

# RESEARCH REPORT 14

Deaf jurors' access to court proceedings via sign language  
interpreting: An investigation

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March 2007

*A project funded by the NSW Law Reform Commission and the  
Macquarie University External Collaborative Grant Scheme*

## PREFACE

In March 2002 the NSW Attorney General asked the Law Reform Commission to conduct an inquiry into whether people who are profoundly deaf or have a significant hearing or sight impairment should be able to serve as jurors. While the *Jury Act 1977* (NSW) does not specifically exclude people who are deaf or blind, there had been an administrative determination that they could not fulfil the duties of a juror.

In February 2004 the Commission published a Discussion paper and invited submissions and comments.

A key issue which arose in the course of the Law Reform Commission's work in relation to deaf jurors was the use of signed language interpreters and the challenge of translating difficult legal concepts using Auslan. In order to gain a better understanding of this issue the Commission consulted with Dr Jemina Napier, an expert in signed language interpreting, who devised a number of back translation exercises using transcript from a Supreme Court trial.

These initial back translation exercises identified the need for a more detailed study. The results of a further study form the basis of this Research Report. The study used a judge's summing up in a criminal trial to assess the accuracy of the interpretation and the level of comprehension of potential deaf jurors compared to hearing jurors. Six deaf and six hearing people acted as jurors. Excerpts from the summing up were interpreted into Auslan and filmed. Two versions of a comprehension test were prepared in Auslan and English to check both the understanding of the facts and the legal concepts. The jurors completed the comprehension test in either Auslan or English.

The study provided significant insights to the Law Reform Commission in preparing its Report 114, *Blind or Deaf Jurors* (September 2006). The study was conducted by researchers at Macquarie University: Dr Jemina Napier, Department of Linguistics, Mr David Spencer, Department of Law and Mr Joe Sabolcec, post graduate student, Macquarie University. Funding for the project was provided by the Macquarie University External Collaborative Grants Scheme and the NSW Law Reform Commission.

Peter Hennessy

Executive Director

NSW Law Reform Commission

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## TERMS OF REFERENCE

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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

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### **Project Researchers**

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### **NSW Law Reform Commission**

Hon Justice Michael Adams

Hon James Wood AO QC

Professor Michael Tilbury

Peter Hennessy

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## **Additional consultations**

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## **Research Team Biographies**

**Jemina Napier** has practised as a sign language interpreter since 1988, and works as a British Sign Language (BSL), Australian Sign Language (Auslan) and International Sign interpreter. Jemina is a senior lecturer in the Department of Linguistics at Macquarie University and coordinates the Department's suite of Translation and Interpreting programs. Jemina is the principal lecturer in all subjects in the Auslan/English Interpreting program. She was the recipient of a 2006 Macquarie University Citation for Outstanding Contribution to Student Learning. Jemina has published two books and several articles concerning sign language interpreting.

**David Spencer** is Senior Lecturer in the Department of Law at Macquarie University. David teaches contract law and dispute resolution, and co-teaches with Jemina on the subject 'Auslan interpreting in legal settings'. He was the recipient of the 2005 Macquarie University Vice-Chancellor's Outstanding Teacher Award and the 2006 Carrick Institute Citation for Outstanding Contributions to Student Learning. David has published several books and articles on his areas of expertise in contracts and dispute resolution.

**Joe Sabolcec** has practised as an Auslan/English interpreter since 1996 and is currently undertaking the Postgraduate Diploma in Auslan/English Interpreting at Macquarie University. He has a social science degree and has been involved in a variety of research projects in Australia and the United Kingdom looking at access to telecommunication technologies and access to interpreting services for people who are deaf and use a signed language.

# **Executive Summary**

Most research on legal interpreting to date has focused on court interpreting. Typically the person requiring the interpreter is the victim, witness, defendant or complainant. No linguistic studies have been carried out on the efficacy of interpreting for the purposes of a deaf juror. In order to assess the ability of deaf jurors to access court proceedings via signed language interpreters, this pilot study sought to investigate:

1. the ability of legal concepts to be translated from English into Auslan; and
2. the level of comprehension of six deaf jurors as compared to a control group of six hearing jurors

Quantitative and qualitative approaches involving post-test interviews, content and discourse analyses found that an interpretation from English into Auslan was highly accurate and that there was no significant difference in the level of comprehension between deaf and hearing participants. The conclusion is that with trained and skilled interpreters, deaf people could effectively access court proceedings via signed language interpreters, and perform their function as jurors, although further research is needed to investigate this issue in more depth.

This report details the findings of the study.

- **Section 1** provides an introduction to the issue of deaf people serving as jurors, and the impetus for this research study.
- **Section 2** gives an overview of the relevant literature to foreground the study.
- **Section 3** introduces the research questions explored.
- **Section 4** discusses the preliminary study which led to the research reported in this publication.
- **Section 5** provides details of the methodology and results for this study.
- **Sections 6 and 7** discuss the findings and implications of this research.
- **Section 8** contains recommendations and suggestions for further research.



# 1. Introduction

- Background
- Law reform in New South Wales, Australia

## BACKGROUND

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 [of Australia]...<sup>1</sup>

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 is thus a group of “ordinary” people, disinterested in the outcome of the trial, and independent of powerful and influential social forces.<sup>2</sup>

1.1 In most English-speaking countries, such as Australia and the United Kingdom, non-English speakers are not allowed to serve as jurors as they cannot access the language of the court. So what about deaf people? Some may be competent English users, but not able to access the language of the court due to not being able to hear it. But technically they could access all other written information in the form of evidence, testimonies, and written confessions.

1.2 Currently, deaf people cannot serve as jurors in Australia or in most other countries in the world. Debates over whether deaf people should be permitted to serve as jurors have long featured in legal journals.<sup>3</sup> Current policy in the majority of countries states that deaf people are not capable of serving as jurors, due to their ‘incapacity’ or disability, that is, their hearing loss.

1.3 The United States has led the way with respect to law reform on this issue, with many States now allowing deaf people to serve as jurors, and with provisions for interpreters for deaf jurors.<sup>4</sup> Deaf people cannot serve as jurors in British or Irish criminal courts due to legal issues with having a thirteenth person (ie, interpreter) in the jury room;<sup>5</sup> however, a deaf woman has served as a juror in a British Coroner’s Court.<sup>6</sup>

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1. NSWLRC, DP 46, 2004, [1.4].

2. NSWLRC, DP 46, 2004, [2.8].

3. Golbas, 1981; Silas, 1993.

4. Ellman, 1992; LSS, 2000.

5. Deaf Blawg, 2006; Enright, 1999.

6. Barber, 2005.

1.4 With the introduction of the New Zealand Sign Language (NZSL) Bill before parliament in 2005<sup>7</sup> to have NZSL recognised as an official language and for use in legal proceedings, a deaf man residing in New Zealand was permitted to serve as a juror for the first time in a tax fraud case.<sup>8</sup> In an interview with the New Zealand National Equal Opportunities Network, David McKee stated that he had been “quite excited about the jury duty because [he] knew [he]’d be breaking down barriers and opening doors for other deaf people who in the future wanted to participate”.<sup>9</sup> He also acknowledged that the judge might have been open to having him on the jury, and interpreters in the court and jury room, because of the NZSL Bill.<sup>10</sup>

## LAW REFORM IN NEW SOUTH WALES, AUSTRALIA

1.5 Given that the notion of deaf people serving as jurors is obviously on the law reform agenda in some countries, the consideration given in Australia to this issue is timely. In March 2002, the New South Wales (NSW)<sup>11</sup> Attorney General requested the New South Wales Law Reform Commission (NSWLRC) to investigate whether deaf and blind persons ought to be able to serve on juries in criminal courts. The terms of reference were:

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 (Commonwealth), and the need to maintain confidence in the administration of justice in New South Wales.<sup>12</sup>

1.6 The NSWLRC established a reference group comprising Phillip French, Graeme Innes, Professor Ron McCallum, Alastair McEwin and Alison Herridge. A Discussion Paper outlining the issues to be

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7. The third and final reading of the NZSL Bill was passed on 6 April 2006, and received royal assent on 10 April 2006. The NZSL Act is thus now enshrined in New Zealand law and recognises NZSL as New Zealand’s third official language alongside English and Te Reo Maori.

8. The Dominion Post, 2005.

9. NEON, 2006.

10. Travaglia, 2005.

11. New South Wales (capital: Sydney) is an Australian State. Australia has six States and two self-governing territories with independent criminal jurisdictions.

12. NSWLRC, DP 46, 2004, p v.

considered was published in 2004.<sup>13</sup> The Discussion Paper invited submissions from interested people and organisations.

1.7 In reviewing law reform concerning deaf jurors in other countries, the Discussion Paper noted:

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*, 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. 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, 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. Some contain safeguards such as specifying that the interpreter will only act to communicate for and to the juror with the disability, or should refrain from personal interjection and uphold the secrecy of the proceeding.<sup>14</sup>

1.8 Thus, early on, the presence of an interpreter as a thirteenth person in the jury room was not considered necessarily to be an issue.

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13. NSWLRC, DP 46 2004.

14. NSWLRC, DP 46, 2004, [5.23]-[5.24].

However, although it was accepted that signed language interpreters are regularly used in criminal courts in order to provide witnesses, complainants and defendants with access to court proceedings, it was felt that jurors require a different level of access to information. Jurors do not just need access to the proceedings in a courtroom, they need to make informed decisions about the status of a person's guilt in committing a crime, and need to be able to participate in jury deliberations. The American case, *People v Guzman*,<sup>15</sup> pointed out:

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.<sup>16</sup>

1.9 Given this difference, concerns were raised in relation to the interpretation of evidence, interpretation of the submissions of counsel, interpretation of a judge's directions to the jury, and interpretation of jury room deliberations. Essentially, questions were raised about whether deaf people can sufficiently comprehend legal proceedings when relying on a signed language interpreter, in order to get full access to the facts of a case and thus make an informed decision about a person's guilt.

1.10 The notion of whether hearing people can sufficiently comprehend court proceedings in order to carry out their role as jurors effectively was acknowledged in the Discussion Paper:

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. Any juror may bring his or her prejudices, such as racism or distrust of police or authority, to the jury room. In addition...although using the same evidence, different jurors will reach different conclusions, despite having the use of the same senses. Nearly all commentators agree that juries have great difficulty understanding and applying judicial instructions.<sup>17</sup>

1.11 Following further consultation, the NSWLRC decided that empirical evidence was needed to assess two key issues:

1. whether legal concepts could be translated from English into Australian Sign Language (Auslan); and

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15. *People v Guzman* 76 NY 2d 1 (1990), 5.

16. NSWLRC, DP 46, 2004, [2.7].

17. NSWLRC, DP 46, 2004, [2.20].

2. whether deaf jurors could access court proceedings through an Auslan/English interpreter.

1.12 The NSWLRC decided that the notion of deaf juror access to jury deliberations should be considered separately, as it was felt that the essential initial issues were related to accuracy and comprehension. Thus the NSWLRC commissioned a study in order to explore the linguistic and interpreting issues that potential deaf jurors faced in accessing court proceedings. The study was jointly funded by the NSWLRC and the Macquarie University External Collaborative Grant Scheme.

1.13 The overall goal of the study was to consider deaf people's access to court proceedings in the role of juror rather than as a complainant, defendant or witness, and to present evidence relating to the issues that arise in considering any proposal for the empanelment of deaf jurors in NSW criminal courts. This Research Report outlines the various stages of the research, the findings and recommendations, and concludes with suggestions for further study.

## **2. Literature review**

- Legal interpreting
- Legal discourse
- Interpreting courtroom discourse
- Interpreting for jurors
- Juror and legal text comprehension

2.1 This literature review provides an overview of issues relevant to this study, with a survey of key factors that need to be considered when assessing deaf jurors' comprehension of the interpretation of courtroom proceedings. Thus we draw on research relating to linguistic, signed and spoken language interpreting in order to discuss legal interpreting and the role of the legal interpreter, legal discourse and interpreting for courtroom discourse, interpreting for jurors, legal text comprehension and comprehension testing.

## LEGAL INTERPRETING

2.2 Most research and discussion on legal interpreting focuses on court interpreting, with a reasonably large body of literature that discusses courtroom interpreting practice, the role of the court interpreter, and ethical dilemmas faced by court interpreters.<sup>18</sup>

2.3 There has been some discussion of other aspects of legal interpreting, such as solicitor-client interviews, police interviews, police interrogations and confessions, tribunals or immigration/refugee hearings.<sup>19</sup>

2.4 In Australia, there have been several publications which explore the cultural barriers for Aboriginal people in accessing court proceedings.<sup>20</sup> In all aspects of legal interpreting, the person typically requiring the interpreter is the victim, witness, defendant or complainant, although there are cases of deaf lawyers relying on signed language interpreters.<sup>21</sup>

2.5 In Australia, any interpreter who works in court must be accredited by the National Accreditation Authority for Translators and Interpreters (NAATI) at the professional interpreter level, which is the minimum standard for professional practice in Australia.

### The role of the legal interpreter

2.6 Much of the literature concerning legal interpreting focuses on the role of the legal interpreter, and the challenges of working in the

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18. For example, Angelelli, 2004; Carroll, 1995; Colin and Morris, 1996; Edwards, 1995; Fenton, 1997; Fowler, 1997; Gonzalez, Vasquez, and Mikkelson, 1992; Kadric, 2000; Kelly, 2000; Lane, McKenzie-Bridle, and Curtis, 1999; Mathers, 2006; Mikkelson, 1998, 2000; Morris, 1999; Robinson, 1994; Schweda Nicholson, 1994.

19. Barsky, 1996; Fowler, 2003; J I E Gibbons, (p ) 1995; Krouglov, 1999; Maley, Candlin, Koster, and Crichton, 1995; Pöllabauer, 2004; R. Shuy, 1998; Zambrano, 2006.

20. Cooke, 2002; Eades, 2003; Fryer-Smith, 2002; Goldflam, 1995; Howard, Quinn, Blokland, and Flynn, 1993.

21. Kurlander, in press.



legal system due to potentially conflicting expectations from different stakeholders involved in the process.

2.7 The case of *Gaio v The Queen*<sup>22</sup> has been influential in determining the court's view of the interpreter's role in Australia. In this case, the High Court of Australia had to determine whether a confession to a patrol officer via an interpreter was admissible as evidence before a court, or whether the confession should be considered as hearsay because it was not obtained directly, but rather indirectly via an intermediary (ie, an interpreter). The debate focused on the role of the interpreter, in order to clarify this issue. The court concluded that if the interpreter translated 'word by word' or 'sentence by sentence' and remained faithful and accurate to the original message, then the translation should not be deemed as hearsay.

2.8 This judgment perpetuates the notion among legal professionals that the more literal a translation, the more correct it is likely to be, and that interpreters should function in 'conduit' mode, like a telephone, relaying the content of a message without having any influence on that message.<sup>23</sup> Realistically, however, interpreter practitioners know that in order to convey the content of a message effectively, they should function as a linguistic and cultural mediator and ensure that the disadvantaged minority language speaker has full access to court proceedings and understands what is going on.<sup>24</sup>

2.9 In order to explore these differing perceptions, Banna<sup>25</sup> interviewed three signed and three spoken language interpreters, and three legal professionals, about their experiences with interpreting in the courtroom. The legal professionals and the spoken language interpreters were found to have similar expectations to those expressed in the *Gaio* case, in terms of the interpreter functioning in a conduit role. The signed language interpreters, however, leaned more towards the ally role, and were focused on ensuring equal access to court proceedings.

2.10 This approach is highlighted in another decisive case in terms of the interpreter role – that of *Gradidge v Grace Bros Pty Ltd*<sup>26</sup> in the New South Wales<sup>27</sup> Supreme Court. In this case, a signed language interpreter was held in contempt of court when she continued to

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22. (1960) 104 CLR 419.

23. Laster and Taylor, 1994; Mikkelson, 1998.

24. Berk-Seligson, 1990; Brennan and Brown, 1997.

25. Banna, 2004.

26. (1988) 93 FLR 414; Roberts-Smith, Frey, and Bessell-Browne, 1990.

27. New South Wales (capital: Sydney) is an Australian State. Australia has six States and two self-governing territories with independent criminal jurisdictions.

interpret for an argument between counsel, after she had been directed to stop interpreting by the judge. Her rationale for continuing was that it was her role to provide access to everything spoken in the courtroom to her deaf client. After being taken to the Supreme Court, the contempt decision was withdrawn, as it was decided that the deaf client was entitled to have the argument interpreted as long as she was present in the courtroom, so that she could 'see' the argument the same way that everybody else could hear it.

2.11 In a study of British Sign Language (BSL) interpreters working in court, Turner and Brown<sup>28</sup> also found that the interpreters did not adhere to a conduit model of interpreting, and instead participated in co-construction of the message with their deaf clients. Thus, they suggest that a different perspective is needed with regards to the role of an interpreter in the courtroom. They advocate for recognition of interpreters' linguistic and cultural expertise as coordinators of interaction between people who do not use the same language, as a means of enhancing the quality of the judicial process.

2.12 With respect to deaf people's involvement in the legal system, there have been a number of publications that specifically discuss deaf people's access to justice via signed language interpreters.<sup>29</sup> Katrina Miller and Vernon McCay have contributed significantly with their discussions of the potential linguistic barriers that deaf people face in the legal system.<sup>30</sup>

2.13 All of these discussions have focused on the deaf person as a member of a minority group being disadvantaged in accessing the legal system. In all of these publications, the role of the interpreter has been considered in light of the position of the client as a participant in the legal system as a defendant, witness, or complainant. None have considered what the role of an interpreter might be in working with a juror. This is probably because non-English speaking people have not historically been allowed to serve on juries. Similarly, deaf people have traditionally been excluded from serving on juries. This situation is beginning to change, however, and the notion of interpreting for jurors is discussed further in paragraphs 2.38 - 2.42.

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28. Turner and Brown, 2001.

29. Brennan, 1999; Fournier, 1997; K Miller, 2001; K Miller and McCay, 1994; Nardi, 2005; Russell, 2002; Stevens, 2005; Tilbury, 2005; G Turner, 1995; Wilcox, 1995.

30. McCay and Miller, 2001, 2005; K Miller, 2003; K R Miller and McCay, 2001.

## LEGAL DISCOURSE

2.14 Regardless of the role of the client, legal discourse will always provide challenges for interpreters of any language. Legal discourse encompasses various relationships between language use and the realm of law. Forensic linguistics is the branch of linguistics that applies discourse analysis to legal contexts, and identifies clear features of linguistic behaviour.<sup>31</sup> The challenge for interpreters does not only relate to legal terminology, but also to how language is used in legal contexts.

2.15 Legal language (or ‘legalese’) differs from colloquial language on lexical, semantic, and syntactic levels, and in particular, the nature of courtroom interaction influences the type of language used.

2.16 It is for this reason that the legal discourse used by lawyers and judges in the courtroom is often found to be too complicated for the layperson to comprehend. Berk-Seligson<sup>32</sup> identifies a number of factors that lead to this level of complexity, including the practice of oral legalese often being written to be read aloud. Berk-Seligson refers to the work of Danet<sup>33</sup> in discussing nine lexical features of legal English: (1) technical terms; (2) common terms with an uncommon meaning; (3) words whose origin is Latin, French or Old English; (4) polysyllabic words; (5) unusual prepositional phrases; (6) doublets (combination of Anglo-Saxon words with French or Latin words); (7) formality; (8) vagueness; and (9) over-precision.

2.17 Berk-Seligson also refers to 11 syntactic features of legal English: (1) nominalizations; (2) passive constructions; (3) conditionals; (4) unusual anaphora; (5) whiz deletion (deletion of relative pronouns); (6) high frequency of prepositional phrases and their unusual placement between the subject and predicate of a sentence; (7) lengthy sentences; (8) unique determiners; (9) impersonality; (10) wide variety of semantically negative words; and (11) parallel structure in the linking of words and phrases by means of conjunctions ‘or’ and ‘and’. Berk-Seligson also states that discourse features in legalese which contribute to incomprehensibility include lack of cohesion and overly compact sentences.

2.18 Further features of legal discourse include information seeking, clarification, reframing, reformulation, paraphrasing, summarizing, option-presenting, questioning strategies, testimony as narrative, double negatives, hedges, hesitation fillers, polite forms, question-

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31. J Gibbons, 1999; J Gibbons, 2003; Olsson, 2004; R Shuy, 2001, 2003.

32. Berk-Seligson, 1990.

33. Danet, 1980.

intonation statements, intensifiers, direct speech, and answering questions (“is it not true that...”).<sup>34</sup>

2.19 Conley and O’Barr<sup>35</sup> investigated language use in trials, and noted that courtroom language is deliberately manipulated by lawyers in order to influence the credibility of witnesses. Strategies used include, for example, abrupt topic shifts and returns, use of tag questions (eg, isn’t that correct?), and use of silence (either witness’s silence treated as problematic or silence after testimony as inference of witness credibility).

2.20 In his analysis of courtroom cross-examinations, Drew<sup>36</sup> states that courtroom participants co-construct a hostile system of cross-examination, with contrasting versions of the story via turn design within interactional sequences of cross-examination, following a specialised sequence of questions and answers. Lawyers design questions to discredit witnesses, paying particular attention to inconsistencies in witness testimony. Witnesses behave in a guarded fashion and give defensive answers. In addition, lawyers will critique statements based on semantics (eg, knocking vs banging on the door) and use partial repeats to emphasise understanding. Drew concludes that this interaction is all designed for an “overhearing audience” (ie, the jury), who then make inferences about the events and then make their decision regarding guilt.

2.21 Gibbons<sup>37</sup> states that these particular forms of language use are adopted to maintain power in the court. He refers to the following strategies used by the court to maintain authority: (a) use of specialist language; (b) control of turn-taking in the courtroom; (c) formality; (d) address forms; (e) coercion in questioning; and (f) rules of interaction of the courtroom.

2.22 The complexities of legal discourse present two challenges of interest to this study in relation to the key research questions:

- How well do lay people understand legal discourse?
- How accurately can interpreters convey the terminology, strategies and conventions used in courtroom discourse in order to match the intention of the speaker?

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34. Tiersma, 1999.

35. Conley and O’Barr, 1998.

36. Drew, 1990.

37. Gibbons, 2003.

## INTERPRETING COURTROOM DISCOURSE

2.23 Several in-depth linguistic studies, with spoken and signed language interpreters, have explored the complexities involved when interpreting in court, with the analysis of pragmatics and discourse in courtrooms, and in particular the challenges of interpreting legalese.

