Discussion Paper 12, 1985).

regard should be had to actual or potential limitations inherent in the jury system that pertain to all jurors, sighted and hearing, which could affect their decision-making. Due to the confidentiality shrouding jury deliberations this is not straightforward. However, in recent years a great deal of jury research has been undertaken worldwide to try to reach a better understanding of how - and how well - juries work, using such methodology as mock shadow juries, interviews with other participants in the trial (such as judges and lawyers), and interviews with actual jurors.[60] Not surprisingly, one likely conclusion from all of this research is that, given the demands of the undertaking and the rules governing the procedure, no juror is perfect:

> As an individual, we ask each member to listen and accurately remember each piece of evidence, where necessary to draw inferences of fact from that evidence, using their experience of everyday life and at the same time evaluate the credibility of witnesses and the relative importance of evidence. Prior to deliberation, we expect each juror to understand and apply directions individually and, when they retire as a jury, to collectively compare the facts with the contents of the judge's instruction on the law and arrive at a verdict…In the eyes of the law, the perfect jury member would be an intelligent but passive sponge who waits until the deliberation stage before reaching a verdict, diligently following the judge's instruction without the burden of prejudice or sympathy and mindless to the consequences of their decision. Unfortunately, there is ample empirical evidence to suggest that such a person would be a rare find.[61]

2.18 Juries developed when trials were very short, rarely lasting over a day. Today, trials are generally longer and involve complex rules and procedures designed to secure a fair trial. This complexity has the potential to affect adversely any juror, perhaps a sighted and hearing one even more than a juror who is blind or deaf and who may have become habituated to developing compensating strategies such as a keener memory or lessened likelihood of becoming distracted.

2.19 The New Zealand Law Commission undertook a detailed consideration of juries as part of a recent review of criminal procedure. It noted that there were problems in identifying apparent juror incompetence in empirical research, as for example in determining whether apparent difficulty in comprehension is due to the jurors' inability or

60. P Darbyshire, A Maughan and A Stewart, "What Can the English Legal System Learn from Jury Research Published up to 2001?"at 10 «www.kingston.ac.uk/~ku00596/elsres01.pdf» (as at 19 June 2003).
61. Darbyshire, Maughan and Stewart at 21.

counsel's failure to present matters clearly.[62] Nevertheless, its research indicated that in the 48 jury trials sampled:

- there were five in which one or more jurors were reported by others to have suffered from intellectual or other limitations which impeded their grasp of the evidence;
- in seven different trials, eight jurors whose first language was not English were said either by themselves or others to have failed to understand fully the evidence due to language; and
- five trials involved technical evidence which jurors lacked the knowledge or experience to assess, these limitations contributing to perverse or compromise verdicts in two cases and a hung jury in a third.[63]

2.20 Any juror may perform below the standard expected, due to such factors as his or her individual attention span, boredom threshold, lack of interest in the matter being tried, the trial's length and unpredictable external events.[64] Any juror may bring his or her prejudices, such as racism or distrust of police or authority,[65] to the jury room. In addition, according to the authors of a comprehensive review of jury research, although using the same evidence, different jurors will reach different conclusions,[66] despite having the use of the same senses. Nearly all commentators agree that juries have great difficulty understanding and applying judicial instructions,[67] although this conclusion is necessarily somewhat speculative. Finally, as the New Zealand Law Commission's research indicates, while the blindness or deafness of a person summoned for jury duty might be obvious to staff of the Sheriff's Office, other disabilities or limitations on the level of comprehension or competence of other potential jurors may not be,[68] making it difficult to predict how well any juror will discharge the duties of the office.

2.21 All these diverse influencing factors affect the entity known as the jury. The question we must attempt to answer is whether people who are blind or deaf are at such a disadvantage in performing the task required that they should be excluded from serving as jurors.

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62. New Zealand, Law Commission, *Juries in Criminal Trials Part 2: Discussion Paper* (PP No 37, 1999) vol 1 at para 220.
63. New Zealand, Law Commission, *Juries in Criminal Trials Part 2: Summary of the Research Findings* (PP No 37, 1999) vol 2 at para 1.4, 3.18.
64. Darbyshire, Maughan and Stewart at 12, 45.
65. Darbyshire, Maughan and Stewart at 53-54.
66. Darbyshire, Maughan and Stewart at 12.
67. Darbyshire, Maughan and Stewart at 25.
68. *Ras Behari Lal v King-Emperor* (1933) 50 TLR 1; cf *R v Thomas* [1933] 2 KB 489.

3. Jurors and the legal process

- Evidence
- Interpreters
- Challenging jurors
- Conclusion

3.1 This chapter explores the various legal issues that may arise if deaf or blind people serve as jurors, for example their ability to evaluate evidence, their use of interpreters, and the impact of the current rules for challenging prospective jurors, and, in this context, considers whether deaf or blind people serving as jurors is consistent with the notion of a fair trial.

EVIDENCE

3.2 The jury's verdict in a criminal trial must be based on the whole of the evidence.[1] It is therefore crucial to determine if a juror who is unable to see or hear is able to receive in its entirety, and properly evaluate, evidence presented at trial. The perceived inability of blind or deaf jurors to do this was the reason identified in almost all preliminary submissions opposing the notion of blind or deaf jurors.[2] Indeed, it is a judgment commonly made by people who are both sighted and hearing. It is, therefore, not based on direct personal experience. According to People With Disabilities it is "based in antiquated assumptions about and prejudice towards people with disability, and ignorance of the personal and technological assistance that can overcome participation barriers".[3] Even if this is so, however, the very substantial question remains whether, bearing in mind that a juror's task is difficult in many cases even for jurors with no impediments to observation and communication, the additional difficulties posed by sight or hearing disabilities create risks for the adequacy of the jury's deliberations.

3.3 Self Help for Hard of Hearing People ("SHHH"), a voluntary non-profit group,[4] calls the view that all blind and deaf people are unable to discharge properly the duties of a juror an "assumption", and one that is "both wrong and discriminatory".[5] People With Disabilities ("PWD") states:

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1. In addition the *Jury Act 1977* (NSW) s 72A requires each juror to take an oath or affirm that he or she will give "a true verdict according to the evidence". Where a court of criminal appeal is asked to set aside a verdict as unsafe "the question must in the end be … whether the appellate court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty": *Whitehorn v The Queen* (1983) 152 CLR 657 at 686; *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 532; *R v Knight* (1992) 175 CLR 495 at 511; *Davies v The Queen* (1937) 57 CLR 170 at 180-181.
2. Far West Law Society, *Submission* at 1; Legal Aid Commission of NSW, *Submission* at 1; New South Wales Police Service, *Submission* at 1-2; Scott, *Submission* at 1; Wood, *Submission* at 1.
3. People With Disabilities, *Submission* at 1.
4. University of Sydney, Research Centre for Adaptation in Health and Illness, "SHHH" «www.usyd.edu.au/rcahi/Links/SHHH.html» (as at 8 July 2003).
5. Self Help for Hard of Hearing People ("SHHH"), *Submission* at 1.

> it can not be said that people who are blind or deaf are unable to perform the inherent requirements of the position as juror. Blindness or deafness does not result in an incapacity to analyse information.[6]

As to how blind or deaf people can "receive" the information in the first place, the PWD submission discusses this with reference to assistive technology and other examples of reasonable adjustments, a subject discussed below at paragraphs 4.15-4.18.

3.4 Advocates for inclusion, while not seeking a universal right, do decry what amounts to a blanket ban on jury service for the deaf or blind. Professor D Nolan Kaiser, Professor of Philosophy at Central Michigan University and himself blind, refers to the exclusion of blind people from jury service as a "confused legal practice".[7] Professor Ron McCallum, Dean of Law at the University of Sydney, states in his preliminary submission:

> I am not suggesting that we blind and deaf citizens should always be entitled to sit upon juries irrespective of our disabilities. For example, circumstances may arise in the administration of criminal justice where, having regard to the visual nature of the evidence to be proffered, it would be inappropriate for a blind or visually impaired person to be empanelled for jury service for that trial.[8]

3.5 Similarly, a blind judge sitting on the Illinois Circuit Court concedes that there are some types of cases for which such jurors should not be eligible. Examples he suggests are of the unsuitability of a blind person judging whether a film is obscene, or a deaf person sitting on a trial in which a singing group is accused of "stealing" someone else's song.[9] However, all three commentators view such cases as the exceptions.

3.6 The nature of the evidence to be adduced at trial is thus a critical question in deciding the suitability of certain persons to serve as jurors. Most evidence is in the form of oral testimony, which would not be an obstacle to a blind juror, except to the extent that he or she is unable to view demeanour, discussed below at paragraphs 3.11-3.22. A deaf juror may be assisted by means of an interpreter,[10] but is, of course, unable to listen to the evidence or, for that matter, to the addresses of counsel, the directions of the trial judge or the deliberations of the other jurors.

3.7 Evidence of a visual nature poses an obvious challenge for the blind, but this should not be regarded as insurmountable in many cases.

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6. People With Disabilities, *Submission* at 4.
7. D N Kaiser, "Juries, Blindness, and the Juror Function" (1984) 60 *Chicago Kent Law Review* 191 at 191.
8. McCallum, *Submission* at 2.
9. Associate Judge Nicholas T Pomaro quoted in D Ranii, "Blind Judge Backs Use of Deaf, Blind Jurors" *National Law Journal* (NY) (21 March 1983) at 11.
10. See para 4.16, 5.23, 5.24.

Documentary evidence can be read aloud, or converted to Braille. It should also be borne in mind that even sighted jurors will not necessarily read entire documents,[11] and trials where examination of documents is important are rare. On the other hand, a blind juror would be very limited in assessing the cogency of identification evidence. An American judge surveyed a small sample of blind jurors, all of whom "claimed emphatically that they could understand visual presentations providing the presenter coupled the visual material with detailed testimony".[12] By this was meant a detailed description of a photograph, diagram, chart or sketch given by the witness, with possible further clarification by their fellow jurors. One commentator suggests that such reliance on other jurors to clarify the visual evidence is to their mutual benefit, as it may force them to focus more clearly on the evidence.[13] This seems to be acknowledged in the practice of some American courts.[14] By contrast, in *Commonwealth v Susi*[15] the Supreme Court of Massachusetts found that in a case where identification was the predominant issue, the trial judge had abused her discretion in denying the defendant's challenge for cause of a blind juror. The Court held that "a mere description of the physical evidence would not have conveyed adequately the subtleties which would be apparent on a visual comparison".[16] A similar conclusion was reached in *Jones v New York City Transit Authority*, although the Court did add that the mere fact of a juror's blindness did not make him or her "any less able to determine the credibility of a witness' testimony through the use of his [or her] other facilities".[17]

3.8 In *People v Caldwell*[18] the Court ruled that a vision-impaired juror *was* able to participate because the case primarily involved credibility determinations based on conflicting accounts from witnesses. The fact that the defendant introduced some photographs at trial did not render the

11. M J Crehan, "Seating the Blind Juror" (1997) 81 *Judicature* 104 at 108.
12. M J Crehan, "Seating the Blind Juror" (1997) 81 *Judicature* 104 at 107.
13. M J Crehan, "Seating the Blind Juror" (1997) 81 *Judicature* 104 at 108.
14. See, for example, S M Wise and G Mota, "Justice Can Be Blind and Still See" *National Law Journal* (14 May 1984) at 47 (blind juror in personal injury case in a Minneapolis district court, who "relied on medical and other testimony, as well as his fellow jurors' descriptions, to form an opinion about the plaintiff's alleged disfigurement"); N Zeldis, "Blind Juror Sits on Case" *National Law Journal* (26 October 1987) at 43 (blind juror in "slip-and-fall" case, NY Supreme Court. The presiding judge said "the only irregularity in the proceedings came when he instructed the jury to view some 13 exhibits during deliberations, and, in deference to [that juror], asked the other jurors to describe the contents to her").
15. *Commonwealth v Susi* 394 Mass 784 (1985).
16. *Commonwealth v Susi* 394 Mass 784 (1985) at 788; Compare M J Crehan, "Seating the Blind Juror" (1997) 81 *Judicature* 104 at 108, 110.
17. *Jones v New York City Transit Authority* 126 Misc 2d 585 (1984) at 589.
18. *People v Caldwell* 603 NYS 2d 713 (1993).