### Spoken language interpreting studies

2.24 Observation and analysis of English-Spanish interpreted interactions in the courtroom in the United States<sup>38</sup> and in Australia<sup>39</sup> have demonstrated that interpreters make a range of linguistic decisions during the interpreting process based on their understanding of courtroom discourse, which influences elements of the interaction, such as turn taking, pragmatic force, interruptions or clarifications, variation in register, discourse markers and politeness. Thus, as an inherent part of the process of interpreting, the interpreter alters the dynamics and therefore impacts on the interaction.

2.25 It has also been suggested that in influencing language and interaction in the courtroom, the interpreter challenges the authority of the court and the lawyers in the courtroom.<sup>40</sup> Gibbons<sup>41</sup> suggests that lawyers often feel discomfort about working with interpreters due to loss of control over the discourse, misunderstanding the interpreting process, and the fact that an interpreter does not function as a conduit.

2.26 These studies of spoken language interpretation of courtroom discourse have also informed the practices of signed language interpreters in court, as the linguistic, pragmatic and power dynamics present challenges for all interpreters alike, regardless of the languages actually being used. There are two specific studies, however, that have advanced our understanding of signed language interpretation of courtroom discourse.

### Signed language interpreting studies

2.27 Brennan and Brown<sup>42</sup> conducted a major study to assess the extent of deaf people's access to justice in the UK. They observed British Sign Language (BSL) interpreters working in court,

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38. Berk-Seligson, 1990, 2002.

39. S Hale, 1996, 1997a, 1997b, 1997c, 1999, 2001, 2002; S Hale and Gibbons, 1999.

40. Berk-Seligson, 1990; Brennan and Brown, 2004; J Gibbons, 2003; S Hale and Gibbons, 1999; S B Hale, 2004.

41. Gibbons, 1999.

42. Brennan and Brown, 1997.

administered a survey of legal interpreters, and interviewed deaf people and interpreters about their legal interpreting experiences in police, court and other legal settings. They highlight the fact that signed language interpreters experience conflict in terms of perceptions of their role. However, the most interesting aspect of their study is their discussion of linguistic issues. In addition to the linguistic and discourse challenges faced by interpreters of all languages, signed language interpreters work bimodally, that is, between two languages that are expressed in different modalities (ie, spoken and visual-gestural). This presents further challenges for interpreters, as Brennan and Brown explain:

BSL encodes visual information as a matter of course. Let us imagine what might seem like a fairly straightforward piece of information: person X recounts how he went into a pub, bought a pint of beer and was short-changed by the bar-tender. We know that in English we could embellish this account in all sorts of ways, but a typical BSL account would include certain types of visual information automatically; it would be more unusual to exclude those than to include them. Thus, we may well be able to glean from the BSL account what kind of doors the pub had, e.g., double swing doors, a single swing door, a door with a round knob or a door with a vertical handle; we may be able to discern that the bar-tender was a large man with stubble and a cigarette hanging out of his mouth; we may be able to tell that the counter was curved, that the place was crowded and X had to elbow his way in and so on. Now it is quite possible to present all of this information in the English language. However, when we say 'I went into a pub' in English we do not typically add information which indicates how we went in, what kind of door we opened, what kind of handle it had and so on. In BSL, not only is it typical to include such information, it is often unavoidable.<sup>43</sup>

2.28 This level of visual encoding may provide a challenge for a signed language interpreter, for example, who hears the phrase 'I ran up the stairs' in English. How should the phrase be interpreted into a signed language? What kind of staircase is it? Is it a spiral staircase or a staggered staircase? The interpreter is then faced with a dilemma—do they interrupt proceedings to clarify in order that the deaf person accesses the right information? How important is it that they give visually accurate information? Likewise, in the other direction, if a deaf person signs that he ran up a spiral staircase—does the interpreter voice-over that level of detail? It may sound strange to someone to hear the sentence 'I ran up a spiral staircase' as people do not normally provide that level of detail in English. Thus if people are

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43. Brennan and Brown, 1997, 121-122.

perturbed by what they hear, they may question the credibility of the person speaking. This has potentially major ramifications for deaf people in the justice system.

2.29 This issue is particularly relevant to the use of super-ordinate terms which often come up in court, such as ‘murder’, which do not have one established sign in BSL (or Auslan). Instead people usually give examples of what it could be, perhaps signing STRANGLE, STAB, SHOOT, or SLIT-THROAT,<sup>44</sup> and either with or without mouthing the word ‘murder’ and fingerspelling M-U-R-D-E-R. Fingerspelling and mouthing English words on the lips are common strategies used by signed language users, which Brennan and Brown discuss in depth, and which Brennan has discussed elsewhere.<sup>45</sup> Such strategies are referred to as ‘borrowing’. Brennan<sup>46</sup> describes how BSL users utilise fingerspelling and lip patterns (mouthing) to borrow English words strategically into BSL. The key points that she raises include:

- initialised signs are a common form of borrowing (eg, CONFIDENCE);
- fingerspelling is used to introduce new or technical terms;
- mouthing of full English words typically co-occurs with production of fingerspelled items or abbreviated signs;
- mouthing of full English words co-occurring with established signs is used to introduce a different register (eg, mouthing ‘injury’ while signing HURT).

2.30 These strategies have also been observed in deaf people and interpreters using American Sign Language (ASL),<sup>47</sup> Italian Sign Language (LIS),<sup>48</sup> and Auslan.<sup>49</sup> This linguistic phenomenon is a result of language contact, where linguistic features are transferred from one language to another at different levels of language.<sup>50</sup> The borrowing described by Brennan<sup>51</sup> is a form of language contact between signed and spoken languages, also referred to as code-

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44. Sign language transcription typically involves the ‘glossing’ of signs using English words for established signs (eg, MOTHER), two words joined together to represent the meaning of one sign (eg, RUN-FAST) and letters divided by hyphens to indicate a fingerspelled word (e.g., L-E-G-A-L) (Johnston and Schembri, 2007).

45. Brennan, 2001.

46. Brennan, 2001.

47. Davis, 1990, 2003; Lucas and Valli, 1992.

48. Fontana, 1999.

49. Johnston, 2002; J Napier, 2006.

50. Clyne, 2003.

51. Brennan, 2001.

mixing<sup>52</sup> or code-blending.<sup>53</sup> This borrowing strategy used by interpreters can be referred to as a *literal translation style*. This style is commonly used in contexts where participants need to access formal registers of language, technical terms or context specific language use, such as university lectures.<sup>54</sup>

2.31 Brennan and Brown,<sup>55</sup> and Brennan<sup>56</sup> essentially discuss court interpreters' use of literal translation, borrowing from English as a linguistic strategy, in order to cope with legalese and to convey legal concepts effectively. Their research is particularly relevant to one of the research questions for this study, in relation to how accurately Auslan can convey legal concepts.

2.32 Another significant investigation of signed language interpreting in court was conducted by Russell.<sup>57</sup> She investigated the accuracy of Canadian English-ASL interpretations in courtroom discourse by contrasting the outcomes of simultaneous and consecutive interpreting approaches.<sup>58</sup>

2.33 Spoken language interpreters typically work in simultaneous whispered mode, or long or short consecutive mode when working in court. Yet signed language interpreters typically work simultaneously as they work between a 'silent' and a spoken language, so there is no apparent intrusion between languages as is evident with spoken language interpreting. Research has identified that consecutive interpretations can be more accurate, due to the fact that interpreters have time to process the message and search for equivalence in the target language without interference from the source language.<sup>59</sup>

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52. Lucas and Valli, 1992.

53. Emmorey, Borenstein, and Thompson, 2003.

54. J Napier, 2002.

55. Brennan and Brown, 1997.

56. Brennan, 2001.

57. Russell, 2002.

58. "Consecutive interpreting is where a speaker/signer delivers their message in discrete chunks, pausing for the interpreter to pass on each piece of the message. These segments can be as short as a phrase or as long as the entire speech, but are commonly around 300–600 words...Interpreters working consecutively often rely on note-taking to aid retention of information within each chunk": Napier, McKee and Goswell, 2006, 15.

"Simultaneous interpreting is where the speaker/signer talks continuously, while the interpreter passes their message on as soon as they hear/see enough to understand.... When interpreters are working in simultaneous mode, they generally do not know what the speaker will say, or mean, until they have said it. So rather than starting their interpreting at exactly the same time as the speaker, there is always some time lag": Napier, McKee and Goswell, 2006, 16.

59. Stone, 2005.



Russell sought to investigate which technique would be more effective in court.

2.34 In her study, Russell<sup>60</sup> conducted four mock trials with real judges and lawyers, some with experience of working with spoken and signed language interpreters. The interpreters worked in either the consecutive or simultaneous mode. Three different discourse events were analysed:

- (i) entering of direct evidence;
- (ii) cross-examination; and
- (iii) expert witness testimony.

Russell found a statistically significant difference in terms of accuracy, with simultaneous interpretations 87% accurate, as compared with consecutive interpretations, which were 95% accurate.

2.35 Post-trial interviews with participants revealed that the lawyers and judges seemed to prefer experiencing interpretation in the simultaneous mode, especially during the cross-examination (for the lawyers). They stressed the importance of preparation with interpreters, and that interpreters should request permission from the judge to clarify information, or consult with one another. Deaf witnesses said that interpreters should be confident and well prepared. The expert witness felt that it was important to prepare with interpreters, and commented that they did not seem comfortable using the consecutive approach or note-taking. The interpreters also stressed the importance of preparation, and recognised that the quality of their interpreting was better when they used the consecutive mode.

2.36 In summary, Russell stated that interpreters should recognise the value of using consecutive or simultaneous interpreting techniques for different discourse types in court, and should negotiate carefully with lawyers and judges about what strategies to use and when.

2.37 Although informative in terms of signed language interpretation in court, these studies focused on interpreting for people who are accessing the justice system, in the form of witnesses, defendants or complainants. The results of the study set out in this Research Report are seminal, because it is the first linguistic study to examine signed language interpretation for deaf jurors in the court system.

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60. Russell, 2002.

## INTERPRETING FOR JURORS

2.38 In the interpreting literature, very little consideration has been given to interpreting for jurors, as people are typically not eligible to serve as jurors if they cannot understand the language of the court. Non-English speaking people can now serve as jurors in the state of New Mexico in the United States.<sup>61</sup> Additionally, deaf people in some states in the US, and also in New Zealand, can serve as jurors, as it has been established that they are prevented from accessing the language of the court due to hearing loss, rather than the fact that they cannot use English (as discussed in paragraph 1.2).

2.39 There are different challenges for interpreters working with jurors, because the role of the client is different. The goal of the interpretation is also different.<sup>62</sup> The role of a juror is:

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... 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.<sup>63</sup>

According to Findlay,

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 likelihood of certain events having occurred in the light of the jurors' personal experiences.<sup>64</sup>

2.40 Thus it can be seen that, as opposed to witnesses, defendants or complainants who typically report, or listen to, versions of events, a juror has to make critical decisions based on the understanding and interpretation of information received. Therefore their information access needs are different.

2.41 In a volume dedicated to discussions of language, the law and deaf communities,<sup>65</sup> Mather and Mather explore the needs of deaf jurors in receiving information via English/ASL interpreters, and evaluate whether this should occur through meaningful

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61. Montalvo, 2001.

62. Mather and Mather, 2003; Montalvo, 2001.

63. Darbyshire, Maughan and Stewart, cited in NSWLRC, 2004, p 17.

64. Cited in NSWLRC, 2004, p 13.

65. Lucas, 2003.

interpretations or through the verbatim transmission of information. In effect, they revisit the point raised in Brennan and Brown's work,<sup>66</sup> acknowledging that interpreters need to borrow from English in order to convey legal concepts, terminology, and key facts of the case so that jurors can sufficiently access information for deliberation purposes. To date, no linguistic studies have been carried out on the efficacy of interpreting for the purposes of a deaf juror, confirming that this study is pioneering a new aspect of research on courtroom interpreting

2.42 In addition to the analysis of interpretation accuracy and the evaluation of the effectiveness of English to Auslan interpretations in conveying information to deaf jurors, this study also focuses on juror comprehension. Very few studies have explored the actual comprehension of signed language interpretations generally,<sup>67</sup> let alone in court. Therefore key questions to be considered include:

- What do deaf jurors understand in court?
- How does that compare to hearing jurors?
- Is comprehension influenced by receiving the information directly or indirectly (via an interpreter)?

## JUROR AND LEGAL TEXT COMPREHENSION

2.43 In a recent article in an Australian newspaper, there was discussion around the role of juries, and more importantly in relation to this study, whether jurors understand directions from judges:

But there's another problem: understanding the baffling language of the law. The state's Senior Crown Prosecutor, Mark Tedeschi, QC, said he could easily understand confusion arising from directions given by judges to jurors before they go to reach a verdict ... Trial judges are tightly restricted in their summing up. Their words are governed by a complex, interwoven set of rules established by appeal courts and legislation... Incomprehensible directions were sharply criticised in the Court of Criminal Appeal in South Australia when it ordered a retrial of Ronald Gordon Hill, who shot his wife in the forehead with a revolver ... Justice Robin Millhouse said: "I wonder how much of a summing up the jury ever understands? For how long is the average juror able to concentrate on what the judge is saying? Not much and not for long, I fear. Judges may overlook that jurors are laymen who before their jury duty know little, if anything, of the courts system and even less of the law which we administer in the courts. Yet they are expected to grasp, at one hearing, the most

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66. Brennan and Brown, 1997.

67. Napier and Rohan, submitted.

complex legal concepts! I'll bet not one juror in a hundred does grasp them!" The chairman of the NSW Law Reform Commission, James Wood, QC, a former Supreme Court judge, said yesterday he was very concerned that directions had become "unmanageable and not understandable". For example, Australian judges cannot do much to explain what "beyond reasonable doubt" means...<sup>68</sup>

2.44 This debate demonstrates that the comprehension of deaf jurors may not be the only issue. Instead, we need to consider deaf jurors' comprehension of courtroom proceedings in comparison to the comprehension of hearing jurors.

2.45 There have been several studies of the comprehension of legal texts which have highlighted that even hearing people listening directly to spoken English can experience difficulty in comprehending legal texts, such as police cautions or jury instructions. For example, Cotterill<sup>69</sup> found that the way that a police officer delivers a caution can influence its comprehensibility. Dumas<sup>70</sup> asserts that jurors experience difficulty in understanding the syntactic and semantic complexities of jury instructions, and that any misunderstanding can be minimized through the use of standardized jury pattern instructions.

2.46 The seminal study on juror comprehension was conducted by Charrow and Charrow,<sup>71</sup> which tested and proved the hypothesis that standard jury instructions are not well understood by most jurors. First, they identified a series of complex linguistic constructions in 14 standard jury instructions, which they hypothesised would be difficult to understand. Then they measured the comprehensibility of these instructions by administering a test, whereby jurors listened to these instructions and paraphrased their understanding of what the instructions meant. Charrow and Charrow then re-wrote the instructions, eliminating the problematic constructions, and re-tested the jurors. They found that the re-written instructions were better understood. Subsequent related studies have also confirmed that jury instructions fail to communicate central points of the law.<sup>72</sup>

2.47 In a more recent study, similar to that of Charrow and Charrow, which focused on written rather than oral comprehension, Hansen,

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68. Dick, 2007, 16.

69. Cotterill, 2000.

70. Dumas, 2000.

71. Charrow and Charrow, 1979a, 1979b.

72. Elwork, Sales and Alfini, 1982; Luginbuhl, 1992; Steele and Thornburg, 1988.

Dirksen, Kuchler, Kunz and Neumann<sup>73</sup> combined three methodological steps to investigate the comprehensibility of rephrased syntactic structures in German court decisions. First, they analysed an annotated corpus of court decisions, press releases and newspaper reports on the decisions, in order to detect complex structures that distinguish court decisions from the other text types. Secondly, the complex structures were rephrased into two simplified versions. Finally, all versions were subjected to a self-paced reading experiment. Their findings correspond with those of Charrow and Charrow in suggesting that rephrasing greatly enhances the comprehensibility for the lay reader.

2.48 A particularly interesting study is that of Judith Levi<sup>74</sup>, who conducted a linguistic evaluation of jury comprehension of instructions in her role as a linguistic expert witness. Levi analysed and discussed the language of the Illinois Pattern Instructions (IPI), which are used in the sentencing phase of a murder trial, in order to assess how well the language used in these instructions clearly communicated the legal concepts to the jury. The study served as a follow up to a survey conducted by Zeisel<sup>75</sup>, which concluded that a consistent majority of jurors misunderstood central points of law concerning deliberations on the death penalty, resulting in an increased likelihood that the jurors will impose the death penalty. Levi's linguistic analysis of the IPI also found:

- a consistent theme of presumption of death at all levels of the text (syntax, semantics, pragmatics and discourse organisation);<sup>76</sup>
- syntactical challenges, for example, use of multiple negatives, covert negatives, and embedded clauses;
- semantic ambiguity, for instance, use of the words 'you' and 'your finding' and whether this should be interpreted as a singular or group reference;
- incohesive discourse organisation, that is, confusing sequencing of points, discontinuity, and needless interruptions to the flow with unrelated information; and

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73. Hansen, Dirksen, Kuchler, Kunz and Neumann, 2006.

74. Levi, 1993.

75. Zeisel, 1990, cited in Levi, 1993.

76. For example, "At one point... the judge first tells the jurors how to sentence the defendant to death and then how to give him a sentence that preserves his life—and then inexplicably restates how to sentence him to death. This death-life-death sequence clearly emphasizes the option of death, not only by repeating it twice but also by presenting it in the two most salient positions within a list, first and last" (Levi, 1993, 47).

- and pragmatic problems in that “jurors were given wholly insufficient information from which they had to deduce, or infer, a number of highly significant but regrettably obscured components of both federal and state law”.<sup>77</sup>

2.49 In order to investigate deaf and hearing jurors' comprehension of courtroom proceedings, it is necessary to acknowledge the intrinsic factors that contribute to comprehension, and consider elements necessary for comprehension testing.

### **Comprehension testing**

2.50 In their analysis of the cognitive components of discourse comprehension, Graessar, Mills and Zwaan<sup>78</sup> identify the following key variables and processes that contribute to the comprehension of a message:

- background knowledge;
- spreading activation of nodes in knowledge networks;
- memory stores—short-term memory (most recent clause), working memory (approximately two sentences) and long-term memory;
- discourse focus—analogue to a mental camera that zooms in on particular characters, objects, actions, events, and spatial regions;
- how much the information resonates with the listener;
- activation, inhibition, and suppression of nodes;
- nodes activated by several information sources;
- repetition and automaticity—familiar words are processed faster than unfamiliar words;
- explanations actively sought out; and
- goals of the receiver influence text comprehension and memory.

2.51 Fundamentally, comprehension is influenced by a range of factors. Thus, any test of comprehension must be carefully designed and include a combination of rubric, item and response questions, and should assess representation of meaning (semantics, pragmatics, body of knowledge).<sup>79</sup>

2.52 Factors affecting test comprehension difficulty include:<sup>80</sup>

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77. Levi, 1993, 31.

78. Graessar, Mills and Zwaan, 1997.

79. Graessar, Mills and Zwaan, 1997.

80. Brindley and Slatyer, 2002; McNamara, 2000.

- the nature of the input: speech rate, length of passage, syntactic complexity, vocabulary, discourse structure, noise level, and accent;
- register: propositional density and amount of redundancy;
- the nature of the assessment task: amount of context provided, clarity of instructions, response format, and availability of question preview;
- individual listener factors: memory, interest, and background knowledge, motivation;
- amount of lexical overlap between the text and the response format;
- length of text preceding the information required to respond;
- length of required response;
- repetition of tested information; and
- whether responses and repetitions of information are verbatim or paraphrases.

2.53 Hughes<sup>81</sup> discusses a range of issues relating to language testing and raises several points that are of relevance to this study. One issue is the inherent differences in modality that make the design of tests applicable across spoken and written texts challenging. Listeners cannot usually move backwards or forwards over what is being said in the way that they can a written text unless the spoken text is also somehow recorded and able to be manipulated by the reader. However, this places additional strain on the listener, whereas a reader usually can quite easily search a written text for information required. In this study, Auslan users are similarly disadvantaged, as there is no agreed method for recording Auslan (or any other signed language for that matter) in written form.<sup>82</sup> An Auslan text must therefore either be observed live or recorded on video for later viewing.

2.54 A possible solution would be to utilise only written text for comprehension testing. Unfortunately, although possibly highly fluent in Auslan, some deaf people may not have a sufficient literacy level in written English due to the sometimes significant educational disadvantage experienced by those with a hearing loss.<sup>83</sup> The ideal is to develop a test which is conducted in the same language as that of the information text (ie, people are tested in their first language).

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81. Hughes, 1989.

82. Johnston and Schembri, 2007.

83. Johnston, Leigh and Foreman, 2002.

2.55 Hughes<sup>84</sup> (1989) also presents a summary of the macro-skills involved in listening (comprehending), which include (i) listening for specific information; (ii) obtaining the gist of what is said; (iii) following directions; and (iv) following instructions. Hughes's<sup>85</sup> suggestion for preparing test items is for the researcher to listen to the text to be used, noting what the candidate should be able to understand from the text. Hughes suggests that items (concepts) to be tested are chosen from parts of the text that are sufficiently far apart, so that a momentary break in concentration does not result in the candidate missing all the necessary information.

2.56 Hughes<sup>86</sup> also comments on response items and the challenge posed by multiple choice items, in that candidates have to hold the options in their memory as they listen to and assess the options. Although live presentation of material is usually closer to real life, this is outweighed by the benefit of uniformity in what is presented to the candidates if recorded.

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84. Hughes, 1989.

85. Hughes, 1989.

86. Hughes, 1989.



### **3. Research questions**

3.1 This research project sought to investigate deaf jurors' access to courtroom proceedings via interpreting. In particular, the aims of the research were:

- to investigate the accuracy of English to Auslan interpretations of excerpts from legal transcripts taken from real court cases;
- to determine deaf jurors' level of comprehension of information mediated via interpreters as compared with hearing jurors' level of comprehension of information received directly by listening; and
- to assess the ability for deaf jurors to access court proceedings via Auslan/English interpreters.

3.2 The project encompassed two phases:

- a preliminary study – an analysis of two interpretations and back translations of excerpts from a judge's summation from English into Auslan; and
- a comprehension study, which sought to analyse interpretation accuracy and test juror comprehension of excerpts from a judge's summation.