juror ineligible because they involved a collateral issue and so it was not absolutely necessary she see them for herself. Although the case was concerned with whether disqualifying the juror would breach the *Americans with Disabilities Act*[19] and other US legislation, the conclusions are relevant:

> It is difficult to imagine a trial in which absolutely no documents, diagrams, police reports, photographs or physical evidence are introduced. If this court were to hold that Ms B was disqualified simply because a few documents and a few photographs are presented, it would, in effect, be concluding that there were almost no cases on which visually-impaired or blind jurors could sit. … Rather, the question is whether the court could accommodate the juror by verbally describing the evidence or by any other means, and whether the evidence is so crucial that the juror's inability to see it denied the defendant a fair trial.[20]

3.9 Lapses in concentration and failures in comprehension due to the technical nature of the material, the lack of clarity with which it is presented or the juror's own limitations may affect all jurors, regardless of sight or hearing problems.[21] However, gaps in any individual juror's understanding of the case may be plugged in the course of jury deliberations.[22] The institution of the jury brings together 12 randomly selected individuals to contribute to the production of one verdict. How each interprets the evidence and how the verdict is reached are unknowable to the world beyond the jury room. In Lord Denning's words, "their verdict is as inscrutable as the sphinx".[23] Each juror brings a unique way of receiving and evaluating evidence based on his or her life experience.[24] Together, the jurors are assumed to enjoy the advantages of group recall and "common sense".[25] Any problem encountered by an individual juror in mastering the information and judicial instruction received at trial, is to some extent offset by the collective nature of deliberations and the application of "common sense justice".[26] Moreover,

19. 42 USC § 12101 and following.
20. *People v Caldwell* 603 NYS 2d 713 (1993) at 716.
21. *People v Guzman* 76 NY 2d 1 (1990) at 6 (NY Ct of Appeals); see also para 2.17-2.21.
22. M J Crehan, "Seating the Blind Juror" (1997) 81 *Judicature* 104 at 110.
23. *Ward v James* [1966] 1 QB 273 at 301.
24. *People v Guzman* 76 NY 2d 1 (1990) at 6 (NY Ct of Appeals).
25. New Zealand, Law Commission, *Juries in Criminal Trials Part 1: A Discussion Paper* (PP No 32, 1998) at para 62.
26. Various commentators, summarised in P Darbyshire, A Maughan and A Stewart, "What Can the English Legal System Learn from Jury Research Published up to 2001?"at 25-26 «www.kingston.ac.uk/~ku00596/elsres01.pdf» (as at 19 June 2003); see also D N Kaiser, "Juries, Blindness, and the Juror Function" (1984) 60 *Chicago Kent Law Review* 191 at 203-204.

they are – or should be – assisted by the arguments of counsel and the judge's summing up.[27]

3.10 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. A person who is deaf, for example, might use visual clues to determine a speaker's tone and inflection.[28] It is also very likely that he or she will have developed increased sensitivity in other faculties as a means of compensating for the loss of sight or hearing. SHHH told us that "a blind jury person may not be able to see the demeanour of witnesses, but may compensate for this by hearing subtle nuances of voice and having a better recollection and analysis of what was said".[29] Blind people may well have greater listening skills and the ability to recall information than the sighted,[30] and can achieve a high level of auditory and tactile perception.[31] Of course, this will not always be the case.

Demeanour

3.11 Perhaps the most significant argument often advanced against people who are blind or deaf serving as jurors is that they will be unable to witness the demeanour of a person giving evidence. Demeanour denotes the outward manifestations of a witness, including appearance, conduct and tone and inflection in speech, which may assist the trier of fact generally in interpreting the witness' oral evidence and also in determining the credibility of the evidence given by that witness.[32]

3.12 The importance accorded demeanour in common law is attested to by the reluctance of an appellate court to overturn the decision of a trial judge where this decision has been based on the judge's opinion of a witness's demeanour.[33] The trier of fact is regarded as enjoying an advantage in seeing and hearing the witness firsthand, rather than having

27. In Australia this will be much more extensive than is the case in the US, where judges are, for the most part, prohibited from discussing the facts.
28. See *People v Guzman* 76 NY 2d 1 (1990) at 6 (NY Ct of Appeals).
29. SHHH, *Submission* at 2.
30. M J Crehan, "Seating the Blind Juror" (1997) 81 *Judicature* 104 at 106.
31. M J Crehan, "Seating the Blind Juror" (1997) 81 *Judicature* 104 at 110.
32. *Butterworths Encyclopaedic Australian Legal Dictionary* (Butterworths, Sydney, 2002) (online).
33. *Yuill v Yuill* [1945] 1 All ER 183 at 188 (Lord Greene MR); *Jones v Jones* [1961] NSWR 278 at 280; *Mashiati v Australian Poultry Ltd* (1995) 11 NSWCCR 345 at 352 (Clarke JA). The importance of demeanour is also given as one of the reasons for the rule against the admission of hearsay evidence: see, for example, *Teper v The Queen* [1952] AC 480 at 486.

to rely on printed evidence.[34] That advantage may be limited, according to Lord Normand, if the witness is a foreigner and not one "whose native language and modes of thought are English".[35] Cultural interpretations of even non-verbal signals may vary. Apparently, among many Aboriginal people:

> silence is a common and positively valued part of conversation which can signal thought, discomfort, lack of understanding, lack of cultural authority to speak on the topic … or disagreement, when unwilling to say so. However, in court silence can be misinterpreted as agreement, … insolence, or guilt.[36]

3.13 It is essential to realise that demeanour is relevant to an understanding and assessment of a witness' testimony in at least two senses. First, the witness may use demeanour, as people commonly do in communication, to convey the meaning of what he or she is saying through body language, gestures, smiles, frowns, nods, hesitations, inflexions and the like. This mode of communication can be used deliberately, but is often unintentional or perhaps instinctive. It can be as powerful as the spoken word that it accompanies. For example, it can turn a "yes" into a "no" and vice versa.

3.14 Secondly, demeanour also becomes relevant to the credibility of a witness where a conflict between what is said and the way in which it is said raises the question of whether or not the witness is telling the truth. The issue is whether or not the way in which something is said unconsciously gives the lie away and, if so, whether the recipient of the communication can tell. The facts surrounding the Chamberlain case, which most Australians will remember, provide an example. Following the disappearance of their daughter, Azaria, and the two resulting coronial inquiries, Lindy and Michael Chamberlain were charged with and convicted of her murder and of being an accessory, respectively. Two appeals failed. The convictions were eventually quashed following a judicial inquiry. A major problem with the prosecution's case was the expert evidence on which it relied and which proved to be wrong. Australians who lived through the entire saga will recall the damaging and potentially prejudicial pre-trial publicity the case attracted, due in part to widespread bizarre and unfounded rumours concerning certain religious practices attributed to the Chamberlains, but also to the widely reported perception concerning the demeanour of the couple, especially Lindy, that

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34. *Watt v Thomas* [1947] AC 484 at 487-8 (Lord Thankerton); *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 480.
35. *The "British Confidence"* [1951] 1 Lloyd's Rep 447 at 460; see also *Mashiati v Australian Poultry Ltd* (1995) 11 NSWCCR 345 at 353.
36. K Mack, "Challenging Assumptions About Credibility" (2001) 39(10) *Law Society Journal* 60 at 62.

they failed to demonstrate sufficient grief. Even the Royal Commissioner, Justice Morling, picked up on this in his report, by apparently feeling the need to comment in passing on this subject, although it was not part of the Crown's case. He says, for example,

> It is true that Mrs Chamberlain might not have displayed as much grief as others may have shown in the same situation, but there is much evidence that she was visibly distressed after Azaria's disappearance.[37]
>
> Further, it was not the fact that [Mr Chamberlain] did not exhibit grief.[38]

For many, the Chamberlain case stands out as a salient example of the danger of relying on demeanour in assessing credibility.

3.15 The danger of relying on demeanour in assessing credibility is recognised in modern law. While there can be no doubt that demeanour is of value in confirming inconsistencies in testimony that become apparent in the context of proceedings as a whole, its evidential value is otherwise limited. The English jurist, Sir James Stephen, wrote that if an ability to discern whether a person is lying can be acquired at all, then it is only to be acquired by personal observation and practical experience. "Unless [the judge] knows [those appearing before him] in their unrestrained and familiar moments, he will have great difficulty in finding any good reason for believing one man rather than another".[39] Almost eighty years ago Lord Atkin expressed the opinion that "an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour", and, elsewhere, "the lynx eyed Judge who can discern the truth teller from the liar by looking at him is more often found in fiction or in appellate judgments than on the Bench".[40]

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37. Australia, Royal Commission of Inquiry into Chamberlain Convictions, *Report of the Commissioner the Hon Mr Justice T R Morling* (Government Printer, Darwin, 1987) at 296.
38. Australia, Royal Commission of Inquiry into Chamberlain Convictions at 300.
39. J F Stephen, *The Indian Evidence Act* (Macmillan, London, 1872) at 42-43.
40. The quotations are from respectively *Société D'Avances Commerciales v Merchants' Marine Insurance Co* (1924) 20 Ll L Rep 140 at 152 and *Lek v Matthews* (1926) 25 Ll L Rep 525 at 543. See also Kirby P in *Britt v Nominal Defendant* (NSW, Court of Appeal, No 147/84, 3 July 1987, unreported) at 1. The following are examples of the inappropriate use of demeanour. In *Quercia v United States* 289 US 466 (1933) at 468, the trial judge had instructed the jury as follows:

    > And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr Foreman and gentlemen, that he wiped his hands during his testimony. It is rather a curious thing, but that is almost always an indication of lying. Why it should be so we don't know, but that is the fact.

3.16 In *Onassis v Vergottis* Lord Denning MR stated:

> Now the Judge [at first instance], it is true, has a great advantage over this Court. He sees and hears the witnesses, and we do not. But demeanour is not always a touchstone of truth. A man who appears to be convincing may yet be mistaken. He may, without being fraudulent, have reconstructed the facts in his mind so as to support his own case. Conversely, a man who appears shifty and spiteful may yet be truthful. The heat engendered by the case may have made him angry, but not a liar. It is for this reason that a judge of fact should always test the evidence by reference to the documents and the probabilities of the case.[41]

Lord Justice Edmund Davies expresses a similar view, adding that demeanour is only one "ingredient" and needs to be balanced against the rest of the evidence.[42]

3.17 In *Devries v Australian National Railways Commission* Justices Deane and Dawson stated in a joint judgment:

> Judges are increasingly aware of their own limitations and of the fact that, in a courtroom, the habitual liar may be confident and plausible, and the conscientious truthful witness may be hesitant and uncertain. In that context, it is relevant to note that the cases in which findings of fact and assessments of credibility are, to a significant extent, based on observation of demeanour have possibly become, if they have not always been, the exception rather than the rule. [43]

> I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.

Stephen wrote:

> "I always used to look at the witnesses' toes when I was cross-examining them," said a friend of mine who had practised at the bar in Ceylon. "As soon as they began to lie they always fidgeted about with them." I knew a Judge who formed the opinion that a letter had been forged because the expression "that woman" which is contained appeared to him to be one which a woman and not a man would use, and the question was whether the letter in question had been forged by a woman. In the *Life of Lord Keeper Guildford* it is said that he always acted on the principle that a man was to be believed in what he said when he was in a passion. (J F Stephen, *The Indian Evidence Act* (Macmillan, London, 1872) at 42-43).

41. *Onassis v Vergottis* [1968] 1 Lloyd's Rep 294 at 297.
42. *Onassis v Vergottis* [1968] 1 Lloyd's Rep 294 at 302. Similar opinions are found in *Yuill v Yuill* [1945] 1 All ER 183 at 189 (Lord Greene MR) and in US cases such as *Carbo v US* 314 F 2d 718 (1963) at 749; *Miller v Virginia Employment Commission* 31 Va Cir 151 (1993) at 152; *John J Williams v Auto Brokers* 6 Va App 570 (1988) at 574.
43. *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 480. See also Kirby J in *Rosenberg v Percival* (2001) 205 CLR 434 at 488.

3.18 The foregoing quotations are made in the context of trials before a judge without a jury. The risk for juries relying on demeanour is arguably greater than it is for judges who have far more experience in observing witnesses. On the other hand, an unreasonable opinion of one juror may be corrected by the others.