3.3 The key research questions were as follows:

- How translatable are legal concepts from English into Auslan?
- How accurately are legal concepts and terminology interpreted from English into Auslan?
- How much do hearing jurors comprehend of a judge's summation?
- How much do deaf jurors comprehend of an interpreted judge's summation?
- Is there a significant difference between levels of comprehension between deaf and hearing jurors?
- Are deaf jurors disadvantaged by relying on sign language interpreters to access information?
- What are deaf and hearing jurors' perceptions of the content of the judge's summation?
- What are deaf and hearing jurors' perceptions of jury duties?
- What are Auslan/English interpreters' perceptions of interpreting for deaf jurors?
- How effectively can deaf jurors access courtroom proceedings via sign language interpreting?

## 4. **Preliminary study**

- Overview of procedure and results
- Limitations of the study

4.1 The first phase of the research involved testing the capacity for Auslan to convey legal information. The goal was to conduct an experimental study which would test whether Auslan/English interpreters can accurately interpret legal terminology from English into Auslan. The study was problematic, however, due to the conditions under which the interpretation was carried out. This led to the development of the more rigorous accuracy and comprehension study (see Section 5). Below is a summary of the preliminary study, and the issues which invalidated the results. This provides the context for the subsequent study.

## OVERVIEW OF PROCEDURE AND RESULTS

4.2 The NSWLRC provided a judge's summation which was taken from a real case heard in the Supreme Court of NSW, Criminal Division.<sup>87</sup> Excerpts were chosen from the introductory comments<sup>88</sup> and parts of the text which focused on technical summations and comments regarding the onus of proof.<sup>89</sup>

4.3 Two NAATI accredited Auslan/English interpreters were approached to participate in the study. Interpreter 1 was a native sign language user with more than 15 years experience of interpreting, a postgraduate qualification in sign language interpreting, some experience of court work, and considerable experience of interpreting in other legal settings (eg, solicitor). Interpreter 2 was a non-native sign language user with approximately seven years interpreting experience, a postgraduate qualification in sign language interpreting, and specialist legal interpreter training, but limited actual legal interpreting experience.

4.4 The extracts of the judge's summation text were read out by a researcher, and Interpreter 1 rendered an interpretation from spoken English into Auslan, which was recorded on video camera. Interpreter 1 was given no preparation, other than being told that he/she was interpreting for a deaf juror who was a competent Auslan user and had reasonable competency in English. The location of the filming was the lounge room in the home of Interpreter 1.

4.5 Interpreter 2 was then instructed to watch the filmed Auslan interpretation (without reference to the original English text) in order to produce a back translation of the Auslan interpretation into written English. The only brief provided was that the Auslan interpretation had been targeted at a deaf juror who was bilingual in Auslan and

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87. *R v Gordon Charles McCreath*.

88. *R v Gordon Charles McCreath*, 1-3.5.

89. *R v Gordon Charles McCreath*, 20-23 and 40-43.

English. No other background information or preparation material was provided to the second interpreter.

4.6 Analysis of the interpretation found that Interpreter 1 had adopted a literal translation style, borrowing English terms into Auslan using mouthing and fingerspelling to reflect the formality and register of the legal text, and to introduce legal terminology.<sup>90</sup> The Auslan interpretation presented information coherently, with distinct episodes ('chunks') representing each concept.

4.7 Analysis of the back translation found a high level of equivalence for the introductory comments, and also in some of the more technical parts of the text. However, in terms of some of the legal terminology, the interpretation was not deemed to be of the level of accuracy required to ensure that a deaf juror could access the information needed to make informed decisions.

## LIMITATIONS OF THE STUDY

4.8 Given that the preliminary study was not designed to replicate a courtroom situation, various issues were identified that influenced the outcome of the research:

- The excerpts chosen for interpretation into Auslan were not linked, so it was difficult for Interpreter 1 to determine what came before each section in terms of introductory concepts. Therefore, the interpretation lacked narrative cohesion. In a real courtroom situation, the interpreter would be able to build the interpretation from the beginning to the end of the summation.
- In a real courtroom situation, the interpreter and deaf person would be present throughout the trial and would have established the signs to be used for specific English vocabulary where required.
- If the interpretation had been carried out in a courtroom, Interpreter 1 would have experienced other, additional challenges. Filming the interpretation in a lounge room provided an unrealistic advantage, in that the pressure on the interpreter of working in a formal, highly structured environment was removed. This may have impacted on the quality of the interpretation, as there were no potential adverse ramifications to any misinterpretation.
- In this preliminary study, the interpreter did not have a deaf 'audience' for whom to interpret. Interpreters often rely on

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90. As discussed by Brennan and Brown, 1997; Brennan, 2001.

feedback from their clients (in the form of facial expression, nodding, etc) to gauge whether their interpretation is being understood, and whether they need to make any adaptations.<sup>91</sup> Several writers have commented on the negative impact of not having a deaf target audience when analysing the work of interpreters.<sup>92</sup>

- In a real courtroom situation, an interpreter could refer to the physical surroundings to signal a witness, prosecutor, defence counsel, or the jury or other key concepts.
- The interpreter usually would be allowed time for some research, or at least would be more familiar with the elements of the trial – for example, the charge, names of participants, and the facts of the case, from an initial briefing.
- The judge's summation was technical and dense and may therefore have posed a challenge to a hearing audience. This initial level of difficulty and potential for misunderstanding has to be considered in assessing how much a deaf person would understand of a judge's interpreted summation.
- Interpreters typically work in teams of two when in court. In this study, Interpreter 1 was disadvantaged, as there was no co-interpreter present to provide support (eg, to clarify terms, numbers, names or to monitor for any potential or actual misunderstandings). The sign language interpreting literature has identified that working in teams is an effective approach to ensuring accuracy, consistency and participation from deaf consumers,<sup>93</sup> especially in challenging contexts (such as court).

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91. Brennan and Brown, 1997.

92. Maroney and Singer, 1996; J Napier, 1998.

93. Cokely and Hawkins, 2003; Fischer, 1993; Henley and Vale, 2005; Mitchell, 2002; J Napier, Carmichael, and Wiltshire, in press.

## **5. Accuracy and comprehension study**

- Methodology
- Results

5.1 Following on from the identified limitations in the preliminary study, it was decided to develop a more rigorous study focusing on accuracy and comprehension, with a research design that would account for the flaws identified in the preliminary study. This study sought to investigate deaf jurors' access to court proceedings via sign language interpreting, by analysing the accuracy of an interpretation of a different judge's summation from English into Auslan. This study, which would be conducted under more rigorous conditions, would test and compare deaf and hearing jurors' comprehension of a judge's summation.

## METHODOLOGY

5.2 The study was designed to approximate a court experience. It was decided to test 12 'jurors', six deaf and six hearing, in order to compare their level of understanding of a legal text. The jurors were briefed in an attempt to simulate their presence throughout a trial. They were then provided with the two excerpts from a real court case, and asked to respond to questions concerning the information covered in these excerpts. The goal of the study was to evaluate the accuracy of the interpretation of legal concepts from English into Auslan, and to assess the participants' level of comprehension of the information provided.

### Source text

5.3 The NSWLRC selected a judge's summation from a case that had been tried in the Supreme Court of NSW, Criminal Division. The case<sup>94</sup> was heard between 27 October – 6 November 2003. Rodney Ivan Kerr was charged with the manslaughter of William Christopher Harris at Redfern Station in NSW. He was also charged with affray and endangering the safety of a person on the railway. Representatives of the NSWLRC selected two excerpts on the basis that they incorporated sufficient legal terminology and important facts of the case for the purposes of this study. Excerpt 1<sup>95</sup> of the summation was delivered on Tuesday 4 November 2003. Excerpt 2<sup>96</sup> of the summation was delivered on Thursday 6 November 2003. The full source text can be seen in Appendix A.

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94. *R v Rodney Ivan Kerr*.

95. *R v Rodney Ivan Kerr*, 14-27.

96. *R v Rodney Ivan Kerr*, 99-107.



## Procedure

### *Translation of English source text into Auslan*

5.4 Two interpreters were recruited to interpret the selected excerpts from English into Auslan for recording on video. In order to approximate the level of background information interpreters would normally have if present throughout a real trial, both interpreters were provided with background materials, including a brief background to the case, a copy of the indictment (see Appendix B), the 14 pages of the transcribed summation prior to the first excerpt, and the written directions circulated and referred to by the judge in the excerpts to be interpreted (see Appendix C). These materials were provided two days prior to filming.

5.5 Filming took place in a Department of Law room at Macquarie University which has been set up to represent aspects of a courtroom.

5.6 Two deaf participants were also recruited to attend the filming of the interpretation in order to provide a live audience for the interpreters. Both audience members were provided with a copy of the indictment and the written directions prior to filming.

5.7 On arrival, the interpreters were given time to discuss interpreting strategies and suggestions for Auslan signs with each other. They were then given additional time to discuss and agree on the translations to be used for the English terms they anticipated would arise. This would normally be the case in a real court situation. Translations were agreed for the following legal terms that were anticipated from the materials provided: accused, affray, assault, beyond reasonable doubt, Director of Public Prosecutions, guilty, jury, manslaughter, parole, Supreme Court, verdict and victim.

5.8 A member of the research team with legal and court experience acted as the judge and provided a short warm-up reading to give interpreters the opportunity to become familiar with the speaker's voice and pace of delivery, and the situation in general. Once filming commenced, the 'judge' read the selected Excerpt 1 as one interpreter carried out the interpretation simultaneously into Auslan and the second interpreter acted as prompt/support. This again simulates the procedure that would occur normally during a trial. Both the interpreter and the 'judge' reading the source text were filmed.

5.9 A five-minute break was provided between the two selected excerpts and the same procedure was then followed for the second excerpt. For the purpose of minimising disruption in such a short exercise, the same interpreter carried out the interpretation of the second excerpt. During a longer interpreting situation, it would be

normal for the two interpreters to alternate their roles at regular intervals to reduce fatigue.

5.10 On completion of the filming, the interpreters and deaf people participated in a debriefing separately with researchers. The interpreters were asked to comment on the challenges encountered, strategies used, perceived differences to interpreting for deaf witnesses, defendants or complainants, and any other general observations. The interpreters commented that there were some challenging parts of the text, especially in relation to use of legalese, and that the text felt repetitive. The interpreters were confident that they had met the needs of the deaf audience, but were conscious of the different strategies used to ensure that the jurors could access the terminology, for example, using more English mouthing and fingerspelling (ie, borrowing).

5.11 The two deaf people acting as an audience for the interpretation were also asked to comment on anything they found difficult to understand, any perceived challenges in accessing courtroom proceedings through an interpreter, and any other general observations. Both commented that they felt that they had understood the interpretation clearly and, if serving as jurors, would have felt able to make an informed decision about the guilt of the defendant. They both expressed interest to serve as jurors if it were made possible.

5.12 Given the feedback of both the interpreters and the deaf people, it was deemed that the source text and resulting interpretation were valid and appropriate to use for the comprehension testing stage of the research.

### ***Back translation and analysis of interpreted Auslan text***

5.13 The filmed Auslan interpretation of the selected excerpts from the judge's summation was then back translated into written English by a third Auslan interpreter who was not present during filming. This interpreter was provided with the same background material and instructions provided to the other participants for the filmed translation task. The process of back translation was used in order to ensure reliability and content validity of the English to Auslan interpretation, and to identify any mistranslations. Back translation is a method commonly used for verification of translated texts between spoken languages,<sup>97</sup> and between spoken and signed languages.<sup>98</sup> The full back translation conducted can be seen in Appendix D.

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97. Hambleton and De Jong, 2003; Hambleton and Patsula, 1999; Stansfield, 2003.

5.14 Key concepts in the original summation and an analysis of the interpretation were then identified, and a content analysis of the back translation was conducted to identify the extent to which these concepts were accurately conveyed.

### ***Recruitment of jurors***

5.15 A flyer was distributed on the university campus by the research team calling for expressions of interest from hearing people interested in participating in the study (see Appendix E). Hearing people with a background in law, sign language or deafness were excluded from the study. A similar flyer was also sent around to members of the deaf community in Sydney. Six deaf and six hearing people were recruited to watch/listen to the judge's summation and participate in a comprehension test.

### ***Comprehension test***

5.16 Noting the need to minimise differences in testing procedure for deaf and hearing participants, two videos were produced for the comprehension stage of the project to ensure that participants would be tested in the same language throughout the comprehension test, whether that be English or Auslan. The first video, for deaf participants, was signed in Auslan by a researcher and consisted of the following sections:

- introduction and overall instructions;
- warm-up text consisting of the first five minutes of the judge's summation interpreted into Auslan;
- the two excerpts from the summation interpreted into Auslan;
- instructions on the nature of the questions that were to be asked and how participants were to respond; and
- twelve questions consisting of:
  - four true/false questions;
  - four multiple choice questions; and
  - four open-ended questions.

5.17 All questions were repeated before a response was requested. The full range of questions can be seen in Appendix F.

5.18 The Auslan interpretation of the warm-up text and the two excerpts was presented as 'picture in picture', so that people would see the interpreter on screen, and the researcher reading the summation in a smaller box on screen, to provide a visual link to the reading of the original text. The test was then piloted with one of the deaf people

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98. Cornes, Rohan, Napier, and Rey, 2006; Montoya et al, 2004.

who had been present at the original filming. This person was asked to comment on the clarity of the instructions and questions in Auslan, and any problems with watching the interpreter and judge on the screen at the same time. Once confirmed that the test was comprehensible, the actual data collection was arranged.

5.19 The video for the six hearing participants consisted of the same sections as the video for deaf participants. However, the video of the warm-up text and the two excerpts from the summation shown to participants consisted only of the 'judge' reading the original text. The video of the interpreter was not shown to hearing jurors as it was felt this would be distracting. Instructions and questions for the comprehension component of the video were spoken to the camera by a researcher.

5.20 Two days prior to the test, deaf and hearing comprehension test participants were sent a brief background to the case and the written instructions provided to interpreters. Participants then attended the test venue individually and watched the relevant video and instructions. All participants were also provided with a written version of questions after they had watched the summation. All participants were filmed giving their responses (whether spoken or signed) to the camera. A researcher was present during this activity in order to pause the video for answers as required.

5.21 At the end of the comprehension test, all participants were also asked to comment on their experience and the challenges encountered. Deaf participants, and hearing participants with no jury experience, were asked about their willingness to be involved in a jury in the future. Hearing participants with jury experience were asked to comment on how this activity compared to their past experience. All answers provided were then transcribed from videotape.

## **Participants**

5.22 The interpreter who carried out the simultaneous interpretation of the source text into Auslan was a professionally accredited interpreter (since 1990). Although not a native signer, she has worked since 1986 as an interpreter in a variety of settings, and her legal interpreting experience included criminal and civil matters. The interpreter also held tertiary qualifications, including a PhD.

5.23 The interpreter acting as prompt to the simultaneous interpretation of the source text into Auslan was also a professionally accredited interpreter (since 1992). Although also not a native signer, she has worked since 1988 as an interpreter in a variety of contexts. In terms of legal settings, these include mentions and short trials within Local, District and Supreme Courts for both criminal and civil

matters. The interpreter also possessed both undergraduate and postgraduate university qualifications.

5.24 Two deaf people attended the filming of the interpretation of the source text into Auslan. One deaf person was a native signer who is most comfortable using Auslan and has some English skills. The other deaf person was a non-native signer who uses Auslan as her preferred method of communication, but has high literacy in English and considers herself to be bilingual. These two were chosen to represent two extremes of the deaf community, so that the interpreters would pitch their interpretation to meet the needs of both audience members.

5.25 The interpreter who carried out the back translation of the interpreted text into English was a professionally accredited interpreter (since 1990). Although not a native Auslan user, her experience in legal interpreting spans court, mediation sessions, tribunals and hearings, police interviews, solicitor appointments, pre-trial conferences, and dispute resolution. In addition, she has worked as a paralegal advocate in a previous position as the manager of a community service.

5.26 The ‘jurors’ were 12 people (six deaf, six hearing) selected to provide a broad representation across the following variables: age, gender, highest educational attainment, employment category, and first language.

5.27 The characteristics of the participants selected are summarised in Appendix G, and were chosen to reflect recommendations from the NSW Office of the Director for Public Prosecutions that jury selection should account for a representation of the community in terms of age, sex, ethnic origin, religious belief, marital status or economic, cultural or social background.<sup>99</sup> In both the deaf and hearing sample, an attempt was made to include non-native users of Auslan and similarly non-native users of English in order to include the additional challenge experienced by such jurors.

## RESULTS

5.28 The results of a linguistic analysis of the source text are set out below. This includes a content analysis of the source and back translated texts, the results of the comprehension test, and the post-test interviews.

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99. DPP, 2003.

## Analysis of source text

5.29 A linguistic analysis of the original spoken English source text identified key issues which may have presented challenges to the interpreter. These included:

- The use of archaic expressions, for example, three in number, element one will occasion you no difficulty, and a country blast on its horn.
- Errors in the oral reading of the written text resulting in a new 'source text'. In particular one example, where the phrase "the deliberate attack or attacks" was heard, which was a misreading of the phrase *deliberate act or acts*.<sup>100</sup>
- Reference to other parties whose role in the trial was not explained and was not readily apparent from the context. For example, the sentence was used, "Mr Button, I think, urged Mr Mikulic as perhaps the most reliable". Mr Button was the barrister for the defendant, and Mr Mikulic was one of the witnesses commenting on the distance between the defendant and the victim at the train station.<sup>101</sup> Although neither party was relevant to the questions that were asked in the comprehension test, the inclusion of this information placed additional cognitive strain on the interpreters and the participants, who naturally are attempting to create links between the information they are being provided with.
- Unclear use of pronouns, for example, with reference to the CCTV camera photographic evidence, the judge states:  
For instance, photograph number 3, by which time the train is in and people are getting off, you may think Mr Kerr and his group is getting off, photograph 3 is at 12.45 and 37 seconds, and then at 12.46 and 5 seconds is Exhibit E, the one with **his** hands on the platform, a split second before the train hit **him**.

In the final clause, the pronouns 'his' and 'him' do not refer to the defendant Mr Kerr, but in fact to the victim Mr Christopher.<sup>102</sup>

- Clear examples of legalese, for example, the use of the term reasonable and proportionate. As the judge says himself:  
It is not suggested that there is any distinction between those two words, reasonable or proportionate. They are embodying

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100. See Appendix A, [S15].

101. See Appendix A, [S18].

102. See Appendix A, [S19].

essentially the same concept which is a concept of reasonableness.<sup>103</sup>

Yet both terms are used throughout the text. This forces the interpreter to either reduce both terms to one Auslan sign or to use two Auslan signs that convey exactly the same meaning, but in a different form in order to match the form of the English text.

### Analysis of interpretation

5.30 An analysis of the English to Auslan interpretation yielded unsurprising results. As per Brennan and Brown's study of BSL/English interpreters,<sup>104</sup> the interpreter was found to use a literal translation style – using mouthing and/or fingerspelling to borrow terms into English, especially legal concepts. An example can be seen in Figure 1, where the interpreter accompanies the mouthing of the phrase 'grievous bodily harm' with fingerspelling.

#### **Figure 1: Example of literal translation**

*Original spoken English source*

5.31 Broadly, to prove murder the Crown must establish two things. The first is that the death of the victim was caused by the acts of the accused, and the second is they must prove that in carrying out these acts the accused person had a particular state of mind, that is, he intended to kill the victim or he intended to cause that victim very serious bodily injury, what is called by the lawyers grievous bodily harm.

*Auslan interpretation*

For prove murder solicitor must prove two things  
first that .

FOR PROVE MURDER SOLICITOR MUST PROVE TWO ONE-TWO  
FIRST PRO-1

person die happen because of that accused person his behaviour  
second .

PERSON DIE HAPPEN WHY PRO-2 PERSON THEIR  
BEHAVIOUR// SECOND

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103. See Appendix A, [S58].

104. Brennan and Brown, 1997.

Prove what that person behaviour before plan  
want.

PROVE WHAT? PRO-2 PERSON BEHAVIOUR WILFUL BEFORE  
PLAN WANT

to kill that person that person plan want kill  
him.

KILL PRO-1 PRO-1 WELL PRO-2 PERSON THINK PLAN YES  
WANT KILL PRO-1

or want hurt that person serious bodily harm called.

OR WANT HURT PRO-1 SERIOUS BODY HARM QUOTATION-  
MARKERS

grievous bodily harm gbh.

G-R-I-E-V-O-U-S BODY H-A-R-M G-B-H WELL

### *Transcription key*

DIE – block word represents use of established Auslan sign

H-A-R-M – represents each fingerspelled letter

him

PRO-1

- word above line represents mouthing used to accompany sign or  
fingerspelled item

- word below line indicates referent sign used to signify pronoun

## **Content analysis of source text and back translation**

5.32 The source text was analysed to identify the key legal concepts presented in the summation and the extent these were accurately interpreted. Eight broad legal concepts were identified in the summation and have been summarised as follows:

- Defining “manslaughter”.
- The 1st element of manslaughter.  
The 2nd element of manslaughter.
- Test of “causation”.
- Defining “reasonable and proportionate”.
- Clarifying the written directions – What did the accused do?.
- Clarifying the written directions – Did the accused’s actions give rise to a well-founded apprehension of physical harm?



- Clarifying the written directions – Was it reasonable for the victim to seek to escape?
- Clarifying the written directions – Was the method of escape reasonable and proportionate?

5.33 Within the above list of concepts, a number of other requirements were also identified which were used to assess the degree to which the live interpretation was accurate. A comparison of the broad legal concepts in the original text and the back translation text found that concepts 2 and 4 were translated accurately, while concepts 1, 3, 5, 6, 7 and 8 raised issues ranging in severity from a change in the order of explanation to more significant changes in meaning. It is interesting to note that the analysis found the back translation of concept 4 to be superior to the original summation! This analysis is discussed in more detail in paragraph 6.2.

5.34 In terms of equivalence in content, analysis showed that the interpretation was 87.5% accurate. This was calculated based on the prevalence of 72 key legal concepts in the original source text, of which 63 were found in the back translation text. Figure 2 shows an example of equivalent concepts from the first paragraph of the first excerpt of the summation.

**Figure 2: Example of equivalent concepts**

*Source text version*

Let me move from that to the first count, that of manslaughter, and in order to explain the elements of the charge, and what the Crown must prove to establish manslaughter, it may assist if I very briefly, and I hope I do not confuse you, say a word about murder and the contrast between murder and manslaughter. You would appreciate, of course, there is no question in this trial of murder. Broadly, to prove murder the Crown must establish two things. The first is that the death of the victim was caused by the acts of the accused, and the second is they must prove that in carrying out these acts the accused person had a particular state of mind, that is, he intended to kill the victim or he intended to cause that victim very serious bodily injury, what is called by the lawyers grievous bodily harm. **(nine legal concepts)**

*Back translation*

Now moving on, I would like to talk about the first count on the indictment - manslaughter. I want to explain what this count entails and what the Crown must prove in order for you to be satisfied of the accused's guilt. Whilst I think it will be useful to provide you with some information, I'll direct the jury only very briefly as I don't want to confuse you. I want to clarify that manslaughter and murder are very different under the law. You of course would understand that in this trial we are not

discussing a charge of murder. In regard to proving murder, the Crown would have to prove two elements. Firstly, that a person died as a result of the direct actions of an accused person; but also that the accused had formed an intention to kill that person. So there is a deliberate or intentional act that has caused that death or has caused serious harm to the person. Causing serious harm to the person is known as “grievous bodily harm”. **(seven legal concepts)**

### Comprehension of source texts

5.35 The results from the comprehension test show that both hearing and deaf ‘jurors’ misunderstood some concepts in the excerpts presented to them. Of the closed/multiple choice questions, approximately 10.5% of these questions were answered incorrectly by all participants. Similarly, some responses from both deaf and hearing participants were problematic for the open-ended questions. Table 1 summarises the correct responses by participants undertaking the comprehension task.

**Table 1: Summary of correct responses grouped by the format of the question**

Questions		Correct responses		
		Deaf participants (n = 6)	Hearing participants (n = 6)	TOTAL (n =12)
True/ false	Q1	6	6	12
	Q2	6	6	12
	Q3	6	6	12
	Q4	3	5	8
Multiple choice	Q5	3	5	8
	Q6	6	6	12
	Q7	6	5	11
	Q8	6	6	12
Open ended	Q9	6	4	10
	Q10	1	0	1
	Q11	5	6	11
	Q12	0	1	1
TOTAL		54/72 75%	56/72 77.8%	110/144 76.4%

5.36 It can be seen that percentage-wise, there appears to be no

significant difference between the number of correct responses from deaf and hearing participants (2.8% difference).

5.37 It is also worth noting that of all the errors in responses to true/false and multiple choice questions, almost half (five of nine errors made) related to Question 5, a multiple choice question which was also the longest of all questions asked.

5.38 A number of similarities can be seen in the responses made by deaf and hearing participants and in the errors seen in Questions 4, 5, 10 and 12 in particular, suggesting that these items may have been challenging regardless of language used or whether the information was received directly or mediated through an interpreter. Table 2 provides the different open-ended responses to Question 9 (the majority of which were correct), and Question 10 (the majority of which were incorrect).

5.39 Interestingly, it can be seen in response to Question 9 that all the deaf participants answered correctly, whereas two of the hearing respondents' answers were inaccurate or incomplete. For Question 10, the only person who answered one question correctly was a deaf participant. It is also interesting to note that, in Question 9, the deaf participants' responses are more detailed, as compared to Question 10, where the hearing participants provided fuller answers. This pattern was reversed for Questions 11 and 12, where the hearing participants had a higher number of correct responses.

### **Post-test interviews**

5.40 In the post-test interviews, all participants commented on the facts of the case being easier to follow, while the legalistic language and repetition resulted in the text being more difficult to comprehend. Figure 3 gives examples of deaf and hearing responses to the question "What was harder or easier to understand?"

#### **Figure 3: What was harder or easier to understand**

##### *Deaf responses*

I didn't understand what was involved in court proceedings before. I was surprised about the repetition. I understood the interpreter, yes, but the language used . . . that I knew I had to try to remember. I understood everything the interpreter signed, that was very easy and clear. She was clear about who did what, she created the context, so it was easy to understand who did what. That made it easy to understand. The only difficulty was the legal language like 'beyond reasonable doubt'. I know it's legal language. Words like 'affray'. So you have to remember these things. And they get repeated, over and over. A bit boring!

What really helped me was the use of space, the explanation in

Auslan. Before I arrived, I didn't know the signs for manslaughter, for example, so having the interpreter explain the sign for the word helped me. Without that, it would have gone over my head. What was more difficult was the pace. It was fast so you didn't have time to sit back and take it in. It started easier and then got more complex.

### *Hearing responses*

The easier parts were the facts because it was quite a simple scenario, other than when the women appeared, because there was not mention of them getting off the train with Mr Kerr so that was really odd. The harder part was the language used in law. And the guy was just reading off and there seemed to be a lot of repeating so you almost get lost in it. It's almost more understandable if you just say this is this, this is this. Which is probably why the fact part of it is easier for me. When you start to repeat things, it becomes a little muddled.

Coming from a different [non-English speaking] cultural and language background I had to concentrate on it all the time, but I found the judge tried to explain everything very clearly, but the wordy explanations sometimes caused, not confusion, but made it even harder for me to follow what he was trying to say. Because it was all written in legal expressions, if it was written in common newspaper language or more everyday language it might be more clearly understandable, but it is a legal document and, as the judge said, without adding or deleting any information, delivering the message accurately was not very easy for all parties... I could follow especially with the written documents, but without this I would have to focus more to follow what he said.

Table 2: Responses to Q9 and Q10

Participant	Question 9: Explain what witnesses said the two women with Mr Kerr did.	Question 10: Explain the legal rule of 'causation'
	<i>Correct answer: One or both women physically restrained Mr Kerr. When Mr Kerr broke free they again grabbed him and held him back.</i>	<i>Correct answer: Did the accused's conduct cause the victim to die? It doesn't have to be the sole or effective cause but did the act or acts of the accused significantly or substantially contribute to the death of the victim.</i>
	Participant responses (correct shown by ✓ and incorrect shown by X)	
Deaf 1	Both women tried to restrain the man, to stop him from fighting with the other man. The man resisted and broke free, going for the other man. Both women again tried to hold the man but he went for the other man. What happened after that I don't know. (✓)	Sorry, I can't give an answer. (X)
Deaf 2	Witnesses saw the two women get off the train with Mr Kerr. When Mr Kerr became aggressive and approached the other man, the women pulled him back to stop him approaching him. Also, when Mr Harris escaped by jumping onto the tracks, one woman yelled 'look train coming'. That's what happened. (✓)	Causation. Two things, A and B happen. If A happens, then eventually B will happen. If A doesn't happen, maybe B would never happen. But if A happens B will definitely happen. (X)
Deaf 3	The two women tried to hold Mr Kerr, then he broke free and ran up to the other man. The two women again grabbed him and held onto him. (✓)	What the accused made the victim do. (X)
Deaf 4	Witnesses said that the two women tried to restrain the man but he broke free so they grabbed him a second time to stop him approaching the victim. (✓)	Sorry, I don't know. (X)
Deaf 5	When the man got off the train the man started to yell at him. The two women tried to stop him but he continued so the women held him but he was determined and resisted. (✓)	Causation. The cause. The man was yelling and that made the other man fearful and run away. This was caused by his yelling at the victim. (X)
Deaf 6	The two women tried to help and keep the men separated, to hold onto the accused. (✓)	That means that the death happened because of the behaviour of the accused, causing the victim to die. There was a link. (X)
Hearing 1	They went over to the victim and pinned him down. Held him down for a little while. (✓)	It goes back to the cause and effect. Was what the accused did, it's hard to put into words, was what the accused, did it cause the victim's action . . . what the accused did is the cause to the victim's action. And it has to be proved beyond reasonable doubt that one affected the other. (X)
Hearing 2	The two women got off the train with Mr Kerr and as Mr Kerr shouted at Mr Harris they attempted to restrain him and hold him back. (✓)	Causation is cause and effect. If there is a consequence of an action and it can be proven that it is a reasonable response to the action of the accused, and the accused is said to have caused that response in the victim. If that victim is of firm mind and sound judgment then that is reasonable cause to say that the action of the accused caused that response in the victim. And it must be continuous. (X)
Hearing 3	They tried to stop Mr Kerr. (X)	It's like cause and affect. A causes B there is causation there if A's act or saying causes B, there is a rule of causation in that incident. (X)
Hearing 4	The two women held Mr Kerr back. (✓)	I was listening but causation and everything else... Cause of something that has happened but being able to prove that you intended something to happen and you were the reason for why it happened. (X)
Hearing 5	Mmmm nothing. They didn't do anything. Failed! (Laughs) Looking at my notes but . . . got off the train . . . yelled . . . sorry. (X)	Hmm. It's the actual cause of it? I didn't write it all down but I understood there the question of cause in a common sense non-technical way. Determining criminal responsibility for serious criminal offences. That's what I would take it as. (X)
Hearing 6	When Mr Kerr started yelling and saying 'what the f**k are you doing' or 'what the f**k are you looking at', witnesses said the two women restrained Mr Kerr. He escaped from their restraint, obviously it didn't appear it was a very strong restraint, they then went to restrain him again and he allowed himself to remain under constraint by the two women. (✓)	From my understanding as described here causation is an unbroken chain of cause and affect. If there is any break in that link between a particular cause and a particular effect, that is not legal causation. There can be several links in that chain but they have to be unbroken and they have to be related to one another. (✓)

5.41 Although the interpreters had agreed on the signs to be used with the deaf audience at the time of filming, there were comments from two of the deaf comprehension test participants about the choice of signs, as seen in Figure 4.

**Figure 4: Comments about choice of signs**

I think I understood things without too much difficulty. The interpreter's signing was a little unusual, for example signing DOUBT NOTHING. I prefer DOUBT DON'T-HAVE

I think I needed more explanation in Auslan about some of the terms and their meaning. For example, 'beyond reasonable doubt'. I don't think the interpretation used was right - DOUBT NOTHING. I think more explanation was needed. The other thing was the sign 'guilty'. I use this sign GUILTY (small finger tapped on chest) [rather than sign used by interpreter which was repetition of the fingerspelled letter G]. So a few things could have been clearer. But otherwise I followed things easily, especially the description of what happened. But the terms used, that was a bit harder.

5.42 This is typical of the lexical sociolinguistic variation in Auslan, where different signs are used according to regional, dialectical and age differences.<sup>105</sup> This is one of the limitations of using a pre-recorded video test. If the interpreter had been in a courtroom with the two deaf people who made these comments, obviously she would have discussed and agreed to use the signs that they use. Nonetheless, the preference for alternative signs from two deaf participants did not seem to impair their comprehension of the content.

5.43 Those hearing participants who had previously served as jury members were asked to compare their participation in the comprehension test with their prior experience. This question was asked in order to ascertain the realism of the test, thus validating the credibility of the results.<sup>106</sup> Figure 5 outlines some of their responses.

**Figure 5: Comparisons with prior juror experience (hearing participants)**

It was similar and those points the judge was explaining did happen in the real case I was in. I guess it was harder here just coming into it in the middle and not having time to go and reflect. I did actually take notes in the real case which I didn't here today and that does help me to work things out in my mind a bit better. I think if I was deciding the fate of someone for the next 10 years I would take notes.

105. Johnston and Schembri, 2007.

106. One of the hearing participants had prior experience in court, but as a Korean-English interpreter, not a jury member, so this was discounted.

Just being on your own, I know you are meant to make up your own mind, but in the jury room I did find there was that talk amongst yourselves and people who had more divergent views did come to see things more from the same point of view. And going back over statements and photographs and exhibits.

Yes definitely [it was an easier experience]. I suppose when you've been through the whole three or four days I was a bit over it, whereas I really listened to this. It was just so much clearer.

5.44 Alternatively, hearing participants with no previous jury service were asked to comment on how confident they felt about being a juror after their brief experience in this study. Their responses can be seen in Figure 6.

**Figure 6: Thoughts about being a juror (hearing)**

Can't say I'm looking forward to it, but if I do it, it won't be a problem. It needs to be done and I'm happy to do it... It's part of modern day society. This is how we've structured our law reforms and this is what you have to do, so it's fine. It's not something I would choose to avoid doing.

Don't think I would ever feel confident about being a member of a jury because I feel like it is a lot of responsibility trying to work out what is what if someone is guilty of certain acts. I guess being able to take in all the information, and trying to remember it. I guess you would have it documented as well and I guess you would probably find it a bit disturbing knowing certain things but (not pleasant things) yes, I would do it and I would probably feel all right doing it, but it is a big responsibility trying to work out someone's fate.

This would have only taken a week say, but that would still have been a week of intense concentration, keeping facts straight, your notes together would have helped, if you're a juror without access to notes, access to written material, you are just sitting there sucking it all in, getting the feel of the case and, when it came time to deliberate, it would be easy for anybody without notes to forget significant points or to misinterpret those points... I could participate and hopefully come up with the verdict. These types of explanations are very helpful [referring to the written directions]. We might know the word but not know how to elaborate on the complete definition in law, and an understanding of terms and phrases.

5.45 As deaf people cannot currently serve as jurors in NSW, we could not ask them to compare their experiences. However, we did ask them

how they would feel about being a juror, in light of this research participation experience. Figure 7 illustrates the comments they made.

**Figure 7: Thoughts about being a juror (deaf)**

I would love to be involved if I had the opportunity. I would be interested to hear about what happened, the victim and other person's arguments. I think it would be a good experience. I watch television and think that it would be interesting to find out what really happened.

I've been asked to be on a jury twice, but I've had to say that I couldn't because I am deaf. I think it would be interesting to be involved. I know it can be boring, heavy work, but I know it is the duty of the community to judge their peers. In this situation, I felt I could participate but there was one thing about the three charges: it was hard for me to see, if we said not guilty to the first charge, how we would then decide on the remaining two charges. That wasn't really clear to me - the difference between charge 2 and 3. I know that it may be because it was the middle of the case - maybe there was more in depth discussion that had been held about the difference between charges 2 and 3 or if they made a decision about not being guilty on the first charge then we would look more in depth at charges 2 or 3.

Yes, because if I could, I would. I've never done it before so I would want to.

Yes, because we need to be equal with the hearing community. Deaf people are excluded from so many things. I got a letter asking me to go for jury duty and I would have loved to, but I knew that because I am deaf I had to sign the form and say that I couldn't attend because I am deaf. I feel I want to be involved because it is right for society.

At first no, but this experience was interesting. I felt scared before that. I didn't want to do it, but having watched this I thought I could be involved. But maybe not a murder trial - that would be intimidating, but something more straightforward... One thing is that deaf people vary in their skill and their education. That worries me a bit. We need to be careful about saying if someone is guilty or innocent. They could be sent to jail for something they haven't done. But then, that's the same for hearing people.

I think it would be interesting and I would want to be seen as equal. With an interpreter, I would be fine. I don't see any issues. And if the opportunity arises in the future, I might try to take it.

5.46 Although anecdotally it seems that members of the general public attempt to avoid jury duty, it is worthy of note that the deaf



people involved in this study expressed the desire to carry out their civic duty, and participate in the judicial system on an equal footing with hearing people. The final question asked of the deaf participants was: ‘In order to have equal access, what would you need as a deaf juror (other than an interpreter)?’ Their thoughts are revealed in Figure 8.

**Figure 8: Access needs for deaf jurors**

I think you would need an interpreter like [Interpreter name]. A level 2 [NAATI paraprofessional] interpreter wouldn't be skilled enough. They would need to be level 3 [NAATI professional], fluent and experienced in court work. Before I came here today, I was thinking that the juror and the interpreter would need to have a good relationship. Without a good relationship, the process wouldn't work so well.

I don't know if it is usual for jurors to have access to notes every day, to later consider what was said. That would be worth having. I don't think I would need a video (of the interpreter). I think that is all. Access to what the [rest of the] jury has.

An interpreter, as you said, and papers that I could read before or through the trial, especially if the interpreter wasn't clear. That would be useful.

Yes, an interpreter, but also I need to know how the court runs everything. One way would be for notes that I could take home to read – to make sure that I understand before I go in on the first day. Sometimes at the start, on the first day, there is so much to understand, so knowing why we are there, the parties, what happened, that would be good to know in advance.

First, education and an explanation of basic terminology. Second, basic awareness of how the court works and how we need to behave. For example, should we allow our emotions to be involved or be detached? We need to understand how to separate out issues and what to set aside, like emotions. I think it is important and that will build our confidence and help us to make the right decision.

5.47 In sum, results show that both the deaf and hearing ‘jurors’ equally misunderstood some terms and concepts. Nonetheless, all the findings show that legal facts and concepts can be conveyed in Auslan effectively enough for deaf people to access court proceedings and to understand the content of legal texts to the same extent as hearing people. The results also show that deaf people are willing to serve as jurors, and are confident that they can access the necessary

information through interpreters (with extra support from written notes) in order to make an informed decision as a juror.

## **6. Discussion**

- Analysis of translation
- Comprehension test results

6.1 In this section, we discuss the analysis of the translation and the interpretation of the comprehension test results.

## **ANALYSIS OF TRANSLATION**

6.2 The purpose of analysing the translation was to assess the degree to which important concepts in the original summation were translated. In doing so, a note of caution must be raised. The usual method for such an analysis, as used here, is to conduct a back translation from the target language (Auslan) to the source language (English) in order to see the degree to which there has been any shift in meaning. Although conducted by a qualified Auslan/English interpreter, there is still the potential for meaning to shift during the back translation process. It could be argued that even the reading of the original English text will introduce the potential for something to be misread or emphasis to be altered from that originally intended by the author.

6.3 A full transcript of the analysis can be seen in Appendix H. The legal concepts identified in the original text will now be examined.

### **Key legal concept No 1 – defining “manslaughter”**

6.4 The issue of the difference between murder and manslaughter, in particular, the *mens rea* or intention to commit a crime, was accurately translated. However, the “reasonable person” test was not well translated. The summation clearly directed the jury to consider “the measure of responsibility being that of a reasonable person stepping off a train at Redfern”. The back translation stated, “You can however make a decision about his words, language, his behaviour”. Although, the use of the word “objectively” was used in the very next sentence, it is uncertain if the average juror would understand the term “objectively” without the use of the example of the reasonable person. This appears to be a problem with this part of the translation.

### **Key legal concept No 2 – the first and second elements of manslaughter**

6.5 No problems were identified with the translation of the first element of manslaughter. However, in relation to the second element of manslaughter, a subtle difference was identified between the summation referring to acts that “caused the death” of the victim compared with the back translation which refers to acts that “contributed to the death” of the victim. An act or acts that contribute to someone’s death is different to an act or acts that cause someone’s death. The accused may have contributed to the death but his act may not have caused the death.

### **Key legal concept No 3 – test of “causation”**

6.6 A major problem was identified in relation to the translation of this concept. The summation clearly left the interpretation of the evidence to the jury:

So that even if you were to find that the deceased himself, by his actions, contributed to his own death...

The back translation made an assumption about the interpretation of the evidence:

The deceased himself by his own conduct of getting onto the tracks clearly contributed to the final result of death...

A judge never tells the jury how to interpret evidence. The jury are called “the tribunal of fact” because their job is to establish whether the facts support the charge. The judge is the “tribunal of law” and determines questions of law that help the jury in their job of only assessing admissible evidence. The back translation would indicate to the deaf juror that the judge has already decided this issue and therefore, the jury should follow suit.

### **Key legal concept No 4 – defining “reasonable and proportionate”**

6.7 The back translation was found to be better, in terms of plain English, than the summation. A minor comment could be made that the summation asks the jurors to consider first if there was a threat at all:

It is an objective view based upon what the deceased did in response to the threat made to him, if you find that there was such a threat.

The back translation assumed there was a threat, although admittedly, the language is not conclusive.

### **Key legal concept No 5 – clarifying the written directions: what did the accused do?**

6.8 The summation leaves the question of what the accused did to the jury. The judge goes close to commenting on the truth of the evidence, but ultimately leaves it to the jury by opining, “ I do not think it is in the least controversial...”, whereas the back translation states on this issue, “All would agree that the victim was directly targeted...” This important difference is the difference in leaving facts for the jury to determine and the judge directing the jury on accepted facts – accepted by him and, by implication, the jury.

### **Key legal concept No 6 – clarifying the written directions: did the accused's actions give rise to a well-founded apprehension of physical harm?**

6.9 The order of the translation was found to be problematic. The following sentence:

In considering the victim's reaction and his sense of fear, was the person himself the kind of person that would experience trepidation more than any other reasonable person?

should have appeared towards the end of this part of the text, not mid-way through. The sentence confuses the subjective with the objective test. The summation was deemed to be in the correct order. This did not appear to be hugely damaging because the objective test is clarified, but it did cause some degree of confusion.

### **Key legal concept No 7 – clarifying the written directions: was it reasonable for the victim to seek to escape?**

6.10 The back translation used the word “causally”, which was assessed to be incorrect. This was not thought to be hugely damaging, but confusing, as the issue of well-founded apprehension or fear is not determinative alone of the issue of causation – it merely contributes to the issue of the presence of causation. Otherwise, there appear to be no other problems with the translation.

### **Key legal concept No 8 – clarifying the written directions: was the method of escape reasonable and proportionate?**

6.11 A reference to the victim escaping because of a “weakness in character” was deemed to be an incorrect insertion, as it was not mentioned in the original summation. This is an objective test, not an assessment of the victim's character as to whether it was reasonable to escape the threat posed by the accused. Otherwise, no other problems were evident.

6.12 From the analysis of the back translation, it can be seen that there were some problems with translations of the broad legal concepts central to the case. Yet, the problems were largely subtle shifts between legal definitions or objectively presented facts, to interpretations of the meaning of such statements. As stated in paragraph 5.28, the overall accuracy of the interpretation was 87.5%, which is relatively high. Given that candidates who sit the NAATI Interpreter Level test are required to achieve a pass mark of 70% for successful accreditation and to be considered safe to practice, 87.5% accuracy is more than acceptable.

## COMPREHENSION TEST RESULTS

6.13 An overall pattern that can be seen in the responses to the comprehension test is the difference between responses to questions of fact and questions relating to legal concepts. Overall, most respondents answered questions of fact correctly. In the case of deaf respondents, this means that the facts of the case had been interpreted clearly and correctly and had been understood. When asked to comment on the comprehension test, four participants specifically mentioned the facts of the case as being one of the easier aspects of the activity.

6.14 When factual errors did arise, they sometimes arose in respondents who otherwise provided correct answers to more complex questions. An example of this can be seen in Question 9. All the deaf respondents provided correct answers as to the accused being physically restrained by the women, while only four of the hearing respondents provided a correct answer. One hearing respondent answered the question correctly but drew a conclusion as to the intentions of the accused to free himself from the grasp of the women. First, this response was not called for by the activity but offered up by the respondent and, secondly, it is inconclusive in terms of the accuracy of the conclusion drawn. One hearing respondent failed to answer the question and guessed incorrectly, yet this respondent had previously answered all of the questions about the legal concepts and the factual matrix correctly.