3.19 Experiments conducted over the past few decades to detect whether ordinary people have the capacity to detect lies or error through observation of non-verbal behaviour have shown:

> [w]ith remarkable consistency … that [the capacity] simply does not exist. To the extent that people can detect lying or erroneous beliefs in another, they do so primarily by paying close attention to the content of what the other says, not by observing facial expression, posture, tone of voice, or other nonverbal behaviour. [44]

3.20 Cues related to vocal evidence, such as increases in speech hesitations, speech errors and in the pitch of a speaker's voice, may be more valuable indicators of deception.[45] Some evidence has even suggested that observation of facial behaviour *reduces* the accuracy of lie detection.[46] This research, however, is conducted in circumstances far removed from a courtroom. Not only is the witness cross-examined but other material in the evidence may be used to assess the witness and will often provide useful clues for understanding particular elements of his or her demeanour.

3.21 Vocal cues would normally be considered part of a witness's overall demeanour. Nevertheless, the New York Court of Appeals questioned whether "perception of vocal inflections is a necessary part or a superior method of assessing credibility".[47] In considering whether a profoundly deaf man was qualified to serve as a juror, the Court disagreed with the defendant's contention that such a juror could not adequately evaluate the credibility of oral testimony because he would miss vocal inflections, and appeared to accept the juror's testimony that he was able to use visual clues to determine the tone and inflection of the speaker. This is not necessarily in conflict with the findings cited in the previous paragraph, as it may be the case that a person who is deaf has learnt to observe with

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44. O G Wellborn III, "Demeanor" (1991) 76 *Cornell Law Review* 1075 at 1104-110.
45. J A Blumenthal, "A Wipe of the Hands, a Lick of the Lips: the Validity of Demeanor Evidence in Assessing Witness Credibility" (1993) 72 *Nebraska Law Review* 1157 at 1195. In cases where jurors must assess the accuracy, rather than the truthfulness, of the witness's testimony, researchers have found that the witness's confidence is the major influence on a jury's belief. Of course, this bears little relation to whether the witness's perception and memory are correct: Wellborn at 1089-1091.
46. Wellborn at 1088.
47. *People v Guzman* 76 NY 2d 1 (1990) at 6 (NY Ct of Appeals).

greater acuity than a person who has all their senses. The Court said this with regard to the way jurors generally arrive at a conclusion:

> Each juror is expected to bring to the courtroom his or her own method of sorting fact from fiction – the same method the juror relies on in conducting everyday affairs. The factors that each juror will rely on to evaluate the trustworthiness of a statement will be a function of that juror's experience. This juror's experience has been to make such determinations without vocal clues. Nothing but speculation suggests that this has been a disadvantage. If anything, his apparent success suggests that for him the ring of truth need not be heard to be recognised.[48]

3.22 While the Commission recognises the force of arguments pointing out the limitations of demeanour for the purpose of assessing whether or not witnesses are telling the truth, those arguments do not address demeanour in the more general sense of interpreting a witness' oral testimony.[49] The Commission considers it crucial to determine if deaf or blind jurors are able to appreciate the meaning of a witness' testimony where the spoken words must be understood in light of the witness' demeanour in this more general sense. The Commission invites submissions on this important issue, which is relevant to Question 1 at paragraph 6.1.

INTERPRETERS

3.23 A principle of common law holds that a jury must deliberate in private,[50] and that it is "an incurable irregularity" for a non-member to be present in the jury room.[51] This was the basis for the Court's decision in *Osman* to discharge a person summoned for jury service who was profoundly deaf and who would have required the services of an interpreter during deliberations.[52]

3.24 In Britain, publicity arising out of cases occurring during the past two decades in which deaf people have been denied the opportunity to serve as jurors has led to calls for change.[53] In April 2000 the Lord Chancellor

48. *People v Guzman* 76 NY 2d 1 (1990) at 6 (NY Ct of Appeals).
49. See para 3.13.
50. *Goby v Wetherill* [1915] 2 KB 674 at 675; *R v McNeil* [1967] Crim L R 540.
51. *In re Osman* [1995] 1 WLR 1327.
52. *In re Osman* [1995] 1 WLR 1327 at 1328.
53. Eg "Prime Minister Tony Blair has indicated that the law could be changed to make it easier for deaf people to perform jury service. The announcement follows the outcry over the failure of an appeal by a profoundly deaf man against a court's decision banning him from sitting as a juror. Jeff McWhinney, chief executive of the British Deaf Association, was told … that the current law did not allow a 13th person – in this case a sign language interpreter – to be present in a jury room during deliberations": BBC News Online (10 November 1999), "Deaf Juror Rules

indicated that he did not oppose deaf people serving as jurors. The following year Lord Justice Auld, who had been appointed by the Lord Chancellor, the Home Secretary and the Attorney-General to review the working of the Criminal Courts of England and Wales, delivered his report. He stated that while caution about the prospect of a thirteenth person in the jury room was understandable, "accredited interpreters work to agreed professional standards that should preclude any attempt to intrude on or breach the confidence of juries' deliberations".[54] Because the Home Office was due to issue a consultation paper on the subject of third party support to jurors,[55] he refrained from making a recommendation but expressed in principle support for providing reasonable arrangements and suitable safeguards to enable people with disabilities to serve as jurors.

3.25 Some jurisdictions within the United States have overcome this problem. Some States have enacted legislation permitting the use of interpreters.[56] In *United States v Dempsey*[57] the Court considered objections to the presence of an interpreter during deliberations. Of concern was whether this posed a threat to the secrecy of jury deliberations,

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'to be Reviewed'" «news.bbc.co.uk/1/hi/uk/514551.stm» (as at 29 July 2003). See also D Silas, "Deaf Jurors" (1993) 143 *New Law Journal* 896; J Robins, "Falling On Deaf Ears" (2000) 97 *Law Society's Gazette* 28; S Enright, "The Deaf Juror and the Thirteenth Man" (1999) 149 *New Law Journal* 1720.

54. R E Auld, *Review of the Criminal Courts of England and Wales: Report* (The Chancellor's Department, London, 2001) at 153.
55. This paper is not available to the Commission at the time of writing.
56. Examples include the following provisions from Massachusetts (permitting a deaf juror to use a translator) and Illinois (rendering it unlawful for a person who is not a jury member to hear or observe jury deliberations):

> … In the presence of the jury, the court shall instruct the translator to make true, literal and complete translations of all testimony and other relevant colloquy to the deaf juror to the best of his ability. The court may permit a translator to be present and assist a deaf juror during the deliberations of the jury. In the presence of the jury, the court shall instruct the translator to refrain from participating in any manner in the deliberations of the jury and to refrain from having any communications, oral or visual, with any member of the jury regarding the deliberations of the jury except for the literal translations of jurors' remarks made during deliberations. The verdict of the jury shall be valid notwithstanding the presence of the translator during deliberations. (General Laws of Massachusetts Chapter 234A § 69.)
>
> However, if any juror is deaf or hard of hearing, the juror may be accompanied by and may communicate with a court appointed interpreter throughout any period during which the jury is sequestered or engaged in its deliberations. If the jury foreman reasonably believes that the interpreter is doing more than interpreting, nothing in this Act shall prevent him or her from petitioning the court and requesting that the interpreter be replaced with another interpreter. (705 Illinois Compiled Statutes § 315/1(a) (Jury Secrecy Act).)

57. *US v Dempsey* 830 F 2d 1084 (1987) at 1089.

and whether the interpreter might unlawfully participate.[58] The Court formed the view that an interpreter could well be less likely than a juror to reveal confidences of the jury room. Participation in deliberations was also unlikely as an interpreter performing his or her role properly would be occupied with signing. In any case such concerns could be obviated by the trial judge administering an oath requiring the interpreter neither to interfere with, nor reveal, the deliberations.[59]

3.26 The Court in *Dempsey* was more concerned with the potential "chilling" effect the presence of a thirteenth person might have - in other words, whether the jurors would feel inhibited from speaking frankly. The Court considered that this was unlikely in a "television-age society" that "has become so accustomed to seeing interpreters for the deaf translating to sign political speeches, newscasts, and the like that virtually all of us have come to view such interpreters more as part of the background than as independent participants".[60] However, because of important social policy considerations militating "against automatically foreclosing members of an important segment of our society from jury duty" merely because of their need for an interpreter in the jury room, the Court declined to adopt a rule stating that the presence of an interpreter in the jury room would necessitate a new trial.

3.27 In *People v Guzman*[61] New York State's highest Court rejected as unfounded concerns about the interpreter's presence in the jury room. The Court stated that the general rule excluding strangers was sufficiently flexible to allow in a signer where this was necessary to accommodate a hearing-impaired juror. The signer is a "neutral figure", in contrast with bailiffs or court officials whom the jury may perceive as being aligned with the law enforcement community and whose presence may thus be inhibiting.[62] Participation in the deliberative process by an interpreter can be avoided by having him or her swear an oath, and by instructing both the interpreter and the jury that participation is improper, any breach reportable to the court. "This, together with ethical constraints and the signer's hope of future employment in this capacity should provide sufficient assurance that the signer will not make public the proceedings in the jury room."[63] The practical result of *Guzman* appears to be an increasing use of deaf jurors in New York courts, with sign interpreters

58. The importance of the secrecy of the jury's deliberations has recently been reinforced in *R v O'Connor* [2004] UKHL 2 (22 January 2004).
59. *US v Dempsey* 830 F 2d 1084 (1987) at 1090.
60. *US v Dempsey* 830 F 2d 1084 (1987) at 1091. The Commission is not suggesting that this is necessarily the same in Australia.
61. *People v Guzman* 76 NY 2d 1 (1990) (NY Ct of Appeals).
62. *People v Guzman* 76 NY 2d 1 (1990) at 7 (NY Ct of Appeals).
63. *People v Guzman* 76 NY 2d 1 (1990) at 7 (NY Ct of Appeals).

being secured through a co-operative relationship between the courts and the New York Society for the Deaf.[64]

3.28 There are other concerns that may be held with regard to the use of sign language interpreters in a jury context. For example, during jury room deliberations, which have no prescribed procedure and where discussion may be lively, a practical difficulty may arise. Should several jurors speak at once, or individual jurors talk amongst themselves, whose contribution is the interpreter to sign? What level of qualification would an interpreter need in order to meet the demands of the trial situation, and how would the competence of the interpreter be assessed? Are there any implications for the trial process in the need to rest and rotate the interpreters? An interpreter may be able to sign for up to an hour or so, depending on the complexity or intensity of the matter, before requiring a break. It is arguable that rotating interpreters is disruptive to the flow of proceedings. It may also have adverse cost implications. On the other hand, for those concerned that an interpreter might somehow participate in deliberations or unduly influence his or her audience, rotation may be seen as a way of countering this by fragmenting each interpreter's time in the jury room.

Is Auslan English?

3.29 A potential problem related to the use of sign language arises in New South Wales. This is the relationship of Auslan[65] to English. Auslan, or Australian Sign Language, is the language used by sections of the deaf community in Australia, and has been formally recognised as a community language in national policy statements.[66] It has no written form. One misconception about sign language is that it is universal. Australian Sign Language evolved in the nineteenth century from British Sign Language (BSL), and while the two are clearly related they are both unlike American Sign Language (ASL), even though all three of these deaf

64. S S Ostrau, "Administrative Judge Hails Efforts of Courts" *New York Law Journal* (11 February 1992) at 2; F Ellman, "Translator Aids Deaf Juror in Negligence Trial" *New York Law Journal* (27 August 1992) at 2; O Kitzes, (Letter to the Editor) *New York Law Journal* (11 February 1992) at 2.
65. The discussion of Auslan is compiled from the following sources: T Johnston (ed), *Signs of Australia: a New Dictionary of Auslan* (North Rocks Press, Sydney, 1996) at 8, 557-566; Victoria Deaf Society, "What is Auslan" «www.vicdeaf.com.au/about us/auslan/about_auslan.htm» (as at 14 October 2003); Australian Communication Exchange, Deafness Resources Australia, "What is the Difference Between Auslan and Signed English?" «www.aceinfo.net.au/Resources/Downloads/ faq/dra.rtf» (as at 14 October 2003); The Western Australian Deaf Society Inc, "Auslan – Australian Sign Language" «www.wadeaf.org.au/auslan.shtml» (as at 14 October 2003)
66. J Lo Bianco, *National Policy on Languages* (AGPS, Canberra, 1987) at 14, 76.

communities reside in countries with English as the spoken language. This brings us to a second common misconception, namely that Auslan is English conveyed through signs, a kind of manual representation of English. Auslan is not English, although it is influenced by it. It is a visual language with its own grammar and lexicon, and is not based on spoken languages. Auslan is the primary, and sometimes only, language of the majority of the early onset profoundly deaf population.[67] Members of the deaf community commonly lead "bilingual lives",[68] in which English is a second language.