6.15 A similar pattern can be found with Question 11, where one deaf respondent answered with:

I can't remember what actual words he used but I remember he yelled. What he actually said I missed.

This was an interesting response given the colourful language used by the accused and recounted accurately by the judge in his summation.<sup>107</sup> Further, given that 11 other respondents recounted the wording almost verbatim, it is odd that one respondent missed it completely. It is unlikely that modesty is the reason for this respondent missing the words as the words can be changed when recounted so that they are not so offensive.

6.16 A possible explanation for this observation is that the facts of the case were sparsely distributed in the body of the text, often arising incidentally within a discussion about a legal concept. These facts were also rarely repeated during the excerpts selected for this study,

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107. See Appendix A [S18].

therefore making them easier to miss. This suggests that in an actual trial, where evidence is presented over a longer period of time and in a more systematic manner, these comprehension errors may decrease as jurors would have time to absorb evidence and arguments before hearing a judge's summation.

6.17 Discussion will now turn to responses to questions where a pattern of misunderstanding may be found. As already suggested in paragraph 5.28 - 5.57, the answers to Questions 4, 5, 10 and 12 were problematic, and focus on the legal concepts raised in the summation.

6.18 Five out of six hearing respondents answered Question 4 correctly, with one additional respondent giving the correct answer, but being confused by the reference to murder, stating that the summation had been addressing the issue of manslaughter. Only three out of the six deaf respondents answered this question correctly, however, with one of the respondents who answered correctly admitting that he or she did not understand the interpretation of the phrase "beyond reasonable doubt". When the researcher simplified this to "without doubt", the respondent confirmed the correct answer. Overall, this may indicate a low level understanding of a basic threshold concept in criminal trials. If respondents cannot grasp this basic threshold concept, then the rest of the evidence may well be lost or misinterpreted by the jury, whether hearing or deaf, in the jury room. However, the level of misunderstanding is comparable between the two sample groups, meaning that the concept or the form of the question was difficult for both groups. This issue will be discussed further below.

6.19 Turning to responses to Question 5, only one of the hearing respondents answered this question incorrectly, compared to three of the deaf respondents. This response is a concern, as this question is a threshold question that distinguishes between the two elements of murder, that is, the *mens rea* (the intention to kill), and the *actus reus* (the act of killing). The prosecution has the burden of proof to prove beyond a reasonable doubt that the accused intended to kill the victim and did kill the victim. If deaf jurors have difficulty understanding the difference between the act and the intention to kill, and that lack of understanding is allowed ultimately to determine the outcome of the case in the mind of that juror, then unsafe verdicts are possible.

6.20 It should also be noted that Question 5 was also the longest of the questions asked of the participants. This raises the challenge of modality in the design of comprehension materials.<sup>108</sup> In this study, this becomes an issue not only for participants responding to complex

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108. Hughes, 1989.



verbal information, but also signed multiple choice items which must also be held in memory as the participant assesses the question, the options and his or her recollections.

6.21 Questions 10 and 12 resulted in the highest number of errors. All hearing respondents answered Question 10 incorrectly. Most were close to the correct answer, but none of the hearing respondents stated the rule correctly. Whether this is fatal to their ultimate understanding of the concept and would lead to unsafe acquittal or conviction is hard to tell. The following elements of their responses show how close the responses were to the correct answer:

- “was what the accused did cause the victim’s action”;
- “the accused is said to have caused the response in the victim”;
- “if A’s act or saying causes B”;
- “cause of something happening”;
- “it’s the actual cause of it”; and
- “an unbroken chain of cause and effect”.

6.22 In a result that is arguably better than the hearing respondents, one deaf respondent correctly answered the question. This respondent stated:

the death happened because of the behaviour of the accused, causing the victim to die. There was a link.

While this response is not perfect in relation to the events establishing an unbroken chain of events, it is the best and most accurate response from the entire sample. The other five deaf respondents made the following responses in part:

- “sorry I can’t give an answer”;
- “if A happens, then eventually B will happen”;
- “what the accused caused the victim to do”;
- “sorry I don’t know”; and
- “the man was yelling and that made the other man fearful and run away”.

6.23 Turning to Question 12, only one hearing respondent gave a correct account of the “reasonable and proportionate response”. Three respondents correctly pointed out that the victim’s response needed to be reasonable compared to the risk posed by the accused for causation to be made out. The remaining two hearing respondents totally missed the point and answered the question by talking about irrelevant facts.

6.24 All of the deaf respondents answered the question incorrectly. The closest deaf respondent stated, “we need to think about what is

fair and proportionate". The respondent in question did not go on to explain what he or she meant by "fair" and "proportionate". We may assume that "proportionate" meant whether the victim's response was proportionate to the threat by the accused. However, "fair" probably does not mean invoking the objective test. It is too easy for a respondent not to understand the difference between the subjective test ("fair" as judged by the victim's demeanour and "fair" as judged by the reasonable person). It is the lack of adequate explanation that makes even this response an incorrect answer. Only two of the deaf respondents raised the element of reasonableness. The other three deaf respondents totally missed the point and talked about the facts, as did the two above-mentioned hearing respondents.

6.25 Again, this is a complex legal concept that is difficult to grasp, but an important concept that effectively proves the causation issue so central to a successful manslaughter conviction. The high level of misunderstanding by both hearing and deaf respondents is a concern. Referring to the comments made by participants at the end of the comprehension test may provide some further illumination of the above results.

6.26 When asked what they found difficult about the activity, six respondents (four hearing, two deaf) responded with reference to the legal language used, the 'wordy' explanation, or the apparent repetition within the excerpts used in the study, for example, "there seemed to be a lot of repeating so you almost get lost in it". This suggests a level of fatigue may have played a part during the viewing of the selected excerpts. One deaf participant noted:

the judge repeated things. I know they have to cover themselves and not show any bias but still... repeating what I already knew, saying the same thing from so many different angles...

Similarly, another deaf participant noted that:

the only difficulty was the legal language like 'beyond reasonable doubt'. I know it's legal language. Words like 'affray'. So you have to remember these things. And they get repeated, over and over.

6.27 While most deaf participants commented on the clarity of the interpretation ("I understood everything the interpreter signed, that was very easy and clear"), the interpretation of some legal concepts was questioned. This included the interpretation of 'beyond reasonable doubt', which two deaf participants suggested could have been signed differently, and the sign used for the concept 'guilty'. As already mentioned, in a real interpreting situation, deaf jurors and interpreters would have the opportunity to develop specialised

vocabulary and rapport over the course of the trial. One deaf participant, however, commented positively on the interpretation of ‘manslaughter’.

6.28 When asked if they would be interested in being involved in a jury after the experience gained in this study, all deaf participants responded positively while noting the negatives. Three participants added that they saw jury participation as the responsibility of all citizens and that deaf people should not be treated any differently:

I know it can be boring, heavy work but I know it is the duty of the community to judge their peers.

6.29 Although not probed extensively in this study, deaf participants noted the need for Auslan/English interpreters qualified at NAATI Interpreter level that are “fluent and experienced in court work”. Deaf participants also noted the need to have any written material provided in advance or notes and/or a video of the interpreter that they could refer to at the end of the day for reflection and review. This raises the additional challenge that deaf participants would face in taking personal notes while watching an interpreter. One hearing participant also commented on this additional challenge and the benefit that he gained from having notes to review and reflect on.



## **7. Conclusion and implications of this report**

- Conclusion
- Implications of this report

## CONCLUSION

7.1 In this study, efforts were made to improve upon the initial preliminary study and create as realistic a scenario as possible. The information was provided to participants prior to undertaking the various stages of the study. However, the source text was still de-contextualised from an actual court case and participants were deprived of the gradual introduction of material that would have occurred in a real-life case. The material was also challenging, as hearing 'jurors' equally misunderstood some aspects of the summation, even though they were receiving the information directly in English. In a real-life courtroom, jurors would have had time to absorb evidence and arguments before hearing the judge's summation. Even with these limitations, this study has demonstrated that:

- legal facts and concepts can be translated into Auslan;
- Auslan interpreting can provide effective access to court proceedings for a deaf juror – but certain conditions are necessary;
- hearing people misunderstand court proceedings without being disadvantaged by hearing loss; and
- deaf people are willing and able to serve as jurors.

7.2 As there is evidence to suggest that deaf people are not disadvantaged by having to rely on sign language interpreters to access information in court, and that they seem to understand just as much content as their hearing counterparts, there is a strong argument in favour of allowing deaf people to serve as jury members. Our responses to the research questions posed in paragraph 3.1 are set out below:

- Legal concepts are translatable from English into Auslan, but interpreters need to be adequately skilled so as not to skew the legal definitions or to bias the text with subtle shifts in interpretation.
- In this study, we found that the legal concepts and terminology present in the original judge's summation were interpreted from English into Auslan with 87.5% accuracy.
- Hearing jurors in this study answered almost 78% of the comprehension test questions correctly, implying a relatively high level of comprehension of the judge's summation.
- Deaf jurors in this study answered 75% of the comprehension test questions correctly, implying a relatively high level of comprehension of the judge's summation.

- For the participants in this study there was no significant difference between levels of comprehension of the deaf and hearing jurors.
- Relying on sign language interpreters to access information in court does not disadvantage deaf jurors.
- Deaf and hearing jurors similarly perceived the content of the judge's summation to be complex and repetitive.
- Deaf and hearing jurors regarded jury service as a necessary civic duty. The deaf jurors all expressed interest in serving as jurors if they were afforded the opportunity.
- The Auslan/English interpreters in this study did note a difference in interpreting for deaf jurors (as compared to deaf witnesses, defendants, etc), but felt confident that they could adequately service their information needs.
- The findings of this pilot study suggest that deaf jurors can effectively access courtroom proceedings via sign language interpreting.

## **IMPLICATIONS OF THIS REPORT**

7.3 The findings of this project contributed to the work of the NSWLRC. It is envisaged that the conclusions of this report will also influence considerations for law reform in other States and Territories in Australia. The findings will also have national and international impact by revealing the extent to which deaf people can access courtroom proceedings and make a contribution to a jury, by demonstrating that they are not disadvantaged in doing so by using interpreters.





## **8. Recommendations and suggestions for further research**

- Recommendations
- Suggestions for further research

## RECOMMENDATIONS

8.1 As a consequence of the findings of the study and our conclusions, we make the following recommendations.

- That deaf people be permitted to serve as jurors in criminal cases in NSW, with access provided through a team of interpreters, and additional support through the provision of written documents (in advance) and access to a transcript at the end of each trial day.
- That deaf people serving as jurors must have reasonable competence in English (as does any juror), in order to understand English legal terms when they are borrowed into Auslan by interpreters, and to understand any written materials.
- Interpreters should receive specific legal training on how to interpret for deaf people in different roles in court.
- Only experienced legal interpreters should work with deaf jurors and they should be qualified at NAATI Interpreter level, as is current practice.
- That deaf jurors and interpreters be allowed time to brief and debrief at the beginning and end of each day during trial, in order to check for such matters as understanding and agreement of signs.
- A predictive screening test for court interpreters of all languages be developed as per the United States Federal Court Interpreter Certification Examination (FCICE),<sup>109</sup> which requires that interpreters in US Federal Courts be certified through a criterion-referenced performance test. The FCICE is a two-phase certification battery for Federal Court interpreters. Phase I is a multiple-choice Written Examination (WE) used to screen candidates for eligibility to take the Phase II criterion-referenced Oral Examination (OE), and thus filter out interpreters who do not have adequate skills to interpret in court.<sup>110</sup> This would be particularly important for Auslan/English interpreters working with deaf jurors.

8.2 This research can only be considered as a pilot due to the small number of participants. Furthermore, this study has demonstrated that a small number of deaf people can understand excerpts from a judge's summation through English to Auslan interpretation, and that they are willing to participate in the judicial system as jurors. It does

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109. Enacted by the Court Interpreters Act (28 U.S.C. §1827), US Congress, 1978.

110. Stansfield and Hewitt, 2005.

not, however, provide evidence for how deaf people can participate in, and make a significant contribution to, jury deliberations. Neither does it explore the potential impact of deaf jurors on the administration of justice from the perspective of the advocates, the bench, the accused and witnesses. Further research is needed to investigate deaf juror participation in court proceedings.

## SUGGESTIONS FOR FURTHER RESEARCH

8.3 We make the following suggestions for further research:

- Administration of the comprehension test on a larger scale to deaf and hearing people throughout Australia, in order to collect data with statistical significance. This will feed into further law reform developments and the issue of comprehension of judges' directions, as discussed in Dick.<sup>111</sup>
- Following on from Berk-Seligson's<sup>112</sup> and Russell's<sup>113</sup> research in the US and Canada respectively, conduct a mock trial over several days, filming the proceedings and jury deliberations and sentencing; and conduct interviews, comprehension tests and discourse analyses of all participant utterances.
- Following on from Brennan and Brown's<sup>114</sup> (1997) research in the UK, when deaf people are permitted to serve as jurors, carry out courtroom observations of real deaf juror experiences wherever possible (and if allowed).
- A collaborative study between the USA and Australia to compare comprehension and participation of jurors relying on signed and spoken language interpreters (ie, Spanish, ASL and Auslan).

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111. Dick, 2007.

112. Berk-Seligson, 1990.

113. Russell, 2002.

114. Brennan and Brown, 1997.



# Appendices

- Appendix A: Transcript of judge's summation
- Appendix B: Indictment
- Appendix C: Written directions referred to by judge
- Appendix D: Back translation of Auslan interpretation
- Appendix E: Recruitment flyer/poster
- Appendix F: Comprehension test questions
- Appendix G: Characteristics of juror participants
- Appendix H: Analysis and comparison of key legal concepts in original summation and back translation

## APPENDIX A: TRANSCRIPT OF JUDGE'S SUMMATION

### JUDGE'S SUMMATION: *CROWN V KERR*

#### Warm up (p 13-14)

[S1] Now, let me move from that to say something about the form of the indictment, which in its amended form, includes three counts against Mr Kerr, each expressed to be in the alternative. The charges are set out in a particular order. That is, the most serious first, that is, count 1, manslaughter, the next most serious next, count 2, affray, and then count 3, the railway charge, which is also a serious criminal offence, but less serious than counts 1 and 2. You should begin by considering the most serious, manslaughter, and if you were to find Mr Kerr guilty of that offence then that would be the end of the matter. Your verdict would be guilty when the count of manslaughter is read by my associate when you return to give your verdict. There would be no need for you to consider counts 2 and 3. Indeed, no verdict would be taken from you in respect of counts 2 and 3. So you consider the indictment down the indictment.

[S2] If, however, you were to find Mr Kerr not guilty of manslaughter, it would then be necessary for you to consider the second count of affray, and the same principles would apply. That is, if you found Mr Kerr guilty of affray when my associate read out that count, the second count, your verdict would be guilty. If, however, you were not satisfied as to that charge beyond reasonable doubt, as to the essential elements, it would then be necessary for you to consider count 3, the railway charge, and to reach a verdict in respect of that charge. Your verdict, as I have said, must be unanimous.

[S3] Now, the fact that there are a number of counts, some more serious than others, is not an invitation, you would appreciate, to compromise. Indeed, were you to approach the matter upon the basis of compromise, then you would be failing in your duty. Suppose, for instance, that six of you thought that Mr Kerr were guilty of the first count and six of you thought that he was guilty of nothing at all, not guilty. Then it would be quite wrong, you would appreciate, for you to compromise and say: Well, we will find him guilty of counts 2 or 3 unanimously. It is not a question of compromise. It is a question of you unanimously being satisfied, if you are, that the Crown has proved its case and, if not, then that you believe the accused is not guilty, because the Crown has failed to satisfy you beyond reasonable doubt in respect of that case.

#### Excerpt 1: Tuesday 4 November 2003 (p 14-27)

[S4] Let me move from that to the first count in the indictment, that of manslaughter, and in order to explain the elements of the charge, and

what the Crown must prove to establish manslaughter, it may assist if I very briefly, and I hope I do not confuse you, say a word about murder and the contrast between murder and manslaughter. You would appreciate, of course, there is no question in this trial of murder.

[S5] Broadly, to prove murder the Crown must establish two things. The first is that the death of the victim was caused by the acts of the accused, and the second is they must prove that in carrying out those acts the accused person had a particular state of mind, that is, he intended to kill the victim or he intended to cause that victim very serious bodily injury, what is called by the lawyers grievous bodily harm. So that involves reaching into the mind of an accused person, and by reference to his words and actions, drawing inferences as to what he intended when he acted in a particular way that is said he acted, did he intend to kill the victim or did he intend to cause that victim very serious bodily injury, grievous bodily harm.

[S6] Now, this is quite different to the issue that arises in manslaughter. Manslaughter is an unlawful killing falling short of murder. The criminal culpability attaching to manslaughter is less than murder, although it is still a very serious criminal offence. The difference in very broad terms is that you judge whatever are the actions of the accused, not according to what he intended, that is, his subjective state of mind, but rather his words and actions are examined from an objective viewpoint. The measure of responsibility is that of a reasonable person in his position getting off the train at Redfern; what such a person would have appreciated in the circumstances.

[S7] I will come to the precise issues which you must address in a moment. At this point let me distribute the written directions which you will have with you in this trial which will be marked for identification 10. There is a copy for each of you.

*Copies of mfi 10 handed to jury*

[S8] What I want to do is introduce you to this document, take you through the various pages, simply to identify what it deals with, and then I will return to the first page and systematically work my way through the document explaining various aspects of it. But you will see that on the first page there is a reference there to count 1, and the heading "Manslaughter by an Unlawful and Dangerous Act". You will see the three matters 1, 2, 3 that the Crown must prove beyond reasonable doubt. In fact there are four matters because the third matter you will see in fact involves two sub-elements. So there are four matters, and I will return to each of these concepts in a moment.

[S9] If you pass over to the second page, you will see there is a heading “Notes re Manslaughter by an Unlawful and Dangerous Act” and then there is a phrase “did cause the death”. That is a phrase which is taken from the words in the indictment for count 1. So you will see, if you pass to the next page, that is, page 3, that there is a reference there to “unlawful act” and “dangerous act” and various definitions are given. So this is like a glossary of terms and I will come back to each aspect in a moment.

[S10] If you pass then to the fourth page you will see that it is headed “Alternative (Count 2): Affray”, and it deals with the second charge brought by the Crown against Mr Kerr in the alternative which has been referred to as affray, count 2, and the elements of that charge are there set out, three in number.

[S11] If you turn the page to page 5 you will see the heading “Further Alternative (Count 3): Railway Charge”, and again the format is the same. It sets out the elements of the railway charge and what the Crown must prove beyond reasonable doubt.

[S12] So they are the written directions. Let me return to the first page where you will see the elements of the first count which the Crown brings against Mr Kerr, that is, the count of manslaughter by an unlawful and dangerous act. Let me draw your attention at once to the introductory words that appear at the very top of that box because they are important. You will see these words: “Before you can convict the accused of manslaughter by an unlawful and dangerous act, you must be satisfied beyond reasonable doubt”.

[S13] That is simply a reminder, first that it is the Crown that has the onus or the burden of proof. It brings the charges. It must prove them. Then the other matter it reminds you of is the standard of proof, the very heavy standard, that is, beyond reasonable doubt.

[S14] Let me go to the elements, and you will see that the first element is “that William Christopher Harris died”. There is, of course, no issue that Mr Harris died at the Redfern railway station at 12.49pm on 27 October 2002, having received multiple injuries after having been struck by a train. Indeed, that is an agreed fact in exhibit O, I think it is the first agreed fact. So clearly element 1 will occasion you no difficulty.

[S15] Let me move at once to element 2. You will see it there: “2: That his death was caused by the deliberate attack or attacks of the accused”, and deliberate in this context simply means voluntarily or willed as opposed to something that may happen by mistake or accident or something that is a reflex action, something that is not willed. It is not being suggested by Mr Button on behalf of Mr Kerr



that the actions of his client were not deliberate in that sense, but it is a matter in respect of which you must be satisfied beyond reasonable doubt.

[S16] Now, this second element, I should say, really involves two questions, and indeed, both questions are important, you may think fundamental, to this trial. The first concerns the actions of Mr Kerr. Exactly what did he do or say? What were his acts? And the second issue is concerned with causation. Whatever Mr Kerr may have said or done, can it be said that that caused the death of William Christopher Harris?

[S17] In respect of the first issue, that is, the factual issue, what Mr Kerr did, I will later in this summing up remind you very briefly of what various witnesses have said, and of course you have the video and the photographic record in exhibit B of the surveillance camera on Redfern station at that time. You may think, having heard the addresses of counsel, that there really is not very much dispute at all as to what actually happened, and that the areas of dispute on the facts really are very limited.

[S18] I will go to the detail later, but the following appears to be more or less common ground. That is, that Mr Harris and the accused were perfect strangers to each other; that Mr Harris was sitting at the end of platform 7, that is, on the last seat, not at the very end of the platform, you have exhibit A, waiting for his train which was due to come in on platform 6; that a train arrived on platform 7 and Mr Kerr got off somewhere near the deceased. There is some controversy about where precisely that was, but somewhere in that general locale. That the accused then addressed Mr Harris saying, and probably repeating, words such as, "What the fuck are you looking at", or "What the fuck are you staring at", and that he then approached Mr Harris and was physically restrained by one or other or both women, and that he at some stage broke free or to some extent escaped from these women to be grabbed again and there were a number of lurching type actions which you can see on the video. That, according to all but one witness, there was no physical contact between the deceased and the accused. The Crown said to you that it is not part of the Crown case that there was physical contact. That the distance which separated these two or the groups was put by some witnesses as two metres, others as 10 and others somewhere in between. Mr Button, I think, urged Mr Mikulic as perhaps the most reliable, who put it between four and eight. Mr Harris did not respond in any way or say anything. Rather he simply got up, moved to his right, circled, as it were, the seat, headed at a reasonable pace towards the edge of the platform and then jumped on to the track.

[S19] There are some differences between witnesses as to how he got down, but he apparently looked up towards the north, towards the city, the direction from which he was expecting his own train. There are differences as to what precisely he then did, which way he was facing at various times, whether at some stage he was facing towards the group, including the accused, on platform 6 and 7. That, at some point, whilst he is on the tracks, the woman on the platform yelled out "train", they having seen the train approaching on the track leading to platform 5, and I think it is common ground that shortly after they yelled out the train gave a blast, a country blast on its horn, and at this point the suggestion is that Mr Harris quickened his pace and that brought him into the path of the train, that he endeavoured to get on to the platform and to some degree was able physically to make contact with that platform, as shown in those photographs, exhibit F, from memory, but ultimately then came into contact with the train and was killed. That this entire episode on any view happened very quickly, and you can calculate the time by looking at the times recorded on those successive stills that are taken from the video footage. For instance, photograph number 3, by which time the train is in and people are getting off, you may think Mr Kerr and his group is getting off, photograph 3 is at 12.45 and 37 seconds, and then at 12.46 and 5 seconds is Exhibit E, the one with his hands on the platform, a split second before the train hit him. That, on my calculations, but do not trust my mathematics, is roughly about 28 seconds about half a minute.

[S20] You will recognise broadly that that is the context within which the first issue must be determined, that is, the factual issue, what is it exactly that Mr Kerr did, what were the words and actions that can be attributed to him, as to which you are satisfied.

[S21] Now, let me say something about the second issue, which is also an important, indeed a fundamental, issue in this trial arising from within element 2, and that is the question of causation. Now, the concept of cause and effect is something with which you are all familiar. In our everyday lives one examines events in order to understand why they occur. Did one event lead to another? Can it be said that one event caused the other? Is one event the effect of some cause or causes? The surrounding circumstances are examined to determine whether the end result can be attributed to a particular cause.

[S22] The approach of the law is no different. Sometimes lawyers refer to the chain of causation when one event can be linked to another, as in a chain, cause and effect. Here you are required to apply your common sense to the conjunction of events and determine whether one thing caused another, bearing in mind, of course, that you are

attributing legal responsibility in a criminal matter, so your inquiry is plainly a serious matter and caution is called for.

[S23] Now, issues of causation, I might say, although not causation leading to death, also arise in the context of the other alternative charges, that is, counts 2 and 3, and I will deal with those charges later. But simply to illustrate that they do involve questions of causation, if you perhaps turn to the second count, affray, page 4 in the written directions, and if you look at element 3 you will see “that the acts and words of the accused were such as would cause a person of reasonable firmness”, so there are questions of causation, so again you will be required to consider issues of cause and effect and you will approach those in the same non-technical common sense way, but bearing in mind that you are attributing legal responsibility in a criminal matter.

[S24] Similarly on page 5, the third charge, the railway charge, you will see element 3 includes the words, “that the accused thereby endangered”, so again it is these acts that are said to have thereby endangered, to have caused this effect, and you will be obliged to consider that issue in the context of those directions.

[S25] But returning to count one, that is the count dealing with manslaughter, an event may have a number of causes. The Crown is not obliged to prove beyond reasonable doubt that the conduct of the accused was the only cause leading to death; for instance, the action of the train was plainly one of the causes and indeed the immediate cause of death. So what does “cause” mean in this context? The test is whether or not the act or the acts of the accused significantly or substantially contributed to the death of the deceased. So that even if you were to find that the deceased himself, by his actions, contributed to his own death, it would not follow that the accused cannot be convicted. The question in that circumstance would be, notwithstanding the contribution to his own death made by the deceased himself: Can it be said that the Crown has established to your satisfaction beyond reasonable doubt that the conduct of the accused significantly or substantially contributed to the death of the deceased?

[S26] Now, in some cases of manslaughter, the issue of causation is straightforward; someone punches someone, someone falls over, they crack their head, and they die. There are not the same complexities that arise in the context of this case. Here the issue of causation is more complicated because it involves the reaction of Mr Harris to the conduct of the accused. Where the conduct of an accused induces in the victim a well-founded apprehension of physical harm, such that it is reasonable for the victim to seek to escape, then the fact that death occurs in the course of that escape does not break the chain of

causation, provided that the Crown satisfies you beyond reasonable doubt that the response of the victim, in this case the deceased, was reasonable or proportionate, having regard to the nature of the conduct of the accused and the fear that that is likely to have provoked.

[S27] So that requires you to address a number of issues. First, what was this conduct of the accused? What did he do or say? Second, did it induce in Mr Harris a well-founded apprehension of physical harm such that it was reasonable for him to escape? So that is an objective inquiry. Looking at the actions objectively. Third, if so, was the response of Mr Harris reasonable or proportionate having regard to the conduct of the accused and the fear it is likely to have provoked?

[S28] In determining whether the response of the deceased was reasonable or proportionate, you should take into account all the circumstances, including the speed with which events unfolded, the way in which a person fearful for their own safety, and forced to react on the spur of the moment, may react. In other words, it is not an armchair inquiry with all the wisdom of hindsight and no limits as to time. You should have regard to the pressure of events as they unfold.

[S29] It is for the Crown to establish beyond reasonable doubt that the acts of Mr Kerr caused the death of Mr Harris. The Crown must therefore satisfy you beyond reasonable doubt that the response of Mr Harris was in the circumstances reasonable and proportionate, having regard to the nature of the conduct of the accused and the fear that is likely to have provoked. If you are not satisfied, then you must acquit the accused of the charge of manslaughter.

[S30] When I use the phrase “reasonable or proportionate”, I am not seeking to draw a distinction between those two words. That is simply the formula that is traditionally used, but it embodies essentially the one concept; that is, the concept of reasonableness. It is an objective test. It is looking at the flow of events, the conduct of Mr Kerr, the response of Mr Harris, and asking is the latter a reasonable and proportionate response to the former such that the former can be said to be a cause. If it was not reasonable or proportionate, then there was a break in the chain of causation.

[S31] So that you can see from the statement that the issue does not depend upon Mr Kerr’s view as to what he thought Mr Harris might do. It is an objective view; not does it depend upon the character of the deceased. It is an objective view based upon what the deceased did in response to the threat made to him, if you find that there was such a threat.

[S32] The character of the accused, as to which there has been a deal of evidence, is not relevant to that issue; that is, the issue of whether the response was reasonable or proportionate. So you may ask: Well, what is the relevance of the evidence concerning the character of the accused? It seems to be common ground that the deceased was of a particular character, that is, a person who was non-confrontational. That evidence is relevant as to the issue of what the accused in fact did, what were the act or acts of the accused.

[S33] When you are judging the accused's behaviour towards Mr Harris, and exactly how bad it was, if it was bad, you may take into account the personality or character of the deceased, Mr Harris. Did Mr Harris get up and seek to escape because the conduct of the accused gave him a well-founded apprehension of physical harm such that it was reasonable for him to escape, or did he get up, not because the character of what the accused did was so bad, but because of his particular personality and his desire to avoid confrontation? So that that is the way in which that evidence as to the actual emotional character of the deceased, if you like, may be relevant.

[S34] I suppose the physical character of the deceased may be relevant, that is to say the fact that he was 44, apparently able-bodied, to the issue of causation, that is, whether what he did was reasonable or proportionate, because, in determining whether what he did was reasonable or proportionate, then one may have regard to the physical character of the person. If a one-legged person endeavoured to act in a particular way, that may be one thing. If a person is able-bodied that may be another. So to that limited degree the physical attributes of the deceased may be relevant to that issue, but the actual character, in the traditional sense of that word, the non-confrontational aspect of his character, which appears to be common ground, that aspect really is only relevant to your assessment of what the accused actually did, in assessing that behaviour, and whether or not what Mr Harris did was a response to his own particular character or a response to the particular acts of the accused because of their intrinsic nature; that is, that they gave rise to a well-founded apprehension of physical harm such that it would be reasonable for a person in that circumstance to escape.

[S35] Members of the jury, it is almost lunch and that is probably a reasonable moment to break, so we will resume at 2 o'clock or shortly after. I will send out the videos with you.

### **Excerpt 2: Thursday 6 November 2003 (p 99-107)**

[S36] Good morning, members of the jury. At the end of yesterday you provided the note which has been marked for identification 11, and just to remind you of the terms of that note I will read it out to you

and then endeavour to provide an answer. The note really is in three parts, and it is in these terms, the first part as follows: "Can Your Honour expand on the definitions of 'reasonable, proportionate' in your directions on page 2?"

[S37] That is a reference, of course, to the written directions which you have, and the topic "Did cause of death". The second part of the note is in these terms: "Do the remarks about 'the victim' relate to Mr Harris in particular or victims or persons in general?"

[S38] And the third part of the note is: "Are the remarks about 'a person fearful for his own safety' to be considered only in terms of Mr Harris's actions, or the actions of a 'reasonable person'?"

[S39] And there is reference to that paragraph, paragraph 5, on page 2. They are the three questions, and if I could take them out of order and postpone for the moment the answer to question one, which is dealing with reasonable and proportionate, and if I could turn rather to the second question which I will read again so you have it in the forefront of your minds: "Do the remarks about 'the victim' relate to Mr Harris in particular or victims or persons in general?"

[S40] I will have my associate, just in case you do not have a copy, provide you with a photocopy of your own note just to remind yourselves of what exactly it is that you asked.

[S41] The short answer to that question, which is directed to that middle paragraph of page 2 where it talks about inducing the victim and so on, and I will come back to it in detail in a moment, the short answer is that the reference in that paragraph to the accused is a reference to Mr Rodney Kerr, the accused; the reference to the victim is a reference to Mr William Christopher Harris, the deceased.

[S42] Let me elaborate upon that answer just to make it clear what is meant. And what the nature of the test is that you must apply. To do that, I think it is beneficial if I read it again, so you have it in your minds, what the written directions say on the issue of causation, and I will just read through it. I know you have probably read through it half a dozen if not more times already, but on page 2 under the heading "Did cause death" these words appear, and you might follow them with me: "The Crown must prove beyond reasonable doubt that the act or acts of the accused caused the death of the deceased. You should approach the question of causation in a common sense non-technical way, appreciating that you are determining criminal responsibility for serious criminal offences. The test is whether the act or acts of the accused significantly or substantially contributed to the death of the deceased."

[S43] There then appears the paragraph which is the subject of your question two: “Where the conduct of the accused induces in the victim a well-founded apprehension of physical harm, such that it was reasonable for the victim to seek to escape, then the fact that the death occurs in the course of that escape does not break the chain of causation, provided the response of the victim was reasonable or proportionate having regard to the nature of the conduct of the accused, and the fear it is likely to have provoked.”

[S44] I think it is probably worthwhile to keep reading, but I will come back to that paragraph in a moment in detail. Just to have it in context, you will see the next paragraph is as follows: “In determining whether the response of the deceased is reasonable or proportionate, you should take account of all the circumstances, including the way in which a person, fearful for his own safety, and forced to react on the spur of the moment, may react. It is for the Crown to prove beyond reasonable doubt that the response of the deceased was reasonable or proportionate having regard to the nature of the conduct of the accused, and the fear it is likely to have provoked. If you are not so satisfied, the accused must be acquitted of manslaughter. Your verdict would be ‘not guilty’ to count 1.”

[S45] So they are the written directions in respect of that aspect, causation. Returning to that middle paragraph on page 2 which speaks of the victim, I should say just by way of explanation as to how the word “victim” came to appear in these directions, that that particular paragraph has been lifted from a case which has been decided in these courts, indeed in the High Court of Australia, which is the highest appellate court in this country, and that is why it is expressed in those terms. It has simply literally been lifted from that case as the comments of the particular Court in that case where they were laying down a general rule, a general test, to be applied in all cases where the issue arises, and that is why it talks about victim and the accused; but you should understand that that case is meant to apply, in the context of this case, that is, the victim allegedly being Mr Harris and the accused being Mr Kerr.

[S46] Analysing that paragraph, that middle paragraph speaking of the victim, you will see that it gives rise to a number of separate issues, and I think an analysis of that paragraph might clarify the way in which you should go about your task. The first issue is: What did the accused do? What did he do or say? I do not think it is in the least controversial, having heard counsel’s addresses, although this is a comment from me, to say that whatever he did appeared on the evidence to be directed at Mr Harris, and Mr Harris is, in the context of those actions of the accused, the victim. So that is the first thing, you have to make up your mind as to exactly what he did. What

exactly was it that he said and did, and that is really the first issue, and that is the bedrock of whatever inquiry you make which affects other issues further down the track.

[S47] The second issue is whatever he did, did it give rise to a well-founded apprehension of physical harm? In other words, was it reasonable that Mr Harris should have been fearful of physical harm at the hands of Mr Kerr? That is an objective matter, not a subjective matter. Let me explain what I mean by that. It does not depend upon the reaction of Mr Harris, the determination of that issue. That is, whether personally he was in fear; rather, it is a matter for you to determine whether objectively a reasonable person in his position would have been in fear having regard to what you find were the acts of Mr Kerr directed at Mr Harris.

[S48] That is not to say that Mr Harris's reaction to whatever happened on the station at Redfern is irrelevant to your determination, but it does not conclude the matter. It is not determinative, it does not determine the outcome. You must stand back, having determined in your own mind what you believe Mr Kerr did or said on that platform, and say to yourself: Well, was it reasonable that a person confronted by that in that situation, that geographical situation, that end of the platform, that time of the day, that situation, was it reasonable that a person confronted by those actions, words and actions, should have been apprehensive of physical harm, should have had, to use the phrase which appears in that middle paragraph, a well-founded apprehension of physical harm. So that is the second issue.

[S49] The first issue is what Mr Kerr did. The second issue is whatever he did. Did that give rise to a well-founded apprehension of fear of physical harm. Then you get to the third issue, which is a related issue, and it comes from the phrase which you will see in that paragraph "such that it was reasonable for the victim", that is Mr Harris, "to seek escape". Again, that is an objective matter, and it depends upon reasonableness. Was it reasonable for a person in the position of Mr Harris, having been confronted by that conduct, having felt that fear of physical harm, to seek to escape? That is the next issue, the third issue, being reasonableness and escaping.

[S50] The fourth issue assumes to some extent that you answered the question: Well, that is what he did, that is the fear he felt, yes or no it was reasonable. If you felt it was not reasonable for him to want to escape, then that would be the end of that, but if you believed it was reasonable for him in that circumstance to seek to escape then you come to the fourth issue. This is the issue which concerns the mode of escape. We know the mode of escape chosen by Mr Harris was to cross the tracks to safety on platform 5. We know that in doing that he met



his death. But what the Crown must prove beyond reasonable doubt is that the death was caused by the conduct of the accused, and what that paragraph in the middle which is the subject of your questions says, there will be a break in the chain of causation, unless the Crown satisfies you beyond reasonable doubt that the response of Mr Harris in choosing to cross the tracks to the safety of platform 5 was reasonable or proportionate, having regard to the conduct of the accused and the fear it is likely to have induced, so you are going back to the conduct of the accused and the fear it is likely to have induced.

[S51] Again, that is an objective inquiry. It is a question of reasonableness. It is a question of your view as to whether that was reasonable or proportionate for him to do, he having chosen to escape. It is a matter for your judgment as to whether that was reasonable or proportionate, having regard to the conduct of the accused and the fear that it induced.

[S52] In making that determination, you may have regard to the context in which this is all happening; that is, the circumstances in which it all took place, including the speed with which the events were unfolding, the geographical location, and the fact that a person who is fearful for their own safety is forced under pressure of events, or may be – it is a matter for you to determine these issues because these are issues of fact – to make a decision and then to react.

[S53] This is what the next paragraph in the directions you may think is driving at. You will see it in these terms: “In determining whether the response of the deceased is reasonable or proportionate, you should take into account all of the circumstances, including the way in which a person, fearful of his own safety, and forced to react on the spur of the moment, may react.”

[S54] That is simply a paragraph which is really a warning against what might be termed an armchair inquiry, that is, with all the wisdom of hindsight and no limits as to time to examine these events. You must when you do make your examination and you do make your determination as to whether you are satisfied beyond reasonable doubt that what Mr Harris did was reasonable or proportionate, have regard to such pressure, if any, as you believe existed in the events as they were unfolding and how people may react in those circumstances.

[S55] I think that probably that may answer not only question two but also question three, but I will read question three as well because it is directed to that last paragraph. Question three of your questions was in these terms: “Are the remarks about ‘a person fearful for his own safety’ to be considered only in terms of Mr Harris’s actions, or the actions of a ‘reasonable person’?”

[S56] The answer really is that what you are examining is Mr Harris's actions, but you are applying an objective test, that is, essentially the test of reasonableness. Has the Crown satisfied you beyond reasonable doubt that what he did in escaping was reasonable or proportionate, having regard to what the accused did and the fear that that is likely to have induced?

[S57] Let me pass from that to the first questions that you asked. The first question is in these terms: "Can Your Honour expand on the definitions of 'reasonable', 'proportionate' in your directions on page 2?"

[S58] Again, members of the jury, I might tell you that that phrase "reasonable or proportionate" has been lifted from a decided case, and that is the test which the highest appellate court in this country has laid down as the test to be applied by juries such as yourselves in the situation which confronts you. Remember what I said in the course of the summing-up, and that is: It is not suggested that there is any distinction between those two words, reasonable or proportionate. They are embodying essentially the same concept which is a concept of reasonableness.

[S59] The task which is given to you as the representatives of the community, as the jury in this trial, is to give those words "reasonable or proportionate" meaning in the context of this case. So it is for you give them meaning and for you to determine the yardstick which should be applied as reasonable or proportionate in the context of a particular situation that confronts you. If I were to elaborate upon what "reasonable or proportionate" means, then I may in my elaboration simply add other words, and those other words may subtract or add to the test which the courts have determined is the test that you must apply.

[S60] So I hope that answer is not unhelpful, but I am afraid it is for you as representatives of the community to apply your own common sense and community standards in the context of which confronts you in this case and determine whether you are satisfied beyond reasonable doubt that what Mr Harris did in the situation that confronted him was reasonable or proportionate, having regard to what the accused did directed towards him and the fear that is likely to have engendered.

[S61] I think that really completes the answer I would propose to give to your question.

## **APPENDIX B: INDICTMENT**

### INDICTMENT

#### **NEW SOUTH WALES**

On 27<sup>th</sup> October 2003, the Director of Public Prosecutions on behalf of her Majesty charges that

#### **RODNEY IVAN KERR**

On 27 October 2002 at Redfern in the state of New South Wales, did cause the death of **William Christopher HARRIS** in circumstances amounting to Manslaughter.

AND THE DIRECTOR OF PUBLIC PROSECUTIONS FURTHER CHARGES THAT:-

#### **RODNEY IVAN KERR**

On 27 October 2002 at Redfern in the state of New South Wales, did threaten unlawful violence towards **William Christopher HARRIS**, and his conduct was such that a person of reasonable firmness if present at the scene would have feared for his or her safety.

AND THE DIRECTOR OF PUBLIC PROSECUTIONS FURTHER CHARGES THAT:-

#### **RODNEY IVAN KERR**

On 27 October 2002 at Redfern in the state of New South Wales, did an unlawful act thereby endangering the safety of **William Christopher HARRIS** on a railway.

## APPENDIX C: WRITTEN DIRECTIONS REFERRED TO BY JUDGE

REGINA v RODNEY IVAN KERR

Written Directions

### A. (COUNT 1): MANSLAUGHTER BY AN UNLAWFUL AND DANGEROUS ACT

Before you can convict the accused of manslaughter by an unlawful and dangerous act, you must be satisfied beyond reasonable doubt:-

1. that William Christopher died;

AND

2. that his death was caused by the deliberate act(s) of the accused; [see note (i)]

AND

3. that the act(s) of the accused was (were):

(a) unlawful; and

(b) dangerous [see note (ii)].

#### Notes re Manslaughter by an Unlawful and Dangerous Act

##### (i) *“Did cause the death”*

The Crown must prove beyond reasonable doubt that the act or acts of the accused caused the death of the deceased.

You should approach the question of causation in a common sense non-technical way, appreciating that you are determining criminal responsibility for serious criminal offences.

The test is whether the act or acts of the accused significantly or substantially contributed to the death of the deceased.

Where the conduct of the accused induces in the victim a well-founded apprehension of physical harm, such that it was reasonable for the victim to seek to escape, then the fact that the death occurs in the course of that escape does not break the chain of causation, provided the response of the victim was reasonable or proportionate having regard to the nature of the conduct of the accused, and the fear it is likely to have provoked.

In determining whether the response of the deceased is reasonable or proportionate, you should take account of all the circumstances,

including the way in which a person, fearful for his own safety, and forced to react on the spur of the moment, may react.

It is for the Crown to prove beyond reasonable doubt that the response of the deceased was reasonable or proportionate having regard to the nature of the conduct of the accused, and the fear it is likely to have provoked.

If you are not satisfied, the accused must be acquitted of manslaughter. Your verdict would be “not guilty” to Count 1.

**(ii) An “unlawful act”**

Where the accused acts recklessly or with the intention of raising in the mind of another an apprehension of immediate physical violence, that is an assault, and an unlawful act.

**A “dangerous act”**

An act is dangerous if a reasonable person in the position of the accused would have realised (whether or not the accused in fact realised) that it exposed another person to an appreciable risk of serious injury.

**B. ALTERNATIVE (COUNT 2): AFFRAY**

Before you can convict the accused of affray, you must be satisfied beyond reasonable doubt:-

1. that on 27 October 2002 the accused, by acts and words, threatened unlawful violence against William Christopher Harris:

AND

2. that the accused intended to threaten violence against William Christopher Harris, or was aware that his words and acts may threaten such violence;

AND

3. that the acts and words of the accused were such as would cause a person of reasonable firmness, present at the scene, to fear for his personal safety.

**C. FURTHER ALTERNATIVE (COUNT 3): RAILWAY CHARGE**

Before you can convict the accused of the offence contained within the third count in the indictment, you must be satisfied beyond reasonable doubt:-

1. that on 27 October 2002, William Christopher Harris was a person on a railway, namely Redfern Station;

AND

2. that the said day, the accused did an unlawful act, namely, by words and conduct, intentionally or recklessly raising in the mind of William Christopher Harris an apprehension of immediate physical violence;

AND

3. that the accused thereby endangered the safety of William Christopher Harris.

## APPENDIX D: BACK TRANSLATION OF AUSLAN INTERPRETATION

### EXTRACT 1

Now moving on, I would like to talk about the first count on the indictment – manslaughter. I want to explain what this count entails and what the Crown must prove in order for you to be satisfied of the accused’s guilt. Whilst I think it will be useful to provide you with some information, I’ll direct the jury only very briefly as I don’t want to confuse you. I want to clarify that manslaughter and murder are very different under the law. You of course would understand that in this trial we are not discussing a charge of murder. In regard to proving murder, the Crown would have to prove two elements. Firstly, that a person died as a result of the direct actions of an accused person; but also that the accused had formed an *intention* to kill that person. So there is a deliberate or intentional act that has caused that death or has caused serious harm to the person. Causing serious harm to the person is known as “grievous bodily harm”.