3.30 Included in the list of those ineligible for jury duty is "a person who is unable to read or understand English." The fact that a deaf juror could require the assistance of an Auslan interpreter does not necessarily mean that such a juror is unable to read or understand English. Nevertheless, the requirement for a juror to be able to read and comprehend English may imply that English is the language through which the jurors are expected to receive evidence presented at trial.[69]

3.31 The point was taken by the court in *Guzman*,[70] which stated:

> It is clear that in order for a deaf person to meet the statutory language requirement for jury service that person must understand and communicate in English using either signed English, or lip reading, or finger spelling or any combination thereof as the mode of communication. There are those in the deaf community who know only American Sign Language and do not know English. These people would not meet the statutory English requirement any more than would any other non-English-speaking person.

3.32 It is possible to sign in English.[71] This can be done by fingerspelling,[72] by combining Auslan signs and fingerspelling in English word order, or by

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67. Johnston at 557.
68. Deaf Society of NSW and NSW Association of the Deaf, *Submission* at 1, 2.
69. In the United States there have even been successful challenges against prospective jurors who were bilingual in English and Spanish, on the basis that some of the testimony was to be in Spanish, and it was feared that the jurors would follow the original Spanish and not the interpreter's official English version: *Hernandez v New York* 500 US 352 (1991).
70. *People v Guzman* 125 Misc 2d 457 (1984) at 459 (NY Sup Ct). The Court of Appeals noted that the appeal did not require it to determine whether a juror dependent on a "nonliteral sign language", such as American Sign Language, would be qualified under the statutory requirement that a juror be English-speaking: 76 NY 2d 1 (1990) at 3 n2. See also *People v Green* 561 NYS 2d 130 (1990); *Arizona v Marcham* 160 Ariz 52 (1988); *People v Rodriguez* 145 Misc 2d 105 (1989).
71. Johnston at 560.
72. Spelling words out, letter by letter, by means of twenty-six distinct configurations of handshapes: Johnston at 558.

means of Signed English.[73] None of these is a sign language in its own right, but rather a manual representation of English, word by word or letter by letter. They have evolved because of the need that sometimes arises, for example, to know what a person or document says word for word in English. Signing in English is effective as a means of communication only to the extent of the signer and audience's knowledge of English vocabulary and syntax. Signing in English will not be understood by a deaf person with poor proficiency in English. It should not be assumed that deaf people living in an English-speaking community are fluent in English, and in fact the level of proficiency in English within the deaf community varies greatly.

3.33 However, even where deaf people are fluent in English, Signed English is not a feasible alternative for use in a courtroom setting. The vocabulary is small, containing only approximately 2500 words.[74] It is, therefore, extremely limited, and it would be difficult even to find an interpreter as Signed English is used little following the completion of schooling.

3.34 The joint submission from the Deaf Society of NSW and the NSW Association of the Deaf states that, "while it is not always possible for Deaf people to use a 'basic level' of spoken English, many Deaf people are employed in positions which require a great deal of public interaction, and most Deaf people can read a newspaper, even though it is written in their second language, English".[75] In this and other respects it is arguable that the situation of a deaf juror relying on an Auslan interpreter but bilingual in Auslan and English, can be distinguished from that of other prospective non-English speaking jurors. Auslan is related to English; should the need arise to convey a precise phrase or sentence (such as a term of a contract) into English, this could be achieved by transliterating Auslan signs into English word order. Furthermore, the life experiences of Auslan speakers have been gleaned in an Australian context, aiding comprehension of evidence adduced at trial.

3.35 Nevertheless, it might be argued that an interpreter is just that, an interpreter; the evidence adduced in the courtroom and the discussion that takes place in the jury room are filtered through the interposition of this third person to the deaf juror, thereby necessitating a kind of editing process. This would especially apply to a jury room situation where a

73. Signed English is a signed form of English, thus English in a different format. It uses English grammar and syntax, but borrows many signs from Auslan: Deaf Society of NSW, "FAQ" «www.deafsocietynsw.org.au/resources/faqsign.htm» (as at 21 October 2003).
74. Advice obtained from Robert Adam, Co-ordinator of Community Relations and Development for the Deaf Society of NSW.
75. Deaf Society of NSW and NSW Association of the Deaf, *Submission* at 2.

number of people might speak at once, the interpreter needing to select which comments to translate into Auslan.

CHALLENGING JURORS

3.36 Part 6 of the *Jury Act 1977* (NSW) provides for the making of challenges to persons acting as jurors. There are two principal types of challenge in New South Wales, the peremptory challenge and the challenge for cause.[76] The peremptory challenge allows each of the accused and the Crown in criminal proceedings to challenge three of the potential jurors without giving any reason.[77]

Challenge for cause

3.37 The Crown[78] and the accused[79] may challenge any number of the prospective jurors for cause on one of the few permitted grounds. In *Murphy v The Queen* the High Court, quoting the trial judge, identified the causes for challenge as being that:

> [T]he proposed juror does not possess the necessary qualifications or that he has some personal defects which render him incapable of discharging his duty as a juror or that he is not impartial or that he has served on another jury in respect of the same matter or that he has been convicted for an infamous crime. [80]

3.38 The qualifications necessary are mostly contained in the legislative provisions referred to in the previous chapter.[81] A reason must, therefore, be provided in order to challenge for cause, and a *prima facie* case put in support of such an application. If a *prima facie* case is established, the prospective juror is sworn and questioned under oath. The trial judge will decide on the balance of probabilities if the grounds for disqualification have been established, and, if so, the juror will be removed from the

76. Challenge to the array, that is, to the entire jury panel, is also available on the basis of some default of duty on the part of the Sheriff eg disregarding the provisions of a statute or of the law: *R v Grant* [1972] VR 423 at 424. See also *Jury Act 1977* (NSW) s 41.
77. *Jury Act 1977* (NSW) s 42(1); If the Crown and all the accused agree, then any number of peremptory challenges may be made: s 42(2). In civil proceedings each party may issue challenges to half the number of potential jurors as are required to constitute the jury: s 42A.
78. *Jury Act 1977* (NSW) s 43.
79. *Jury Act 1977* (NSW) s 44.
80. *Murphy v The Queen* (1989) 167 CLR 94 at 102.
81. See para 2.2.

panel.[82] Because the identity of prospective jurors is confidential,[83] the parties have no information other than appearance on which to base such a challenge. Consequently, challenges for cause are rare in New South Wales.[84]

3.39 The fact that a juror has a significant vision or hearing impairment may not be apparent to the parties. It is, however, vital that the parties have this information, as they are in the best position to know whether the impairment may adversely affect their cases. Present procedures, which disclose nothing about a prospective juror, would, therefore, need modification. While this does not appear to be an insuperable problem, the Commission would welcome comments on it. Another procedural difficulty is the delay caused to the commencement of trial, should a juror requiring a sign interpreter be selected. Interpreters available for the duration of the trial and subsequent jury deliberation need to be identified and appointed.

Peremptory challenges

3.40 A peremptory challenge is one in which no reason need be given for objecting to a particular potential juror. Chief Justice Barwick stated:

> [t]hat the challenge is peremptory means that the accused need not in any wise justify his challenge. It need represent no more than his personal objection to be tried by the person whom he sees before him. … It is his peculiar right to follow his own impressions and inclinations.[85]

3.41 Because the challenge for cause is so little used, the peremptory challenge is the main means by which a party may exclude as a juror a person suspected of bias or partiality.[86] This may be relevant, for example, where a trial is held not in a city but in a small rural town, where an increased probability exists of an accused being acquainted with a person summoned for jury duty.[87] Chief Justice Barwick said of the right of challenge "and particularly the right of peremptory challenge, [that it] lies at the very root of the jury system as it now exists."[88] An American

82. L A McCrimmon, "Challenging A Potential Juror For Cause: Resuscitation Or Requiem?" (2000) 23 *University of New South Wales Law Journal* 127 at 135; *Jury Act 1977* (NSW) s 46.
83. *Jury Act 1977* (NSW) s 29, 37, 67A, 68.
84. M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, Melbourne, 1994) at 45; McCrimmon at 128.
85. *Johns v The Queen* (1979) 141 CLR 409 at 418.
86. Findlay at 48.
87. New South Wales Law Reform Commission, *The Jury in a Criminal Trial* (Report 48, 1986) at para 4.60.
88. *Johns v The Queen* (1979) 141 CLR 409 at 418.

commentator referred to the peremptory challenge as having been "sacrosanct" and a cherished part of the US jury system.[89] However, like the challenge for cause, information on which to base a peremptory challenge is lacking, and this, together with the absence of a requirement for justifying the challenge, undermines its utility. The irony is that, in supposedly countering bias, the peremptory challenge may itself be driven by prejudice. If not based on any facts other than the potential juror's appearance, then the risk is that it is based on crude social stereotyping, and that it is superficial and arbitrary.[90] The ability to challenge jurors slightly qualifies the randomness of juror selection.

3.42 In the context of people with disabilities serving as jurors, the peremptory challenge may present an insurmountable problem. Were initiatives to be introduced, such as assessment by the Sheriff's Office or the court of individual prospective jurors to ascertain whether their blindness or deafness in reality prevents their effective functioning, as well as the introduction of interpreters and assistive technology, these can nevertheless be rendered ineffective by the continuing use of peremptory challenges.

3.43 In 1986 this Commission produced a report on juries in criminal trials.[91] At that time each side was permitted twenty peremptory challenges where the offence was murder, and eight in any other case.[92] Having regard to the inherent problems with this type of challenge, the Commission considered various options for reform, including its abolition. This option was rejected, as it was felt that parties would be forced to challenge for cause, a procedure both more time-consuming and potentially embarrassing for the prospective juror.[93] Further, it was argued that, as the rules and procedures pertaining to jury selection are established by the Crown, the abolition of peremptory challenge would

89. M A Lynch, "The Application of Equal Protection to Prospective Jurors With Disabilities: Will *Batson* Cover Disability-Based Strikes?" (1993) 57 *Albany Law Review* 289 at 305.
90. Findlay at 49-52. See also England and Wales, Fraud Trials Committee, *Report* ("Roskill Report") (HMSO, London, 1986) at para 7.22-7.24.
91. See note 86 above.
92. NSWLRC Report 48 at para 4.58.
93. Compare Findlay at 55: "Given the limited grounds on which a challenge for cause can be mounted, and the paucity of information that counsel possess about prospective jurors, there is little to suggest such an extravagant consumption of time or stress. Further, it could be argued that it is highly desirable, where counsel has strong grounds for suspecting bias on the part of a prospective juror (such as would warrant a challenge for cause), that this bias be explicitly identified in the courtroom. In this way the empanelment procedure would be clearly seen to be operating to secure an "impartial" jury…"

deny the accused an input into the composition of the jury trying his or her case.[94]

3.44 The law was amended to allow each side three peremptory challenges,[95] with a correspondingly reduced risk of discriminatory selection.

United Kingdom

3.45 In 1986 the Fraud Trials Committee published a report ("the Roskill Report"), recommending the abolition of the peremptory challenge in fraud cases.[96] The Committee's comments make clear that it would have gone further had it not been constrained by its terms of reference:

> The current practice of peremptory challenge further weakens the same principle [of random selection], to a potentially critical extent. Our evidence shows that the public, the press and many legal practitioners now believe that this ancient right is abused cynically and systematically to manipulate cases towards a desired result. The current situation bids fair to bring the whole system of jury trial into public disrepute. We conclude that in respect of fraud trials such manipulation is wholly unacceptable and must be stopped. Whether it is acceptable in robbery, drugs or murder trials is for others to conclude. [97]

That invitation appears to have been accepted. In 1988 peremptory challenge was abolished in the United Kingdom.[98]

United States

3.46 In contrast with the juror anonymity provisions of this State, most American jurisdictions permit extensive examination of prospective jurors by means of a "voir dire". Through this procedure counsel may question prospective jurors about their attitudes and other personal details, and then use the results to make peremptory "strikes", or challenges, against them.[99] To the extent to which this practice is unregulated, its use

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94. New South Wales Law Reform Commission, *The Jury in a Criminal Trial* (Discussion Paper 12, 1985) at para 4.16.
95. *Jury (Amendment) Act 1987* (NSW) Sch 1 item 5; *Statute Law (Miscellaneous Provisions) (No 3) Act 1988* (NSW) Sch 12 item 3. Findlay is critical of this so-called "compromise", claiming that "the only practical alternative to the vagaries of the current peremptory challenge mechanism is to dismantle it altogether": Findlay at 53-54.
96. Roskill Report at para 7.38.
97. Roskill Report at para 7.37.
98. *Criminal Justice Act 1988* (UK) s 118(1).
99. M Findlay at 53.

carries the risk that it may reflect no more than the prejudices of the challenger.[100]

3.47 In *Batson v Kentucky*[101] the United States Supreme Court imposed limits on the prosecution's right to make peremptory challenges, by prohibiting challenges made on the basis of race. The Court's finding was based on the Equal Protection Clause contained in the Fourteenth Amendment to the US Constitution, and to that extent is of little relevance in New South Wales. Of interest, however, is the mirroring by *Batson* (and its so-called "progeny") of initiatives to reduce discrimination in society, together with comments contained in the majority opinion pertaining to jury selection.

3.48 The appellant was an African American convicted of burglary and receipt of stolen goods. During the trial the prosecutor had used his peremptory challenges to strike all four black persons on the *venire*, or jury pool, and an all-white jury was sworn. It was held that, while the prosecutor was ordinarily entitled to exercise peremptory challenges for any reason, the Equal Protection Clause forbids challenges to potential jurors solely on account of their race. The Court stated:

> While we recognise, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice. The reality of practice, amply reflected in many state- and federal-court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.[102]

3.49 Elsewhere[103] the Court expressed the opinion that:

> [t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black

100. A Weis, "Peremptory Challenges: the Last Barrier to Jury Service for People With Disabilities" (1997) 33 *Willamette Law Review* 1 at 5, refers to peremptory challenges as "the final and ultimate bastion of prejudice, segregation, and exclusion preventing jury service by "qualified" people with physical and mental impairments".
101. *Batson v Kentucky* 476 US 79 (1986).
102. *Batson v Kentucky* 476 US 79 (1986) at 98-99.
103. *Batson v Kentucky* 476 US 79 (1986) at 87-88.

> persons from juries undermine public confidence in the fairness of our system of justice. Discrimination within the judicial system is most pernicious because it is "a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others."

3.50 Implicit in the prohibition against race-based challenges is the recognition that they are based on irrational prejudice.

3.51 *JEB v Alabama ex rel TB*[104] extended the prohibition to gender-based peremptory challenges. Previous decisions had already applied *Batson* to civil cases,[105] and to criminal defence use of racially discriminatory challenges.[106] It appears unlikely, however, that *Batson* will be extended to prohibit peremptory challenges on the basis of disability. As the Court stated in *United States v Harris*[107] "unlike race or gender, disability may legitimately affect a person's ability to serve as a juror".[108] Rather, the current approach of examining each case on its particular facts to discover whether a prospective juror can do the job, with or without reasonable accommodations, seems likely to continue.[109]

3.52 Unlike race or gender, blindness or deafness *can* impair the ability of the person to perform effectively as a juror. However, it is arguable that a *blanket* ban on allowing persons who are blind or deaf to serve as jurors is no more rational than a ban based on race or gender. Testing the extent of a sight or hearing disability is always possible.

3.53 In *Galloway v Superior Court of the District of Columbia*,[110] a blind man responded to a notice to appear for jury duty but was then barred from serving due to his blindness. He filed suit alleging the violation of various legislative provisions. The Court, finding in his favour, noted that "whether a blind juror can serve competently can be addressed on a case-by-case basis".[111] In *Guzman*, the New York Court of Appeals stated that, in regard to those such as deaf prospective jurors, "the question in each case, assuming that the prospective juror is otherwise qualified, must be whether the *individual* is capable of doing what jurors are supposed to do"

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104. *JEB v Alabama ex rel TB* 511 US 127 (1994).
105. *Edmonson v Leesville Concrete Co Inc* 500 US 614 (1991).
106. *Georgia v McCollum* 505 US 42 (1992).
107. *US v Harris* 197 F 3d 870 (1999) at 875.
108. See also *NY v Falkenstein* 288 AD 2d 922 (2001); *Donelson v Fritz* 70 P 3d 539 (2002); Compare *People v Green* 561 NYS 2d 130 (1990).
109. Lynch at 302.
110. *Galloway v Superior Court of the District of Columbia* 816 F Supp 12 (1993).
111. *Galloway v Superior Court of the District of Columbia* 816 F Supp 12 (1993) at 18 n 12.

(emphasis added).[112] Both cases assume that reasonable adjustments ("accommodations") such as sign interpreters, will be offered as required.[113]

The limits of reform

3.54 If the conclusion from analysis of the current exclusionary policy is that there are compelling reasons for departing from the *status quo*, there is nevertheless a real danger that reform risks being cosmetic only. A blind or deaf person, called to be a juror, may be prevented from being empanelled due to peremptory challenge by counsel on the basis of the sorts of preconceptions discussed in this chapter. In the United States a peremptory challenge based on a juror's deafness was disallowed because, the Court stated, "the effort to bar the hearing impaired person from jury service must, at the very least, have a rational basis" and, in the light of *Guzman*, the proposed challenge based solely on disability and not on the juror's ability to communicate was not rational and violated the juror's equal protection rights.[114] However, even in the United States this test is not applicable in all jurisdictions, making it easier to sustain a peremptory challenge in these circumstances.[115] In New South Wales it is not a requirement that a peremptory challenge be based on any articulated reason.[116]

3.55 For meaningful change to take place, considerable effort would be required to educate and instil confidence in lawyers and the general public as to the competence of deaf or blind people to serve as jurors. Unless such a perception becomes widespread and not merely patchy, in practice blind or deaf people may well continue to be excluded from juries.

CONCLUSION

3.56 Many of the objections to blind or deaf people serving on juries appear to be based on prejudice, stereotyping, or the inconvenience of devising means to accommodate such jurors. The systematic exclusion from jury service of a sector of society, especially where its members have expressed a willingness to serve, has the potential to undermine public confidence in

112. *People v Guzman* 76 NY 2d 1 (1990) at 5 (NY Ct of Appeals).
113. See further discussion at para 4.15-4.18.
114. *People v Green* 561 NYS 2d 130 (1990) at 132-133.
115. The US Supreme Court has stated "Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to "rational basis" review": *JEB v Alabama ex rel TB* 511 US 127 (1994) at 143; see also D J Meyer, "A New Peremptory Inclusion to Increase Representativeness and Impartiality in Jury Selection" (1994) 45 *Case Western Reserve Law Review* 251 at n 152.
116. *Katsuno v The Queen* (1999) 199 CLR 40 at 50, 57-58.

the criminal justice system by calling into question its fairness. Belief in the fairness of the justice system could be damaged by the perception that legal rules fail to keep pace with our better understanding of the rights of people with disabilities, and their ability to contribute to, and participate in, society. In this regard, Justice Deane has stated:

> a change in community perceptions or standards may lead, on reconsideration, to the modification or abandonment of rules or practices which were, in other times, seen as necessary to ensure that the trial of an accused was a fair one.[117]

3.57 Examples from American jurisdictions, cited above, show that some US courts are demonstrating increasingly their confidence in the ability of deaf or blind people to serve as jurors without compromising the fairness of the trial.

117. *Dietrich v The Queen* (1992) 177 CLR 292 at 328.

4. Disability discrimination

- Legislation
- Policy considerations
- Reasonable adjustments
- Deaf and blind people in the legal system

LEGISLATION

The Jury Act 1977 (NSW)

4.1 Section 14 of the *Jury Act 1977* (NSW) mandates the removal from the supplementary jury roll of the names of persons who are disqualified or ineligible to serve as jurors. The section also gives the Sheriff discretion to determine eligibility:

> (1) The sheriff shall delete from a supplementary jury roll those persons whom the sheriff determines:
>
> (a) are disqualified from serving as jurors or ineligible to serve as jurors, or
>
> (b) are entitled as of right to be exempted from serving as jurors and who have duly claimed exemption. (emphasis added)

4.2 In practice, with the possible exception of item 11 of Schedule 2 ("persons who do not read or understand English"), discretion plays no part with regard to any category of disqualification, ineligibility or exemption contained within the first three schedules to the Act, other than that pertaining to people with sickness or disability. If a doubt arises as to whether a prospective juror will be able to discharge the requisite duties, either because of insufficient English language proficiency or because of some forms of impairment or illness, the Sheriff's office will attempt to ascertain whether the prospective juror meets the requirements of the position. However, as far as blind or deaf people are concerned, the current policy is automatic exclusion from jury service.

Anti-Discrimination Act 1977 (NSW)

4.3 Deafness and blindness constitute disabilities for the purposes of the *Anti-Discrimination Act 1977* (NSW) ("ADA").[1] Disallowing deaf or blind persons from serving as jurors falls within discriminatory behaviour on the basis of disability, as defined in s 49B:

> (1) A person ("the perpetrator") discriminates against another person ("the aggrieved person") on the ground of disability if, on the ground of the aggrieved person's disability … , the perpetrator:
>
> (a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person who does not have that disability …

1. *Anti-Discrimination Act 1977* (NSW) s 4.

4.4 This, however, does not make it unlawful. Section 54(1)(a) permits discriminatory behaviour where this is necessary in order to comply with a requirement of another statute.[2] As already stated, once the Sheriff has determined, as he or she is entitled to do under s 14 of the *Jury Act 1977* (NSW), that a blind or deaf person is ineligible to serve as a juror, the deletion of that person's name from the roll is mandatory. It would seem, therefore, that by virtue of s 54, the Sheriff's act in deleting from the supplementary jury roll the names of blind and deaf persons, is not inconsistent with the ADA. This would obviate the need to discuss how a blind or deaf person's desire to serve as a juror would be affected by Divisions 2 and 3 of Part 4A of the ADA, which specify the areas of the Act's application such as employment and the provision of goods and services.

4.5 A different interpretation is suggested by Chris Puplick, the former President of the Anti-Discrimination Board of New South Wales. He states that the *Jury Act 1977* "does not *necessitate* exclusion of people who are blind or deaf" (his emphasis). If there are suitable accommodations that can be made "there is no reason to conclude that a person who is blind or deaf is unable to discharge his or her duties as a juror". He asserts that guidelines developed by the Sheriff's Office, not having statutory force, do not attract the protection of s 54.[3]

Disability Discrimination Act 1992 (Cth)

4.6 Section 5(1) of the *Disability Discrimination Act 1992* (Cth) (hereinafter "DDA") defines disability discrimination in essentially the same terms as s 49B of the ADA. Section 15 of the DDA makes it unlawful to discriminate against a person on the grounds of disability in the area of employment. While it is unlikely that this provision would have any application to the issue of jury service, the terms of s 12 of the Act render any detailed consideration unnecessary by limiting the scope of s 15 to Commonwealth employees.[4]

4.7 Section 24 of the DDA prohibits discrimination in relation to the provision of goods and services. The Human Rights and Equal Opportunity Commission has held that "service" includes "providing the administration and management to enable eligible persons to serve on a jury".[5] The case

2. The Commission has noted that s 54 was intended as a temporary measure, and has recommended its repeal: New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, 1999) at para 6.9, 6.34 and Recommendation 43.
3. Puplick, *Submission* at 4.
4. *Disability Discrimination Act 1992* (Cth) s 12(1), (4), (5).
5. *Druett v New South Wales* (HR&EOC, No H99/6, Street SC, 17 April 2000, unreported).

concerned wheelchair access to a courtroom for a person summoned for jury service. There was no question as to whether the complainant was eligible to serve as a juror, but rather, whether being eligible, she was treated less favourably than other eligible persons without her disability, by the respondent's refusal to provide a service. This is distinguishable from the situation of those potential jurors who, due to blindness or deafness, are deemed ineligible by the Sheriff. While it might be argued that the judgment that no blind or deaf person is capable of discharging the duties of a juror is flawed, the fact that the Sheriff has used his or her discretion to arrive at this decision cannot be regarded as having failed to provide a service, thereby treating less favourably a person with a disability.