So a murder charge consists of an element of trying to consider what might have been happening in the mind of an accused person at the time of the event, appreciating their words, their language, their behaviour and trying to discern what may have been the intention in the accused’s mind – so the charge is dependent on the behaviour and whether the person intended to kill the person or to cause them grievous bodily harm. So that’s murder and it is clearly very different from a charge of manslaughter. Manslaughter is not treated the same under the law as murder. Although a person has been killed it is considered a less serious charge than murder. The degree of responsibility linked to the charge of manslaughter is less than that associated with murder. It is still very serious but isn’t treated with the same gravity as a charge of murder. In regard to this difference between the charges, you must only consider the accused person’s behaviour, not form an opinion about his intention, or what might have been going on in his mind, what his views were per se. You can however make a decision about his words, his language, his behaviour. You can objectively step back and analyse his conduct in making your decision.

\*\*We have to consider the position of any reasonable person alighting from a train in Redfern.

Moving on, I want to talk about precise issues for consideration soon but at the moment I’d like to distribute some written directions that

you can keep throughout the trial. They are marked as exhibit 10. I'm going to ask you to read this information for yourselves.

(APPARENT PAUSE IN PROCEEDINGS)

Now what I would like to do is explain the information that can be found in document on the various pages to clarify what we are talking about and then we are going to go back to the first page and I will work through the different parts of the paper and explain the various aspects in greater detail.

On the first page we talk about the first count, manslaughter by an unlawful act. Under this initial heading there are 3 specific elements on the page. Have you read these? The Crown must prove these beyond reasonable doubt. In regard to the third element, the act(s) of the accused, there are two further aspects to consider. So, there are essentially 4 parts under the heading on page 1. I will return to these later.

Please turn to page 2 now. The page is titled "Notes re manslaughter by an unlawful and dangerous act". The phrase directly under the title is "Did cause the death". This phrase is an extract taken directly from the wording of the first charge. You can see for yourself if you look to the next page. Have a look at page 3 now. It refers to an unlawful act and a dangerous act and definitions are offered about what these mean, clarifying the terminology. I would like to return to these points of information later to discuss them in more detail.

Now if you could turn to page 4 please. The title is "Alternative (count 2) Affray". This is the alternate, or second option, in charging the accused. In relation to the charge of affray, there are also 3 elements of the count to consider. If you have a look at page 5 the title is "Alternative (count 3) railway charge". Similarly, this particular alternate charge also requires 3 elements to satisfy this count. This is what the Crown must prove in order to satisfy you beyond reasonable doubt.

So I have concluded my preliminary directions and let's return to page 1 again. As noted, there are 3 elements on this page in relation to the accused being charged with manslaughter by an unlawful or dangerous act. Please review the language in the introductory passage at the top of the page. This language is critical. The words clearly note that before you can convict the accused of manslaughter by an unlawful and dangerous act you must be satisfied beyond reasonable doubt.

So I am compelled to remind all of you to firstly bear in mind that it is the responsibility of the Crown – that the burden of proof lies with the Crown to make its case in raising these counts against the accused.



Secondly, I must stress that the standard of proof required is also significant and must be delivered beyond reasonable doubt.

Now, let's have regard for the 3 elements in count 1. William Christopher Harris died. This first part of the manslaughter charge is a given – there is no question that he is deceased. We know that he died at Redfern train station at 12.49 pm on 27 October 2002. He suffered multiple injuries after being hit by a train. We all agree on that fact it is noted in exhibit marked "0". So, at the outset we can concede the first point in count 1 of the indictment.

The second part of this count is whether his death was caused by the deliberate act of the accused. Meaning that he wilfully caused the action as opposed to it being a mistake or an accident. I'm not suggesting that Mr Button (the accused's solicitor) said that his client did or didn't deliberately perform this act, but you need to consider this question and decide for yourself beyond a reasonable doubt in making a judgment in this matter.

Further to this second part to count 1. There are two key issues or questions in relation to this part, and both questions are very important. You have to consider these carefully, they may appear to be very basic points but they are integral to this trial. The first key issue relates to the act or acts of the accused. What was his behaviour? What did he do? What did he say? What was his conduct? The second pertinent issue is in relation to chain of causation - whether the accused's behaviour can be directly linked to the victims death. Was the accused's conduct an act that contributed to the death of the deceased?

In relation to the first question under consideration – we know what the accused did. Later in my summation, I would like to remind you of a few points about the various witnesses that you have heard testimony from, and you've also seen evidence in exhibit B from the video footage that was taken at the train station. So, you've already seen what actually occurred at the scene at train station.

You've also heard both the prosecution and the defence evidence presented during the course of this trial and perhaps you feel you know what actually happened. On many points of fact there is little disagreement in relation to what happened. I'd like to elaborate on this more later, but for now I will note the points of agreement. Both counsel present an agreed position that the victim died and that the accused and the victim didn't know each other prior to this event – they had never met before. The victim was seated at the train station at the far end of the last row of seats on the platform on platform 7 at Redfern train station waiting for a train which was soon to arrive on platform 6. A train then arrived at platform 7 and the accused person

alighted from the train in the vicinity of the victim and sat near the victim. Now at this point some disagreement occurs in terms of the exact location of the parties concerned, but essentially they were in the vicinity of the end of platform 7.

The accused started talking to the victim, using expressions such as 'what the fuck are you looking at?' 'what the fuck are you staring at?' or something similar. The accused then started to approach the victim and then other people tried to intervene – two women tried to stop the accused from getting any closer to the victim. He broke free from the two women and came closer to the victim and the women then grabbed him again to prevent him from getting too close. He was then straining to pull away from the women. You've seen all this on the video footage already.

According to all the witnesses, there is only one different aspect to the testimony. All of the witnesses agreed that no physical contact occurred between the victim and the accused. The accused didn't actually touch the victim at any time. Now the Crown have stressed this is not part of their case – they are not arguing that the accused assaulted or came into physical contact with the victim. At all times there was a distance between the two groups or the two parties roughly of about two metres, some people have said as much as 10 metres separated the parties, and other people have said somewhere between two to 10 metres. Mr Button, the accused's solicitor, has said that Mr Mikulic, another witness, more precisely believes it was four to eight metres. Mr Harris, the victim, ignored the taunts from the accused and did not respond to the accused. Of his own accord, he got up and moved to his right, around behind the row of seating and proceeded to walk, not in hurried fashion, to the edge of the platform and then he jumped down onto the train tracks.

This is the point where the testimony starts to differ as to how he got down onto the tracks. It appeared initially he was looking north to the city to see if the train was coming soon. But some other witnesses presented other stories about what happened next, some stating the victim was looking in different directions at this point, including looking back at the group of the people where the accused had remained on platform 6/7. At some time while the victim was still on the tracks a woman on the platform called out to him to say the train was coming. The woman turned to watch the train approaching – it was coming up to platform 5. I believe all the witnesses agree that shortly after the woman calling out that a train was coming that the train signal was sounded very loudly. At that point, most people said that the man quickly tried to get off the tracks at that point as the train was coming. He got to the edge of the tracks, but could not pull himself back up onto the platform in time. He was scrambling up and

had his hands up near the edge of the platform and you can see the photos in exhibit F that demonstrate that he was trying to do that when at that point the train struck him and that he died from his serious injuries.

This series of events all happened in a relatively short space of time. You can note the time for yourselves. If you regard the video footage you will see that there is a time and date stamp on the footage, as well as on the photo images of the station happenings. So for example, photo number 3 shows the time of the first train arriving when the accused first alighted and that was at 12.45 and 37 seconds that photo was taken. Then at 12.46 and 5 seconds exhibit photograph E shows the man trying to get up onto the edge of the platform just prior to the train colliding with him.

In my estimation then, and you don't have to take my word for it, the series of events took place in approximately 28 seconds, or less than half a minute during which all of this occurred.

It is apparent that it was a very short duration of time. How can you make a decision in regard to the first count then? You need to consider the facts of the incident in relation to the first charge. So what the accused did...consider the accused's behaviour, what he said, and his words to the victim and whether you feel satisfied that this was indeed what occurred.

Now I would like to turn your attention to the second element of count 1. This element is important, in fact critical. The second element of the manslaughter count is in regard to causation – whether the accused's behaviour contributed to or substantially influenced the victim's behaviour. Just as in your course of everyday life there is clearly a chain of causation that occurs. You can see that if you do something whereby something else eventuates as a result of an initial incident, that there may well be a causal link between these two matters. You have to consider the context of situations carefully to decide whether the latter result that occurred was linked to the initial incident.

The law operates in a similar fashion. Lawyers must consider a series of events in context to determine whether there is a chain of causation – whether cause and effect are linked. In this example please use your common sense. You must consider the chain of events – whether the incidents that occurred are all linked to one another. Members of the jury, you have to consider your significant legal duty in determining criminal responsibility very carefully. It requires very serious and thoughtful deliberation before making a decision in relation to this matter.

\*\*So, causation may be able to be applied if the accused's actions did cause the death of the victim, however causation may also play a role in the context of the other alternate counts in this matter which I will address in more detail later.

Counts 2 and 3 do include the question of causation. If you review the written directions in regard to Count 2 – Affray – please have a look now for yourselves by reading page 4. In regard to Count 2, there are three elements that must be satisfied, and the third element makes reference specifically to the accused's acts and words. Whether these were such as would create a sense of apprehension and cause a person of reasonable firmness, present at the scene, to fear for his personal safety and want to flee the scene. Once again, this element relates to a potential chain of causation – that the actions of the accused may be directly linked to the resulting response of the victim. It must be considered whether such behaviour on the part of the accused would contribute to a sense of trepidation in the mind of a reasonable person. Please approach the question of causation using your common sense, rather than in a technical manner, appreciating you are determining criminal responsibility for serious criminal offences.

Again returning to page 5, the third count is the railway charge and the wording of element 3 makes specific reference to you being satisfied that the accused person made the victim feel a sense of apprehension or fear. That the accused's conduct then caused the victim to flee and led him to go down onto the train track where he was then struck by a train. You must carefully consider that matter.

According to the written directions, I would now like to return to count 1 again, the charge of manslaughter. It is possible that the victim's death was as a result of many factors. The burden isn't on the Crown to prove beyond a reasonable doubt that the accused's behaviour was the *only* cause leading to the victim's death. For example, the train was actually what caused the death of the victim, quite obviously, so the nature of causation, what is it really?

You have to consider whether the accused's conduct significantly and substantially contributed to, and ultimately caused, the death of the deceased. The deceased himself by his own conduct of getting onto the tracks clearly contributed to the final result of death, however the accused can end up with a jail sentence in relation to this charge. Naturally the victim shouldn't have jumped onto the tracks in front of an oncoming train. You have to be satisfied then beyond a reasonable doubt that the accused's conduct significantly influenced the victim's response and caused the victim's death.

In some other cases of manslaughter, the question of causation is sometimes very simple to demonstrate. For example, if someone

assaults a person and they die of a head injury from a fall after receiving punch then causation is very easy to prove as the chain of causation is quite evident. Such a case would be relatively simple to determine. This particular case is more difficult and in this case the link of causation may be less evident and is more complex.

Much of the test for chain of causation in this instance is in regard to the response of the victim. You need to consider the reaction of the victim in response to the accused's conduct. Did the accused's conduct lead to a well-founded sense of apprehension on the part of the victim? Did he fear physical harm, such that it was reasonable for him to seek to escape? If so, then the fact that the death occurs in the course of that escape does not breach the link in the chain of causation. If the Crown can satisfy you beyond a reasonable doubt that the response of the victim in this situation was reasonable and proportionate with regard to the nature of the conduct of the accused.

So you have to deliberate a few different issues. You have to consider the accused's conduct – what he did and what he said. Secondly whether his conduct in regard to the victim did a cause a sense of apprehension of assault and in fear of his safety, caused the victim to flee and whether this was a reasonable response in such circumstances. So you must objectively consider whether the conduct of the accused led to the victim's death, and furthermore whether the response of the deceased was in proportion to the nature of the conduct of the accused and the fear it is likely to have provoked. Would any reasonable person also respond this way in the same situation? Would the members of the jury respond in this manner if in the same circumstances? So, whether the victim's response was reasonable and proportionate and in line with the response likely from other reasonable persons.

You must take account of all the circumstances, and the short time span in which all this occurred, of only 28 seconds. This includes the way in which a person, fearful for his safety, and forced to react on the spur of the moment, may react.

It may be contextually very different for you to sit comfortably with no time pressures and to ponder at length as to how this person should have reacted. This person didn't have the luxury of considering over a course of time as to how they might react in this situation but instead made a spur of the moment decision, so you have to try and put yourself in the shoes of the victim who acted very quickly.

It is the responsibility of the Crown to demonstrate the burden of proof beyond reasonable doubt that the accused's conduct did cause the death of the victim. That the victim's response was reasonable or proportionate to the nature of the provocation from the accused.

If you are not satisfied the Crown has met its burden, or if you have any doubts at all, you must find the accused not guilty in relation to count 1.

I say reasonable or proportionate not necessarily because I want to differentiate between the two. We have to think about the notion of reasonableness and what is reasonable to the regular person and what they might do in the same situation. The concept of reasonableness is a test as to what people might do – it is an objective test, not a subjective test of what you might think, but an objective assessment of the situation. Ask yourself, was the victim's response reasonable in regard to the nature of the accused's conduct. If the answer is yes, then you may consider the accused did cause the death of the victim. However, if you consider the victim's reaction to the accused unreasonable and disproportionate, then this would mean the events are not causally linked and you cannot make a determination of guilty.

How to solve the problem doesn't depend on the accused's view of what he thinks he would do. It's a more detached objective view. Your decision also doesn't depend on the victim's character or personality. You must distance yourself from judgments about that. You have to consider only the victim's response to the conduct of the accused and whether you feel there was a chain of causation occurring there. The character and personality of the accused is also not relevant to this specific question of law. A lot of people have talked about the character of the accused, but this is not relevant, you must only consider the question of the reasonableness of the response of the victim.

You may well ask me if there is any relevant evidence to consider when trying to establish the character of the parties. I think everyone has agreed or indicated that the victim was a non-confrontational person and was not an assertive or aggressive personality. This particular evidence may be important to consider. So what was it about the accused's conduct that led the victim to feel a sense of apprehension? When you consider the conduct of the accused, was it to such an extent that a fear for his safety on the part of the victim was reasonable, or was the nature of conduct disproportionate to the response? This is for you to deliberate.

Do you feel that that the accused was behaving sufficiently provocatively, that his personality or the character of the victim was influential in him trying to flee the situation because the accused's conduct gave him a well-founded apprehension of physical harm and that it was reasonable for him to want to flee the scene? Or is it perhaps the case that the victim did not get up due to the language or the conduct of the accused per se, but rather because the victim's own

personality type meant that he did not want to engage in any confrontational situation.

So that is how the evidence about the emotional substance of the victim may have some relevance in regard to the victim's character. It may be relevant and indeed important to consider the character of the deceased. He was 44 years of age and had no disabilities. You must consider whether there is a chain of causation between the conduct of the accused and the response of the victim and whether such a response was reasonable and proportionate. Think about the fact that he sought to escape and whether such an action was reasonable enough in the circumstances. Consider his character and his physical fitness.

If it had been a different person, perhaps, for example, someone with a mobility disability would they have responded differently? Two people in the same circumstances may have responded differently. So his body and physical fitness may also be relevant and also his emotional character in being reluctant to court confrontation may also be relevant. Everyone seemed to agree the victim was a passive type of character and that is only relevant to thinking about in regard to his response to his perception of the accused's conduct and as to whether his apprehension was well-founded. Was his reaction to flee as a result of the accused's conduct, or due to the influence of his own character type in wanting to avoid the accused? If the victim was fearful that he may be harmed in that situation and the conduct of the accused induced in the victim a sense of apprehension, would other reasonable persons in the same circumstance have felt the same way and reacted in the same way?

Members of the jury, we are approaching lunchtime now and I think it is an appropriate time to adjourn proceedings for lunch. We will close now and we will resume shortly after 2 o' clock this afternoon. You can take the video with you.

## **EXTRACT 2**

Good morning, members of the jury. When we concluded yesterday, you tendered some issues in a document that has since been labelled exhibit 11. There were some terms noted in the document and I would like to read that for you now and respond to the issues that you presented to me.

The document consists of three sections. The first section requests, can the judge please expand on what is meant by reasonable or proportionate according to the information on page 2 in the notes given to the jury two days ago? These would be the written directions with the heading "Did cause the death".

The second section of the document I have received from you queries whether you should consider the deceased in this matter, Mr Harris, or other victims generally. Specifically, Mr Harris or other victims generally?

In the third section of the document, you query the issue of apprehension for his personal safety. You ask if you must only consider Mr Harris's response, or the response of other reasonable persons in the same situation.

In paragraph 5 on page 2, there are some questions also. You asked me three questions at the end of yesterday. I don't want to answer immediately in relation to some of these particular questions that you have asked. I think I will defer responding to the queries you raise in the first section and instead will address your questions relating to the second section of the document.

In regard to your second question, I will read the information again now to refresh your memory.

Your comments are about the deceased. You ask if the information relates to him specifically or whether it relates to other reasonable persons. In responding to your issues, I have asked my Clerk of Courts to distribute a copy of your queries back to you in case you do not have a copy of the letter you provided to me yesterday so you can re-acquaint yourself with the specific comments.

So to offer you a brief response to your issues...in regard to the middle paragraph on page 2, you ask was there a deliberate act on the part of the accused towards the victim? We will speak more on that point shortly. On my page 2, paragraph 2, it talks about Rodney Kerr, the accused person, and the victim, William Christopher Harris, who is the deceased. I would like to expand somewhat with my response to clarify what I mean and what you need to consider and assess before making your decision. I think it might be valuable to read the written directions again to ensure they are uppermost in your mind in terms of the guidelines I gave you two days ago in regard to causation. It would be helpful to review these once more. I know you may have read these written directions six or more times already, but please have a look at page 2. The sub-heading notes "Did cause the death". That is the precise wording on the paper.

The Crown must have proved beyond reasonable doubt that the accused's conduct created a chain of causation that led to the deceased's death. You must carefully deliberate the causation issue, approaching the question in a common sense non-technical manner. You have to determine criminal responsibility here in regard to a very serious crime. You are charged with the duty of considering whether



the act or acts of the accused significantly or substantially influenced the victim by inducing a fear for his personal safety and causing him to flee, which led to his death.

In the following paragraph, you specifically ask question number 2, whether the accused's conduct induced in the victim a well-founded apprehension of physical harm, and to such an extent that any reasonable person would have felt the same in the same situation and if, in seeking to escape, then the fact that the death occurs in the course of the escape does not break the link in the chain of causation? One issue for determination is whether the victim's response was reasonable or proportionate in relation to the nature and extent of the accused's conduct. If the conduct was sufficient to have provoked such fear and apprehension resulting in the person fleeing, then it is.

It would be useful to read in more depth now, and return to this section later for further discussion.

In order to establish a context for the next section, I'd like to read it again for you. In considering whether the victim's response was reasonable and proportionate in regard to the accused's conduct, you must take into account all of the circumstances of the matter, including the manner in which any reasonable person fearful for his own safety and forced to react on the spur of the moment may react in the same situation.

The Crown must prove beyond a reasonable doubt that the victim's response would be in keeping with any other reasonable person based on the accused's conduct. Maybe the accused's behaviour created a heightened sense of fear in the victim. If you are dissatisfied and have any doubts at all, you must find the accused not guilty on count 1 of manslaughter. So the specific finding would be "not guilty on count 1".

Moving on now from the written directions and the chain of causation. If you return to page 2, the middle paragraph talks about the victim, the person that was injured in this instance. I would like to explain the paragraph including the term 'victim' has been cited from another case – a matter which appeared in front of the High Court of Australia, the uppermost court of Australia. That is why it has been referred to in this sense. It has simply been adopted from another case and applied in this trial. A judgment in the other matter resulted in a specific test or ruling and, in a legal context, we can use other findings from other trials and cases to provide a test for application across other contexts. So the other trial established a general rule or test about the concept of a 'victim' and the 'accused' and then that had been used and applied in this case, in relation to the victim and the accused. You must understand this general rule can then be linked to

this trial in that Mr Harris is the victim in this instance and Mr Kerr is the accused.

In reading further into the middle paragraph on page 2 in relation to the victim, I note there are a few separate issues that may need to be explained by me more clearly to help you make a decision and to help you understand the decision-making process more comprehensively.

The first issue is the accused's conduct - what did he say, what did he do? I think it would be agreed and will not be a point of contention because the counsel for both parties have already given their address on this, but this is my opinion, that the evidence in this matter points to the accused clearly directing his actions against the victim. All would agree that the victim was directly targeted, so you need to consider what exactly did the accused say, what exactly did the accused do? That is the primary issue for you to consider and is the most important factor in the decision-making process in regard to other considerations you must later make, in that it is the first issue to contemplate.

The second issue for you to carefully deliberate is whether the accused's conduct – regardless of whatever that may have been – induced in the victim a sense of apprehension of physical harm and concern for his personal safety, and whether such extent of fear provoked was reasonable in regard to the extent and nature of the accused's conduct.

It is an objective test, not a subjective consideration, but an objective view of the chain of events. I will elaborate on what I mean by this. In considering the victim's reaction and his sense of fear, was the person himself the kind of person that would experience trepidation more than any other reasonable person? If it was another person in the same place of this particular victim would they have responded in the same way? Would another reasonable person have felt the same extent of trepidation should the accused's conduct be directed at them?

It doesn't mean that the victim's own reaction to the incident at Redfern train station isn't important – certainly his reaction in this instance is important to regard.

\*\* It certainly isn't a quick decision you can make, but it was a spur of the moment decision for the victim in the circumstances that led on to other consequences.

It is an objective assessment of the situation. You must consider the victim's response and judge objectively whether you think that whatever the accused's conduct and actions may have been, and given what he did and what he said, that the victim in listening and observing the conduct of the accused felt sufficiently threatened in

that place at the end of that platform at that time of night or day in the same situation would a reasonable person when experiencing that conduct or in hearing that language feel the same extent of trepidation as Harris did? Using the same language from the text, was there a ‘well-founded apprehension of physical harm’? That is essentially the second issue for you to deliberate.

So the first issue is in regard to what Mr Kerr did or didn’t do, and the second issue is, regardless of what he did, whether then his behaviour was causally linked to the fear for personal safety on the part of the victim.

The third issue is perhaps related to the first two concerns. It comes from section 2 again, meaning whether it was reasonable for the victim to have felt his only course of escape was to do what he did. Again, this is an objective test. You are not a subjective party in this incident. You need to consider whether the course of action was appropriate in that situation, that as the accused approached the victim and as the sense of apprehension on the part of the victim developed to such an extent that he was fearful of his personal safety given what he was hearing and what he was seeing. That he was fearful of physical harm and that this led him to react in the way that he did by fleeing. That is essentially the third key issue for you to consider, how reasonable it was for him to seek to escape.