POLICY CONSIDERATIONS

4.8 Lord Justice Auld, in the report referred to in the previous chapter,[6] supported people with disabilities serving as jurors "not because there is a general right, as distinct from duty, to undertake jury service or under any anti-discrimination legislation, but because such inclusiveness is a mark of a modern, civilised, society".[7] In Australia, the broad policy, if not the actual provisions, of the anti-discrimination legislation referred to above, accords with the aspirations of those blind or deaf persons desiring, but denied, the opportunity to perform jury service. The ADA is "an Act … to promote equality of opportunity between all persons". The DDA, lists amongst its objects:

- to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and
- to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community. [8]

4.9 In introducing the *Disability Discrimination Bill* to Federal Parliament, Mr Howe, then Minister for Health, Housing and Community Services, stated:

> Our vision is a fairer Australia where people with disabilities are regarded as equals, with the same rights as all other citizens, with recourse to systems that redress any infringements of their rights; where people with disabilities can participate in the life of the community in which they live, to the degree that they wish;

6. See ch 3 note 53.
7. R E Auld, *Review of the Criminal Courts of England and Wales: Report* (The Chancellor's Department, London, 2001) at 153.
8. *Disability Discrimination Act 1992* (Cth) s 3(b), (c).

> … where difference is accepted, and where public instrumentalities, communities and individuals act to ensure that society accommodates such difference. Only then will we be able to say that justice has been achieved. [9]

4.10 Jury duty is, arguably, an area where there is still some way to go in translating these aspirations into practice. While "reasonable adjustments"[10] have been made in cases of persons with some impairment to hearing or sight, it has been assumed that such adjustments are not required in the case of profoundly blind or deaf persons, presumed to be incompetent to act as jurors. The general absence of discussion regarding the possibility for adjustments reflects the current legal practice preventing blind or deaf persons from undertaking jury service.

4.11 The accused's right to a fair trial has, rightly, been afforded pre-eminence. There is, however, little sign of any consideration of the possibility that this right may not be compromised if blind or deaf people serve as jurors. In the United States there has been a gradual shift of emphasis from the defendant's rights to those of others in the community. Andrew Weis[11] identifies three phases, and while his analysis is within the context of the discriminatory use of the peremptory challenge and constitutional guarantees of equal protection, it does serve to highlight the fact that the US Supreme Court has not been content to sacrifice the rights of jurors totally to the pre-eminent rights of the accused. Initially, according to Weis, the US Supreme Court upheld the accused's right to a jury from which members of the accused's race had not been deliberately excluded. In later decisions the Court began to emphasise the excluded jurors' right to be free from discrimination, as well as the community's right to a legitimate judicial system. More recently the rights of the excluded jurors have been given more prominence. The Court held in *Georgia v McCollum*[12] that a criminal defendant was prohibited by the Constitution from exercising a peremptory challenge in a racially discriminatory manner.

4.12 The notion of "equality of opportunity" in the present context need not be restricted to the question of whether a deaf or blind person should be eligible for jury duty, but also raises the broader issue of whether such a person has been subjected to the same selection process. Members of the public with a disability who are summoned for jury service are invited by the Sheriff's Office to make contact in order to discuss the situation,

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9. Australia, *Parliamentary Debates (Hansard)* House of Representatives, 26 May 1992 at 2755.
10. See para 4.15-4.18 below.
11. A Weis, "Peremptory Challenges: the Last Barrier to Jury Service for People With Disabilities" (1997) 33 *Willamette Law Review* 1 at 8-9.
12. *Georgia v McCollum* 505 US 42 (1992).

and see if the disability can be reasonably accommodated.[13] This approach suggests that people with disabilities who wish to explore the possibility of serving as jurors can have their particular situation assessed. Those with a significant hearing or sight impairment are not treated equally, in the sense that they are subject to a policy of blanket exclusion, and not assessed, as individuals, on a case-by-case basis. In the light of the American experience, it is necessary to reconsider the argument that, solely by reason of their impairment, deaf or blind people are incapable of performing the necessary duties of jury service.

4.13 People With Disabilities ("PWD"), a peak disability rights and advocacy organisation, urges the Commission to proceed from a social model of disability, according to which "the fundamental issue" is not the individual's limitations "but, rather, a hostile and non-adaptive society":

> From a social model perspective, people who are blind or deaf are not prevented from participation in jury service as a result of their impairments, but as a result of a failure of the legal system to adapt to their participation requirements.[14]

4.14 Such views challenge automatic exclusion. Few people would disagree with the policy objectives of the ADA and DDA. The aspirations they embody can, nevertheless, be undermined in the jury context by regarding people with disabilities as fortunate in *not* being required to perform jury service, and as *favoured* over those citizens who find the obligation a nuisance. This, again, depends on one's perspective. A civic duty may be a burden to a person obliged to perform it, while treasured by the person who must fight to undertake it.[15] One commentator has noted that, in addition to practical barriers to jury service faced by people with disabilities, such as lack of access to courtrooms or sign interpreters, they may also encounter "humanistic" barriers "such as the court officer who 'takes care' of the disabled person by relieving her of jury duty".[16] The judgment in an American case concerning a challenge to a deaf juror contained the following statement:

> The deaf are not poor creatures to be patronized by us, congratulated on their individual efforts to overcome their handicaps and summarily brushed aside. Like members of any other cognizable group, the deaf are a part of our community and must be considered, evaluated,

13. New South Wales, Office of the Sheriff, "People with Disabilities and Jury Duty" «www.agd.nsw.gov.au/ots.nsf/pages/jury16» (as at 15 September 2003).
14. People With Disabilities, *Submission* at 2.
15. M A Lynch, "The Application of Equal Protection to Prospective Jurors With Disabilities: Will *Batson* Cover Disability-Based Strikes?" (1993) 57 *Albany Law Review* 289 at 297.
16. Lynch at 299.

and finally either accepted or rejected for service as individuals just as any other citizen.[17]

REASONABLE ADJUSTMENTS

4.15 Reference has been made elsewhere in this paper to "reasonable adjustments", or "reasonable accommodations" as they are referred to in the United States. These are changes or modifications, for example within an environment or to a job, that make it possible for an otherwise qualified person with a disability to participate in a process or perform required tasks.[18] The New South Wales Attorney General's Department, which is responsible for administering the State's court system, has developed a Disability Strategic Plan ("DSP") in order to meet its obligations under State and Federal anti-discrimination legislation. It is arguable that this legislation does not pertain to blind or deaf people who are summoned for jury service.[19] Indeed, the DSP's chief concern is with the non-discriminatory delivery of services to clients, and the enjoyment of a disability-friendly workplace by departmental employees (and jurors fall into neither of these two categories). Nevertheless, more generally the Department states that one of its objectives is to incorporate disability principles into the Department's policies and practices. [20]

4.16 Various accommodations are already made in relation to facilitating jury duty.[21] Some courthouses are wheelchair-accessible, or equipped with hearing aid loops. Travel allowances are available for general or wheelchair-accessible taxis, and the Sheriff's Office undertakes to be flexible regarding such matters as arranging suitable parking facilities and reallocating a prospective juror to a courthouse better equipped to meet that person's needs. Auslan interpreters are available in certain situations, although not, at present, for use by jurors. Whether it would be unreasonable, as to either expense or inconvenience, to make available a greater range of accommodations in order to open up jury duty to a larger pool of potential jurors with significant sight or hearing loss is a matter which the Commission is exploring in its work on this review.

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17. *People v Guzman* 125 Misc 2d 457 (1984) at 474 (NY Sup Ct).
18. See, eg, US Department of Justice, "Americans With Disabilities Act Questions and Answers" «www.usdoj.gov/crt/ada/employmt.htm» (as at 5 November 2003).
19. See para 4.3-4.7.
20. New South Wales, Attorney General's Department, "Disability Strategic Plan 2003-2005" «www.lawlink.nsw.gov.au/agd.nsf/pages/dap» (as at 5 November 2003).
21. New South Wales, Attorney General's Department, Office of the Sheriff, "People with Disabilities and Jury Duty" «www.lawlink.nsw.gov.au/ots.nsf/pages/jury16» (as at 5 November 2003).

4.17 In the US, the court in *Caldwell*[22] accommodated a juror with a detached retina in one eye and limited vision in the other. This was done by taking measures such as moving her to a seat in the jury box closer to the witness box, reading documents into the evidence, and providing her with an enlarged print version of the transcript. In *Galloway*,[23] a prospective juror who was blind had been barred from jury service, no reasonable accommodations being offered. The Court, in granting his motion for judgment against the court that had initially excluded him, suggested that accommodations that might have been offered included reading aloud the documentary evidence and describing the physical evidence. The Court noted that the Library of Congress uses a device called the Kurzweil Reading Machine, which translates printed material into audio. "Audio describers" – individuals trained to describe physical movements, dress and physical settings for the blind – could also be employed. In conclusion, the Court stated that it took no position on the reasonableness of any particular accommodation "other than to note that solutions are as limitless as a willing imagination can conceive".[24]

4.18 PWD states the view that many jurors struggle to retain comprehension of all the evidence with which they are presented and would benefit from having access to a transcript.[25] It is already permissible for jurors to be furnished with transcripts if the judge agrees.[26] Real-time captioning, in its versatility, could prove very useful to everyone concerned. In a court situation, where proceedings are already being transcribed by a court reporter, the captions can be displayed on a television or computer screen and read by a juror who is deaf, so long as he or she meets the requirement of being able to read and understand English. Created in an electronic format, this could then be easily converted to Braille for a blind juror to refer to later, if necessary. The service is cost effective because the captions are recorded to become the written transcript, available to the judge, lawyers and any other relevant party. In New York real-time technology was first used to assist a deaf juror in 1990, and its use is widespread in the United States.[27]

22. *People v Caldwell* 603 NYS 2d 713 (1993) at 714.
23. *Galloway v Superior Court of the District of Columbia* 816 F Supp 12 (1993).
24. *Galloway v Superior Court of the District of Columbia* 816 F Supp 12 (1993) at 18 n 11.
25. People With Disabilities, *Submission* at 2.
26. Advice from Sheriff's Office by email dated 24 June 2003.
27. D Wise, "Courtroom Open For Real-Time Transcription" *New York Law Journal* (27 June 1996) at 1.

DEAF AND BLIND PEOPLE IN THE LEGAL SYSTEM

4.19 A number of deaf or blind people operate effectively in modern legal systems. For example, there are a small number of judicial officers, appointed to their posts despite a significant sight impairment. In *Galloway v Superior Court of the District of Columbia*[28] the Court stated:

> in the United States, there are several active judges who are blind. Indeed, it is highly persuasive that Judge David Norman, a blind person, served as a judge on the Superior Court of the District of Columbia and presided over numerous trials where he was the sole trier of fact and had to assess the credibility of the witnesses before him and evaluate the documentation and physical evidence. Defendants have never claimed that "those trials were invalid because [Judge Norman] was blind." It is thus illogical to suggest that all blind persons are unqualified to sit on a jury when a blind judge in the same Superior Court successfully fulfilled those very duties a blind juror would have to discharge. No distinction can be drawn between a blind judge's ability to make factual findings and the abilities of a blind juror.

The Court went on to note:

> The well-proven capabilities of blind lawyers, although not precisely parallel to those of every blind juror, are nonetheless persuasive. Blind lawyers have tried both civil and criminal cases before this Court and in doing so, they have utilised the same skills that a blind juror would need – they evaluate the credibility of witnesses and the content of physical and documentary evidence. [29]

4.20 In *Jones v New York City Transit Authority* the Court held that, due to the facts of the particular case, a blind person was not competent to serve as a juror. However, the Court also stated that blindness did not disable a person to be a lawyer or judge, and it would be "contradictory to use the defect as the sole basis for rejecting a juror, especially since the juror does not act alone but in conjunction with the other persons on the jury to reach a joint determination".[30]

4.21 In the United Kingdom, in the eighteenth century, Sir John Fielding, brother of the novelist Henry, was appointed to the magistracy despite his blindness. It was said he knew more than three thousand London thieves by their voices.[31] More recent appointments to judicial office of blind

28. *Galloway v Superior Court of the District of Columbia* 816 F Supp 12 (1993) at 17.
29. *Galloway v Superior Court of the District of Columbia* 816 F Supp 12 (1993) at 17 n 8.
30. *Jones v New York City Transit Authority* 126 Misc 2d 585 (1984) at 589.
31. National Portrait Gallery, Search the Collection, "Sir John Fielding" «www.npg.org.uk/live/search/portrait.asp?LinkID=mp01570&rNo=1&role=sit» (as at 30 October 2002).

persons in the United Kingdom have included a deputy master of the High Court,[32] an assistant recorder of a criminal court ("seen as the first rung on the judicial ladder"),[33] and an immigration adjudicator.[34] In addition to several blind people serving as members of various tribunals, nine blind magistrates were appointed in 2001, following a three year pilot scheme initiated by the Lord Chancellor.[35]

4.22 Of course a judge is in an easier position than a juror since he or she has control of the court and is thus able to deal, so far as is possible, with any needs arising from his or her blindness. Likewise, a lawyer has greater control of his or her environment than a juror.

32. In the News section, "Blind Justice" (1991) 141 (February 8) *New Law Journal* at 155.
33. F Gibb, "Crime Court Debut For Blind Judge" *Times* (21 March 2000) in Features Section.
34. F Gibb, "Crime Court Debut For Blind Judge" *Times* (21 March 2000) in Features Section.
35. K Foster, "Blind Justice Sets Moral Precedent" *The Scotsman* (27 June 2001) at 7; United Kingdom, Lord Chancellor's Department, "Seven Advisory Committees Seeking Blind Magistrates" «www.newsrelease-archive.net/coi/depts/GLC/coi4342d.ok» (as at 27 October 2003).

5. Law reform in overseas jurisdictions

- Canada
- England and Wales
- New Zealand
- United States
- Conclusion

5.1 This chapter examines the law governing jury service by people with disabilities in selected overseas jurisdictions with emphasis on legislative reforms.

CANADA

5.2 Criminal jury trials are a shared sphere of responsibility between the Federal and Provincial governments. Each Province and Territory has legislation (*Jury Act*) that sets out the qualifications for inclusion in jury panels and how jury panels will be constituted. Federally, the *Criminal Code* establishes rules to ensure that selection of jury members is fair.[1]

Provincial and Territorial law

5.3 In most Provinces and Territories, physical infirmity is a ground for disqualification, or exemption, or challenge for cause. For example, the legislation in Manitoba,[2] Northwest Territories[3], Nunavut,[4] Ontario[5] and Yukon[6] provides that a person who possesses a physical or mental infirmity incompatible with the discharge of jury duties is disqualified from serving as a juror. Courts have construed this statutory language as an absolute disqualification.[7]

5.4 In the 1990's three provinces – Alberta, British Columbia and New Brunswick – amended their laws to allow people with physical disabilities to render jury service under certain circumstances. The amendments also require the provision of assistance to enable such individuals to render adequate jury service. More specifically, these Provinces' statutory provisions disqualifying or exempting a person with physical infirmity do not apply to a person who wishes to serve as a juror and who:

- if aided would be able to see or hear adequately and attend court in adequate comfort, and

1. For a discussion on the interplay between federal and provincial law on juries, see Canada, Department of Justice, *Amendments to the Criminal Code and the Canada Evidence Act With Respect to Persons With Disability* (Consultation Paper, 1993) at 12.
2. Jury Act (Manitoba), CCSM 1987, c J30, s 3(o).
3. Jury Act (Northwest Territories), RSNWT 1988, c J-2, s 5(b).
4. Jury Act (Nunavut), RSNWT 1988, c J-2, s 5(b).
5. Juries Act (Ontario), RSO 1990, c J.3, s 4(A).
6. Jury Act (Yukon), RSY 1986, c 97, s 5(b).
7. *R v Boak* [1925] SCR 525 (deaf person).

- will receive the assistance of a person or device that the presiding judge considers adequate to enable the person to discharge the duties of a juror.[8]

5.5 The legislation in British Columbia and New Brunswick provides further that a person giving assistance may attend in all the proceedings including the jury deliberations but must not comment on the proceedings and can take part in the proceedings only by assisting the juror as the court directs.[9] Such provision overcomes the legal impediment to the presence of a non-juror (for example, a sign language interpreter) in the jury deliberation room.

Federal law

5.6 The reforms in some of the Provinces have been reflected at the Federal level. The *Criminal Code* was amended in 1997 giving courts the authority to permit a juror with a physical disability to have technical, personal, interpretative or other support services.[10] Moreover, it provides that a person with a physical disability may be challenged only if he or she is physically unable to perform properly the duties of a juror even with the aid of technical, personal, interpretative or other support services.[11] The amendments were made on recommendation by the Federal Task Force on Disability Issues[12] and the Federal Justice Department,[13] which was of the view that people with disabilities have rights to participate in the criminal justice system and that their automatic disqualification from sitting as jurors diminishes those rights.

ENGLAND AND WALES

5.7 Section 9B of the *Juries Act 1974* (Eng) provides that where it appears to the appropriate officer that on account of physical disability there is doubt as to the capacity of a person to act effectively as a juror, the person may be brought before the judge who must determine whether

8. Jury Act (Alberta), RSA 2000, c J-3, s 6(1); Jury Act (British Columbia), RSBC 1996, c 242, s 5; Jury Act (New Brunswick), RSNB 1973, c J-3.1, s 5.1(1).
9. Jury Act (Alberta), RSA 2000, c J-3, s 6(1); Jury Act (New Brunswick), RSNB 1973, c J-3.1, s 5.1(2).
10. *Criminal Code 1986* (Can) s 626(2).
11. *Criminal Code 1986* (Can) s 638(e).
12. Canada, Federal Task Force on Disability Issues, *Equal Citizenship for Canadians with Disabilities* (1996), Recommendation 21.
13. Canada, Department of Justice, *Amendments to the Criminal Code and the Canada Evidence Act With Respect to Persons With Disability* (Consultation paper, 1993) at 12-13.

or not the person should act as a juror.[14] This section, introduced in 1994,[15] established a presumption that people with disabilities can serve as jurors.[16] "The judge must affirm the summons unless he or she is of the opinion that the person will not, on account of his or her disability, be capable of acting effectively as a juror, in which case he must discharge the summons."[17]

5.8 However, courts have used this section to discharge jury summonses received by deaf individuals.[18] In one of these cases, the court identified duties in the court and in retirement as the two aspects that present obstacles to jury service by deaf people. A deaf person must rely on an interpreter during the hearing and in the process may lose some of the meanings of the oral testimony. Consequently, he or she will be ineffective in assessing the credibility of witnesses. The more serious problem – which the court described as "insoluble" unless overturned by legislation – is that the presence of an interpreter in the deliberation room would violate the established rule prohibiting a person who is not a juror from retiring with the jury.[19]

5.9 Following the widely publicised case involving the exclusion from jury service of the chief executive officer of the British Deaf Association,[20] Prime Minister Tony Blair indicated in Parliament that the law could be changed to make it easier for deaf people to perform jury service, stating: "Jury service is a great public service and we should do all we can to encourage people to participate in it."[21] The Home Office is preparing a consultation paper on this matter.[22]

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14. In addition, a judge has, at common law, 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 to prevent scandal and the perversion of justice. A judge must, for example, prevent a juryman from serving who is completely deaf or blind or otherwise incompetent to give a verdict: *Mansell v The Queen* (1857) 8 El & Bl 54; 120 ER 20; *R v Ford (Royston)* [1989] QB 868.
15. *Criminal Justice and Public Order Act 1994* (Eng) s 41.
16. See R E Auld, *Review of the Criminal Courts of England and Wales: Report* (The Chancellor's Department, London, 2001) at para 42.
17. *Juries Act 1974* (Eng) s 9B(2).
18. See "Judge ban deaf juror from case" *The Times* (21 January 1994); R Verkaik, "Ban on severely deaf jurors is upheld by court" *The Independent* (10 November 1999) at 5; *In re Osman* [1995] 1 WLR 1327.
19. *In re Osman* [1995] 1 WLR 1327.
20. R Verkaik, "Ban on Severely Deaf Jurors is Upheld by Court" *The Independent* (10 November 1999) at 5.
21. United Kingdom, *Hansard Debates* House of Commons, 10 November 1999 at column 1123.
22. See para 3.24.

NEW ZEALAND

5.10 Section 8(j) of the *Juries Act 1981* (NZ) excluded from jury service persons "incapable of serving because of blindness, deafness, or any other permanent physical disability". This provision was repealed by the *Juries Amendment Act 2000* (NZ). The intention was to encourage people from all walks of life to take part in jury duty.[23] However, while persons with physical disabilities are no longer automatically disqualified, the *Juries Act* contains a number of provisions under which such persons may be excluded or exempted from jury service at various stages of the proceedings. For example, before the jury is sworn, the judge, on his or her own motion, or on application by the registrar, may discharge the summons of a person if the judge is satisfied that, because of physical disability, the person is not capable of acting effectively as a juror.[24] The New Zealand Law Commission, in its report on juries in criminal trials, expressed this view:

> The ability of physically disabled people to serve on juries has been adequately addressed by the Juries Amendment Act 2000. No further amendment is required.

It agreed with the Act's focus on ability to serve rather than on categories of disability.[25]

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23. New Zealand, *Hansard Debates*, 23 February 2000 at 749.
24. *Juries Act 1981* (NZ) s 16AA. See also the following provisions:
    Juries Act 1981 (NZ) s 25(1)(b) (Each party to the proceedings is entitled to challenge for cause a potential juror on the ground that he or she is not capable of acting effectively as a juror in the proceedings because of physical disability).
    Juries Act 1981 (NZ) s 15(1)(aa) (If the registrar is satisfied, on written application made to him by or on behalf of any person summoned to attend as a juror on any occasion, that, because of that person's physical disability attendance on that occasion would cause or result in undue hardship or serious inconvenience to that person, or to any other person, or to the general public, the registrar may excuse that person from attending on that occasion).
    Juries Act 1981 (NZ) s 22(1)(b) (The judge may discharge a juror if, at any time after the jury is constituted but before the case is opened or the accused is given in charge, it is brought to the attention of the judge that the juror is not capable of acting effectively as a juror in the proceedings because of physical disability).
25. New Zealand, Law Commission, *Juries in Criminal Trials* (Report 69, 2001) at para 190-194. It did not express any view on the issues associated with the use of interpreters nor on the demeanour problem discussed in Chapter 3 of this Discussion Paper.

UNITED STATES

Qualification/Disqualification

5.11 Juror qualification requirements are set by statute or court rules both at State and Federal levels. Under Federal law, a person is not qualified to serve on a jury if he or she is incapable by reason of mental or physical infirmity to render satisfactory jury service.[26]

5.12 The statutes in some States used to contain provisions that disqualified outright persons whose senses of hearing or sight are substantially impaired.[27] New York's law required a juror to be in "possession of his natural faculties",[28] which was construed as an automatic disqualification of a blind person.[29] Such disqualification provisions have all been repealed.

5.13 Reflecting the Federal law, many States currently have uniform provisions that exclude people who are incompetent "by reason of physical or mental ability to render satisfactory jury service".[30] Courts are divided on the construction of these provisions. Earlier cases have construed them as an absolute disqualification for blind and deaf individuals. In other cases, however, they have been interpreted as giving courts the discretion

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26. 28 USC § 1865(b)(4).
27. See M Golbas, "Due Process: The Deaf and Blind as Jurors" (1981) 17 *New England Law Review* 119, note 3 citing the legislation then current in Arkansas, Iowa, North Carolina and Tennessee.
28. New York Judiciary Law § 506(3). This section has been amended and now provides that in order to qualify as a juror a person must not have a mental or physical condition, or combination thereof, which causes the person to be incapable of performing in a reasonable manner the duties of a juror.
29. *Lewinson v Crews* 236 NE 2d 853 (1968).
30. Alabama Code § 12-16-60; Arkansas Code § 16-31-102; Colorado Revised Statutes § 13-71-105; General Statutes of Connecticut § 51-217; Delaware Code § 4509; Hawaii Revised Statutes § 612-4; Maryland Code § 8-207; General Laws of Massachusetts, Chapter 234A § 4; Nebraska Revised Statutes § 25-1601; North Carolina General Statutes § 15A-1212; Vermont Statutes Annotated § 962. See also Idaho Code § 2-209; Indiana Code § 33-4-5.5-11; Louisiana Code of Criminal Procedure Article 401; Michigan Compiled Laws § 600.1307a; Minnesota Rules of Practice for District Courts, Rule 808; Missouri Revised Statutes § 494.425(9); Nevada Revised Statutes § 6.030; New Hampshire Revised Statutes § 500-A:6; New Jersey Statutes § 2B:20-1; New Mexico Statutes § 38-5-1; New York Judiciary Law § 506; North Dakota Century Code § 27-09.1-04; Rhode Island General Laws § 9-9-1.1; South Carolina Code § 14-7-810; West Virginia Code § 52-1-8.

to assess the suitability for jury service of a person with a disability depending on the particular circumstances of each case.[31]

5.14 There are an increasing number of States that have amended their laws to prohibit the disqualification of a person from jury service "solely on the basis of loss of hearing or sight in any degree".[32] The legislation of West Virginia contains such prohibition but also provides a test as to when people with disabilities may be disqualified:

> A person who is physically disabled and can render competent [jury] service with reasonable accommodation shall not be ineligible to act as juror or be dismissed from a jury panel on the basis of disability alone: *Provided,* That the circuit judge shall, upon motion by either party or upon his or her own motion, disqualify a disabled juror if the circuit judge finds that the nature of potential evidence in the case including, but not limited to, the type or volume of exhibits or the disabled juror's ability to evaluate a witness or witnesses, unduly inhibits the disabled juror's ability to evaluate the potential evidence.[33]

5.15 It should also be noted that many States require jurors to have the ability to read, speak and/or understand the English language.[34]

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31. For a comprehensive survey of cases involving jurors with disabilities, see American Bar Association, *Into the Jury Box: A Disability Accommodation Guide for State Courts* (1994).
32. See for example Alaska Statutes § 09.20.010; Arkansas Code § 16-31-102; California Code of Civil Procedure § 203; General Statutes of Connecticut § 51-217; Florida Statutes § 913.03(2); Oregon Revised Statutes § 10.030.
33. West Virginia Code § 52-1-8(e).
34. Alabama Code § 12-16-59; Alaska Statutes § 09.20.010; Arkansas Code § 16-31-102; California Penal Code § 893; Colorado Revised Statutes § 13-71-105; Conneticut General Statutes § 51-217; Delaware Code § 4509; Georgia Code § 15-12-163; Hawaii Revised Statutes § 612-4; Idaho Code § 2-209; Indiana Code § 33-4-5.5-11; Iowa Code § 607A.4; Kentucky Revised Statutes § 29A.080; Louisiana Code of Criminal Procedure Article 401; Maryland Code § 8-207; General Laws of Massachusetts, Chapter 234A § 4; Michigan Compiled Laws § 600.1307a; Minnesota Rules of Practice for District Courts, Rule 808; Missouri Revised Statutes § 494.425(5); Nebraska Revised Statutes § 25-1601; Nevada Revised Statutes § 6.010; New Hampshire Revised Statutes § 500-A:6; New Jersey Statutes § 2B:20-1; New York Judiciary Law § 510; North Carolina General Statutes § 9-3; North Dakota Century Code § 27-09.1-08; Pennsylvania Consolidated Statutes § 4502; South Carolina Code § 14-7-810; South Dakota Codified Laws § 16-13-10; Utah Code § 78-46-7; Vermont Statutes Annotated § 962; Washington Revised Code § 2.36.070; West Virginia Code § 52-1-8; Wisconsin Statutes § 756.02; Wyoming Statutes § 1-11-101.

This requirement may be used to disqualify deaf persons who use sign language, such as American Sign Language.[35] The American Bar Association recommended the deletion of words that require jurors to hear, write, read or understand English. It proposed a broader phrase allowing jury service by persons able to communicate effectively in English. [36] It is not clear how such an approach would solve the problem of whether or not Auslan is an acceptable language for purposes of the *Jury Act 1977* (NSW).[37]

Challenges for Cause

5.16 Many States have statutory provisions allowing parties to challenge a person from sitting as a juror on grounds of physical disability that satisfies the court that the challenged person is incapable of performing jury duties in the particular action.[38] However, a number of States now provide that hearing or visual disability alone is not a ground for challenge.[39]

Exemptions and Excuses

5.17 A few States provide legal exemption from jury service to persons with physical disabilities.[40] An exemption, which is granted automatically to persons belonging to an identified group, differs from an excuse, which may be given on an individual basis by the court. There are States that provide excuses, instead of exemptions, based on physical disability.[41]

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35. In *People v Guzman* 478 NYS 455 (1984), the court, in *obiter dicta*, stated that a deaf juror who only knows American Sign Language and does not know English does not meet the New York statutory requirements for jury service that a person understand and communicate in English. See also para 3.29-3.35.
36. American Bar Association, *Into the Jury Box: A Disability Accommodation Guide for State Courts* (1994) at 20.
37. This problem is discussed in para 3.29-3.35, 6.6, 6.7.
38. Arkansas Code § 16-33-304; California Code of Civil Procedure § 228(b); Colorado Revised Statutes § 13-71-105; Illinois Supreme Court Rules, rule 434; Iowa Court Rules of Civil Procedure, Rule 287(f); Iowa Court Rules of Criminal Procedure, rule 17-5; North Carolina General Statutes § 15A-1212; Oregon Revised Civil Procedure § 57D(1)(b); Utah Rules of Criminal Procedure, rule 18(e); Washington Revised Code § 4.44.170.
39. Arkansas Code § 16-31-102; Florida Statutes § 913.03(2); New York Judiciary Law § 510; Oregon Revised Statutes § 10.030.
40. Georgia Code § 15-12-1; Michigan Compiled Laws § 600.1307a; Tennessee Code § 22-1-103(7); Texas Government Code § 62.109.
41. Alaska Statutes § 09.20.030; California Rules of Court Rule 860(d)(5); Maine Revised Statutes § 1213(2); Nebraska Revised Statutes § 25-1601; Nevada Revised Statutes § 6.030; New Mexico Statutes § 38-5-11B(1); New York Standards and Administrative Policies (Part 28 Uniform Rules for the Jury

5.18 The American Bar Association recommends the elimination of all automatic exemptions, on the basis that group exemptions reduce the representativeness of the jury panel. It favours excuses based either on continuing hardship or if the person's ability to receive and evaluate information is so impaired that he or she is unable to perform their duties as jurors. This proposed test is phrased in functional terms instead of relying on diagnostic labels, since it is the effect of the disability rather than its cause that is significant. It would encourage tailored assessments based on competence rather than on broad medical terms and stereotypes.[42] As has been seen, the *Jury Act 1977* (NSW) defines eligility in terms of competence.

Reasonable Accommodation

5.19 In July 1990, the *Americans with Disabilities Act* (ADA) became effective as the most comprehensive federal civil rights law for people with disabilities in the United States.[43] It protects qualified individuals with disabilities from discrimination on the basis of disability. It requires that individuals with disabilities be given equal opportunity in access to State services, including State court programs and services.[44] It obliges government agencies including courts to modify their policies, practices and procedures to avoid discrimination, unless the modification would fundamentally alter the nature of its services, programs or activities.[45]

5.20 The ADA, which has been invoked by people with disabilities in cases where they have been disqualified from jury service, has influenced judges to give greater access to the jury process by providing reasonable accommodations to individuals with disabilities, while ensuring a fair trial.[46]

5.21 Some States have included juror accommodation provisions in their statutes or rules. They require the provision of assistance to jurors with disabilities, which may consist of human services (such as interpreters for deaf people or readers for the visually impaired) and technology

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System) § 128.6-b(1); Rhode Island General Laws § 9-10-9; Utah Code § 78-45-15; Vermont Statutes Annotated § 962.

42. American Bar Association, *Into the Jury Box: A Disability Accommodation Guide for State Courts* (1994) at 10.
43. 42 USC § 12102-12213.
44. 42 USC § 12132.
45. 28 Code of Federal Regulations § 35.130(b)(7).
46. See for example *People v Caldwell* 603 NYS 2d 713 (1993).

(for example assistive listening device, videotext display, open captioning equipment and real-time computer assisted transcription).[47]

5.22 The ABA's *Disability (Jury) Accommodation Guide for State Courts* contains a comprehensive list of suggested accommodations that go beyond what is currently in State legislation, for example eliminating the physical barriers at the courthouse, such as modifying the jury box and the deliberation room to make them more accessible to people with disabilities.[48]

Interpreters

5.23 One issue relating to jury service by deaf people is that the presence of a sign language interpreter in the deliberation room violates the rule excluding persons other than the jurors in that room. In *Eckstein v Kirby*,[49] the US District Court ruled that it did, noting that secrecy must be preserved to guarantee a vigorous and candid discussion of the issues by the jurors. However, some courts have held that the rule excluding persons other than jurors from the jury room during deliberations does not apply to sign language interpreters based on a number of reasons.[50] First, the rule is said to apply in reality only to officers of the court such as bailiffs, judges or counsel, who because of their (perceived or actual) capacity to influence the jurors, might inhibit free discussion. This danger would not arise in the case of an interpreter who performs a purely mechanical function, much like a hearing aid, microphone or typewriter. Absent any evidence of inappropriate behaviour on the part of an interpreter, the jurors are unlikely to perceive him or her as having any influence on or capacity to pressure any of them. Also, the judge may give instructions to both the interpreter and the jury that participation by the former is improper. Secondly, jury secrecy would not be endangered since there are legal and ethical rules preventing interpreters from revealing confidences made during jury deliberations. Finally, practical experience has shown that none of the anticipated problems have arisen. In those jurisdictions where deaf people have been sworn, interpreters accompanied the jurors in the jury room, and there has never been a breach of confidentiality, nor problems with the interpreter breaching the oath of non-involvement,

47. See for example, Kansas Statute § 75-4355a - 75-4355d; Missouri Revised Statutes § 476.750, 476.753.
48. American Bar Association, *Into the Jury Box: A Disability Accommodation Guide for State Courts* (1994) at 21-37.
49. 452 F Supp 1235 (1978).
50. *People v Guzman* 478 NYS 455 (1984) at 465-467; *DeLong v Brumbaugh* 703 F Supp 399 (1989); *United States v Dempsey* 830 F2d 1084 (1987). See also para 3.25-3.29.

nor any problem with respect to the panel not being able effectively to deliberate because of the presence of the interpreter.

5.24 A number of States have adopted legislation or court rules allowing an interpreter to accompany a deaf juror during deliberations.[51] Some contain safeguards such as specifying that the interpreter will only act to communicate for and to the juror with the disability,[52] or should refrain from personal interjection and uphold the secrecy of the proceeding.[53]

CONCLUSION

5.25 Law reform in a number of overseas jurisdictions has resulted in the adoption of laws prohibiting the disqualification, exemption or challenge from jury service of blind and deaf people (and others with physical disabilities) based on their disability alone. They give courts discretion to scrutinise the suitability of people with disabilities for jury service. However, rather than focusing solely or mainly on a person's disability, they emphasise two issues:

- the person's ability to perform adequate jury service; and
- whether aid or assistance to such a person would enable him or her to render jury service effectively and attend court in adequate comfort.

5.26 The first obliges courts to make determinations on a case-by-case basis and enables them to take into account such factors as: the extent of the person's disability, the nature of the potential evidence in the case and the person's ability to receive and assess evidence, including the credibility of witnesses (if any).

5.27 The second element underscores another aspect of the reforms. In addition to removing any legal impediment to jury service by blind and deaf people, courts and other institutions involved in the justice system are being required to modify their policies, practices and procedures to avoid discrimination of people with disabilities, unless the modification would fundamentally alter the nature of their services, programs or activities. In particular, the reforms mandate the provision of support services (also known as reasonable accommodations) required by individuals with disabilities to participate in the jury process.

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51. Colorado Revised Statutes § 13-71-137; Connecticut Superior Court Rules § 16-1; Florida Statutes § 90.6063; 705 Illinois Compiled Statutes § 315/1(a); West Virginia Code § 52-1-8(e)(1).
52. West Virginia Code § 52-1-8(e)(2).
53. Florida Statutes § 905.17(3).

5.28 Furthermore, there is an emerging trend to adopt laws allowing a person giving assistance to a person with a disability (for example, an interpreter) to attend in all the proceedings including the jury deliberations. The laws are intended to overcome the long-standing prohibition on a non-juror from being present at the jury deliberations.

5.29 Finally, there has been a proposal for the deletion of words in US statutes that require jurors to hear, write, read or understand English. These provisions may be used to disqualify deaf people who use a sign language and require sign language interpreters. The proposed alternative is to require an ability to communicate effectively in English. It is argued that such broader language would allow people who use sign language, such as American Sign Language, to serve as jurors.