The fourth matter for you to consider is dependent on how you answer whether it was reasonable for him to feel such a sense of fear and to try to escape. Perhaps you consider it was reasonable to seek escape given the circumstances. However, you may feel it was not reasonable for him to try escape – that his apprehension wasn’t well-founded or that it was based on a weakness in the character of the victim, then you do not need to consider the matter any further.

However, if in regard to the third issue, that you do believe his sense of apprehension was well-founded, and that it was legitimate for him to seek a route of escape from the situation due to the accused’s conduct, then you do need to consider a fourth issue.

The fourth issue is essentially how the victim chose to escape and what his possible options for escape were. We know how he ultimately decided to flee – he jumped down onto the train tracks, perhaps in an endeavour to cross the tracks and to reach the next platform along, platform 5. We know that’s how he died, whilst on the track. However, the Crown must prove beyond a reasonable doubt that the deceased’s death occurred as a result of the accused’s conduct.

The paragraph in the middle of page 2 addresses a question to me as presented yesterday afternoon. The question is in regard to if you are

not satisfied that the victim's death was caused by the accused's actions. The Crown must satisfy you beyond a reasonable doubt that the victim's decision to flee to safety over on platform 5 was reasonable and was substantially caused by the accused's conduct, which induced a well-founded apprehension in the victim. Once again then, we return to the initial consideration of the accused's conduct in this instance and whether the victim's apprehension was reasonably induced from the acts of the accused.

Again, it is an objective test. A consideration taking into account all the circumstances and the notion of 'reasonableness'. Your perception of whether the victim's response was reasonable and in proportion with the nature of the accused's conduct, leading to his decision to escape, is important. Members of the jury, it is for you to decide whether the response in seeking to escape was reasonable and proportionate having regard to the nature of the conduct of the accused and the fear it is likely to have provoked.

Further, in relation to question 4, you have to think about the context where the event occurred, the situation including how it happened and the fact that it was a very rapid series of events. Consider where people were placed during the incident, and the extent of trepidation experienced by the victim, in being concerned for his personal safety and in being forced to react on the spur of the moment. So you need to deliberate these four main questions. We have many facts available to us. We know the facts, we know the times, we know decisions and the reactions taken.

I'd like to move onto the bottom paragraph on page 2. In reading this, you'll see that the particular phrasing requires you to consider to decide whether you think the victim's reaction was a reasonable response and in proportion to the conduct exhibited by the accused. You must take into account all of the factors and circumstances, including whether any other reasonable person would feel the same fear or apprehension and possibly react in the same way that the victim did given the limited time available to him, or not.

That is just referring back to that latter paragraph and offering you a reminder of the point also that you now have the luxury of time and a considered response to this incident – you should not however take your time in considering all of this. You must quickly come to a decision, and ensure in making such a decision that you feel satisfied beyond reasonable doubt that the response was a reasonable and proportionate reaction to the accused's conduct. Bear in mind the time pressures on the victim at that instant as well and the fact the series of events occurred in rapid succession. Consider whether a reasonable person in the same situation would have reacted in the same way or not.

There is some difficulty with question 2 and question 3, I'll read question 3 again. Because it is related to the last paragraph on page 2, question number 3 from yesterday that you provided to me refers to a person who fears for their own safety and you ask me if you are to consider this only in relation specifically to Harris or in relation to any reasonable person. My answer to that then is that you have to consider only the specific victim's response in this case. However, you can objectively consider the situation and apply the test of reasonableness and whether another reasonable person would do the same. You may ask yourself whether the Crown has satisfied you beyond a reasonable doubt that the victim fleeing from the situation was a reasonable and proportionate response to the accused's conduct. Consider the accused's conduct and the possible extent of apprehension experienced by the victim.

Returning your attention now to question 1, your first question presented to me from yesterday was "can Your Honour please elaborate on what is meant by reasonable and in proportion?" on page 2. Again, members of the jury, I can advise you that this phrase "reasonable and proportionate" has been adopted from findings in other cases. The test used in the High Court of Australia is the test used for this matter and it is a test based on the ordinary man in the street, persons just like you and is a test developed for application in situations such as the matter we have before us now.

If you will recall in summing up, I noted that I wouldn't like to particularly differentiate between the terms reasonable and proportionate. In essence they are the same. It means that the response was fair enough – that it was what would be expected of any other sensible person in the same situation. Your position as members of the jury carries a grave responsibility. You are representing the wider community. You are the members of the jury selected for this particular trial and therefore are charged with the responsibility of defining the terms reasonable and proportionate and trying to attach meaning to the terms within the context of this trial. It is with your judgment that you may consider what is reasonable and what is proportionate with regard to the facts of the matter in this trial, given the specific context and situation of this case.

Given you are charged with this purpose, I do not want to elaborate any further on defining proportionate and reasonableness because I might add in further terms that may cause some confusion to you or reduce your understanding further. So you really need to consider yourself on how you apply this test in this case without further input from me.

I hope that my answers have been helpful. You are however charged with the responsibility of representing your community and you must

use your common sense and apply a community standard as to what you may think would be an appropriate result for this trial. In making your decision you must be satisfied beyond reasonable doubt that the victim's response was reasonable and in proportion with the nature of the accused's conduct and that it induced a well-founded apprehension for his safety. I think that concludes my response to your questions.

## APPENDIX E: RECRUITMENT FLYER/POSTER



Do you like watching 'Law and Order' or other legal TV shows or films?

Can you read and understand English?

Have you ever wondered what it would be like to serve on a jury?

Would you like to be involved in a research study as a jury member?

**IF YOU SAID 'YES' TO ALL THESE QUESTIONS, THEN PLEASE CONSIDER PARTICIPATING IN A NEW AND INNOVATIVE RESEARCH PROJECT\*.**

Jemina Napier (Linguistics) and David Spencer (Law) of Macquarie University are conducting a study to investigate deaf jurors' access to court proceedings via sign language interpreting, with the assistance of research assistant Joe Sabolcec. The aim of the project is to compare deaf jurors' comprehension of a judge's summation through interpreting with non-deaf jurors' understanding by listening.

This project will lead to recommendations as to whether deaf people can serve as jurors in NSW.

If you are interested in serving as a jury member in this research project please contact Joe Sabolcec by Monday 10<sup>th</sup> April 2006 (email: [joe.sabolcec@bigpond.com](mailto:joe.sabolcec@bigpond.com)) for more details.

Your involvement will involve approximately two hours on campus, and you will receive a \$25 gift card for your time and trouble.

We look forward to hearing from you.

\*If you are a law student or have any knowledge of sign language or deafness you cannot be involved in the project.

## APPENDIX F: COMPREHENSION TEST QUESTIONS

1. Mr Harris was hit by a train at Redfern. True or false?
2. The Crown or the solicitor for the prosecution has to prove the accused was guilty of the offence. True or false?
3. There were no witnesses to what happened when Mr Harris died. True or false?
4. The offence of murder has to be proved beyond reasonable doubt. True or false?
5. To prove murder it must be established:
  - a. only that the accused caused the death of the victim.
  - b. that the accused caused and intended to cause the death of the victim.
  - c. that the accused caused the death of the victim without intention.
  - d. that the accused only intended to cause the death of the victim but death did not actually occur.
6. Mr Harris and Mr Kerr:
  - a. went to school together.
  - b. were brothers.
  - c. were work colleagues.
  - d. were strangers to each other.
7. Manslaughter is:
  - a. killing without the intention to kill.
  - b. recklessly killing.
  - c. killing recklessly with intention to kill.
  - d. only committing grievous bodily harm.
8. When Mr Kerr got off the train he:
  - a. hit Mr Harris.
  - b. pushed Mr Harris off the platform.
  - c. yelled but did not touch Mr Harris.
  - d. told Mr Harris to run away.



9. Explain what witnesses said the two women with Mr Kerr did.
10. Explain the legal rule of 'causation'.
11. Explain what witnesses said Mr Kerr yelled at Mr Harris when he saw Mr Harris.
12. In assessing the actions of Mr Harris in response to the actions of Mr Kerr, explain what you, as a juror, must take into consideration.

## APPENDIX G: CHARACTERISTICS OF JUROR PARTICIPANTS

**Table 7.1: Characteristics of hearing 'jurors'**

		Participant					
		1	2	3	4	5	6
Variables	Gender	M	M	M	F	F	F
	Age range	18-30	31-49	50+	18-30	31-49	50+
	Highest educational attainment	Tertiary (TAFE)	HSC	Tertiary (TAFE)	Tertiary (TAFE)	Tertiary (university)	School certificate
	Employment category	Manual/ Trade/ Paraprofessional	White collar/ professional	White collar/ professional	White collar/ professional	White collar/ professional	White collar/ professional
	First language	English	Italian	English	English	Korean	English

**Table 7.2: Characteristics of deaf 'jurors'**

		Participant					
		1	2	3	4	5	6
Variables	Gender	M	M	M	F	F	F
	Age range	18-30	31-49	50+	18-30	31-49	50+
	Highest educational attainment	Tertiary (university)	Tertiary (TAFE)	Tertiary (TAFE)	Tertiary (university)	HSC	School certificate
	Employment category	White collar/ professional	Manual/ Trade/ Paraprofessional	Manual/ Trade/ Paraprofessional	White collar/ professional	Not in workforce (student)	Manual/ Trade/ Paraprofessional
	First language	English	Auslan	Auslan	English	Auslan	Auslan

## APPENDIX H: ANALYSIS AND COMPARISON OF KEY LEGAL CONCEPTS IN ORIGINAL SUMMATION AND BACK TRANSLATION

[Note the notation “S” refers to paragraphs in the Judge’s Summation. The notation “BT” relates to paragraphs in the Back Translation]

### Key legal concept No 1 – defining “manslaughter”

[S6] Now, this is quite different to the issue that arises in manslaughter. Manslaughter is an unlawful killing falling short of murder. The criminal culpability attaching to manslaughter is less than murder, although it is still a very serious criminal offence. The difference in very broad terms is that you judge whatever are the actions of the accused, not according to what he intended, that is, his subjective state of mind, but rather his words and actions are examined from an objective viewpoint. The measure of responsibility is that of a reasonable person in his position getting off the train at Redfern; what such a person would have appreciated in the circumstances.

[BT3] Manslaughter is not treated the same under the law as murder. Although a person has been killed it is considered a less serious charge than murder. The degree of responsibility linked to the charge of manslaughter is less than that associated with murder. It is still very serious but isn’t treated with the same gravity as a charge of murder. In regard to this difference between the charges, you must only consider the accused person’s behaviour, not form an opinion about his intention, or what might have been going on in his mind, what his views were per se. You can however make a decision about his words, his language, his behaviour. You can objectively step back and analyse his conduct in making your decision. We have to consider the position of any reasonable person alighting from a train in Redfern.

*Comment: The issue of the difference between murder and manslaughter, that being the mens rea or intention to commit a crime is accurately translated. However, the “reasonable person test is not well-translated. The summation clearly directs the jury to consider “the measure of responsibility being that of a reasonable person stepping off a train at Redfern”. The back translation states, “You can however make a decision about his words, language, his behaviour”. Although, the use of the word “objectively” is used in the very next sentence, I am not sure that the average juror would understand the term “objectively” without the use of the example of the reasonable person. I think this is a problem in this part of the translation.*

## **Key legal concept No 2 – the first element of manslaughter**

[S14] Let me go to the elements, and you will see that the first element is “that William Christopher Harris died”. There is, of course, no issue that Mr Harris died at the Redfern railway station at 12.49 pm on 27 October 2002, having received multiple injuries after having been struck by a train. Indeed, that is an agreed fact in exhibit O, I think it is the first agreed fact. So clearly element 1 will occasion you no difficulty.

[BT11] Now, let's have regard for the three elements in count 1. William Christopher Harris died. This first part of the manslaughter charge is a given – there is no question that he is deceased. We know that he died at Redfern train station at 12.49 pm on 27 October 2002. He suffered multiple injuries after being hit by a train. We all agree on that fact it is noted in exhibit marked “O”. So, at the outset we can concede the first point in count 1 of the indictment.

*Comment: No problems here.*

## **Key legal concept No 2 – the second element of manslaughter**

[S15] Let me move at once to element 2. You will see it there: “2: That his death was caused by the deliberate attack or attacks of the accused”, and deliberate in this context simply means voluntarily or willed as opposed to something that may happen by mistake or accident or something that is a reflex action, something that is not willed. It is not being suggested by Mr Button on behalf of Mr Kerr that the actions of his client were not deliberate in that sense, but it is a matter in respect of which you must be satisfied beyond reasonable doubt.

[S16] Now, this second element, I should say, really involves two questions, and indeed, both questions are important, you may think fundamental, to this trial. The first concerns the actions of Mr Kerr. Exactly what did he do or say? What were his acts? And the second issue is concerned with causation. Whatever Mr Kerr may have said or done, can it be said that that caused the death of William Christopher Harris?

[BT12] The second part of this count is whether his death was caused by the deliberate act of the accused. Meaning that he wilfully caused the action as opposed to it being a mistake or an accident. I'm not suggesting that Mr Button (the accused's solicitor) said that his client did or didn't deliberately perform this act, but you need to consider this question and decide for yourself beyond a reasonable doubt in making a judgment in this matter.

[BT13] Further to this second part to count 1. There are two key issues or questions in relation to this part, and both questions are very

important. You have to consider these carefully, they may appear to be very basic points but they are integral to this trial. The first key issue relates to the act or acts of the accused. What was his behaviour? What did he do? What did he say? What was his conduct? The second pertinent issue is in relation to chain of causation - whether the accused's behaviour can be directly linked to the victim's death. Was the accused's conduct an act that contributed to the death of the deceased?

*Comment: The only comment here would be the subtle difference between the summation referring to acts that "caused the death" of the victim compared to the back translation that refers to acts that "contributed to the death" of the victim. An act or acts that contribute to someone's death is different to an act or acts that cause someone's death. The accused may have contributed to the death but his act may not have caused the death.*

### **Key legal concept No 3 – test of "causation"**

[S25] But returning to count one, that is the count dealing with manslaughter, an event may have a number of causes. The Crown is not obliged to prove beyond reasonable doubt that the conduct of the accused was the only cause leading to death; for instance, the action of the train was plainly one of the causes and indeed the immediate cause of death. So what does "cause" mean in this context? The test is whether or not the act or the acts of the accused significantly or substantially contributed to the death of the deceased. So that even if you were to find that the deceased himself, by his actions, contributed to his own death, it would not follow that the accused cannot be convicted. The question in that circumstance would be, notwithstanding the contribution to his own death made by the deceased himself: Can it be said that the Crown has established to your satisfaction beyond reasonable doubt that the conduct of the accused significantly or substantially contributed to the death of the deceased?

[BT27] According to the written directions I would now like to return to count 1 again, the charge of manslaughter. It is possible that the victim's death was as a result of many factors. The burden isn't on the Crown to prove beyond a reasonable doubt that the accused's behaviour was the only cause leading to the victim's death. For example, the train was actually what caused the death of the victim, quite obviously, so the nature of causation, what is it really?

[BT28] You have to consider whether the accused's conduct significantly and substantially contributed to, and ultimately caused, the death of the deceased. The deceased himself by his own conduct of getting onto the tracks clearly contributed to the final result of death,

however the accused can end up with a jail sentence in relation to this charge. Naturally the victim shouldn't have jumped onto the tracks in front of an oncoming train. You have to be satisfied then beyond a reasonable doubt that the accused's conduct significantly influenced the victim's response and caused the victim's death.

*Comment: There is a major problem here. The summation clearly leaves the interpretation of the evidence to the jury – “So that even if you were to find that the deceased himself, by his actions, contributed to his own death...” whereas the back translation makes an assumption about the interpretation of the evidence – “The deceased himself by his own conduct of getting onto the tracks clearly contributed to the final result of death...”. A judge never tells the jury how to interpret evidence. The jury are called “the tribunal of fact” because their job is to establish whether the facts support the charge. The judge is the “tribunal of law” and determines questions of law that help the jury in their job of only assessing admissible evidence. The translation would indicate to the deaf juror that the judge has already decided this issue and, therefore, the jury should follow suit.*

#### **Key legal concept No 4 – defining “reasonable” and “proportionate”**

[S30] When I use the phrase “reasonable or proportionate”, I am not seeking to draw a distinction between those two words. That is simply the formula that is traditionally used, but it embodies essentially the one concept; that is, the concept of reasonableness. It is an objective test. It is looking at the flow of events, the conduct of Mr Kerr, the response of Mr Harris, and asking is the latter a reasonable and proportionate response to the former such that the former can be said to be a cause. If it was not reasonable or proportionate, then there was a break in the chain of causation.

[S31] So that you can see from the statement that the issue does not depend upon Mr Kerr's view as to what he thought Mr Harris might do. It is an objective view; nor does it depend upon the character of the deceased. It is an objective view based upon what the deceased did in response to the threat made to him, if you find that there was such a threat.

[BT36] I say reasonable or proportionate not necessarily because I want to differentiate between the two. We have to think about the notion of reasonableness and what is reasonable to the regular person and what they might do in the same situation. The concept of reasonableness is a test as to what people might do – it is an objective test, not a subjective test of what you might think, but an objective assessment of the situation. Ask yourself, was the victim's response reasonable in regard to the nature of the accused's conduct. If the answer is 'yes', then you may consider the accused did cause the death

of the victim. However, if you consider the victim's reaction to the accused unreasonable and disproportionate then this would mean the events are not causally linked and you cannot make a determination of guilty.

[BT37] How to solve the problem doesn't depend on the accused's view of what he thinks he would do. It's a more detached objective view. Your decision also doesn't depend on the victim's character or personality. You must distance yourself from judgments about that. You have to consider only the victim's response to the conduct of the accused and whether you feel there was a chain of causation occurring there ...

*Comment: The back translation is better, in terms of plain English, than the summation! The only minor comment is that the summation asks the jurors to consider first if there was a threat at all – "It is an objective view based upon what the deceased did in response to the threat made to him, if you find that there was such a threat" whereas the back translation assumes there was a threat, although I admit the language is not conclusive.*

### **Key legal concept No 5 – clarifying the written directions: what did the accused do?**

[S46] Analysing that paragraph, that middle paragraph speaking of the victim, you will see that it gives rise to a number of separate issues, and I think an analysis of that paragraph might clarify the way in which you should go about your task. The first issue is: What did the accused do? What did he do or say? I do not think it is in the least controversial, having heard counsel's addresses, although this is a comment from me, to say that whatever he did appeared on the evidence to be directed at Mr Harris, and Mr Harris is, in the context of those actions of the accused, the victim. So that is the first thing, you have to make up your mind as to exactly what he did. What exactly was it that he said and did, and that is really the first issue, and that is the bedrock of whatever inquiry you make which affects other issues further down the track.

[BT58] The first issue is the accused's conduct - what did he say, what did he do? I think it would be agreed and will not be a point of contention because the counsel for both parties have already given their address on this, but this is my opinion, that the evidence in this matter points to the accused clearly directing his actions against the victim. All would agree that the victim was directly targeted, so you need to consider what exactly did the accused say, what exactly did the accused do? That is the primary issue for you to consider and is the most important factor in the decision-making process in regard to

other considerations you must later make in that it is the first issue to contemplate.

*Comment: The summation leaves the question of what the accused did to the jury. The judge goes close to commenting on the truth of the evidence but ultimately leaves it to the jury by opining – “I do not think it is in the least controversial ...” whereas the back translation states on this issue, “All would agree that the victim was directly targeted ...” This important difference is the difference in leaving facts for the jury to determine and the judge directing the jury on accepted facts – accepted by him and by implication the jury.*

### **Key legal concept No 6 – clarifying the written directions: did the accused’s actions give rise to a well-founded apprehension of physical harm?**

[S47] The second issue is whatever he did, did it give rise to a well-founded apprehension of physical harm? In other words, was it reasonable that Mr Harris should have been fearful of physical harm at the hands of Mr Kerr? That is an objective matter, not a subjective matter. Let me explain what I mean by that. It does not depend upon the reaction of Mr Harris, the determination of that issue. That is, whether personally he was in fear; rather, it is a matter for you to determine whether objectively a reasonable person in his position would have been in fear having regard to what you find were the acts of Mr Kerr directed at Mr Harris.

[S48] That is not to say that Mr Harris’s reaction to whatever happened on the station at Redfern is irrelevant to your determination, but it does not conclude the matter. It is not determinative, it does not determine the outcome. You must stand back, having determined in your own mind what you believe Mr Kerr did or said on that platform, and say to yourself: Well, was it reasonable that a person confronted by that in that situation, that geographical situation, that end of the platform, that time of the day, that situation, was it reasonable that a person confronted by those actions, words and actions, should have been apprehensive of physical harm, should have had, to use the phrase which appears in that middle paragraph, a well-founded apprehension of physical harm? So that is the second issue.

[BT59] The second issue for you to carefully deliberate is whether the accused’s conduct – regardless of whatever that may have been – induced in the victim a sense of apprehension of physical harm and concern for his personal safety, and whether such extent of fear provoked was reasonable in regard to the extent and nature of the accused’s conduct.



[BT60] It is an objective test, not a subjective consideration but an objective view of the chain of events. I will elaborate on what I mean by this. In considering the victim's reaction and his sense of fear, was the person himself the kind of person that would experience trepidation more than any other reasonable person? If it was another person in the same place of this particular victim would they have responded in the same way? Would another reasonable person have felt the same extent of trepidation should the accused's conduct be directed at them?

[BT61] It doesn't mean that the victim's own reaction to the incident at Redfern train station isn't important – certainly his reaction in this instance is important to regard.

[BT62] \*\* It certainly it isn't a quick decision you can make but it was a spur of the moment decision for the victim in the circumstances that led on to other consequences.

[BT63] It is an objective assessment of the situation. You must consider the victim's response and judge objectively whether you think that whatever the accused's conduct and actions may have been, and given what he did and what he said, that the victim in listening and observing the conduct of the accused felt sufficiently threatened in that place at the end of that platform at that time of night or day in the same situation would a reasonable person when experiencing that conduct or in hearing that language feel the same extent of trepidation as Harris did? Using the same language from the text, was there a 'well-founded apprehension of physical harm'? That is essentially the second issue for you to deliberate.

*Comment: The order of the translation is problematic here. The following sentence, "In considering the victim's reaction and his sense of fear, was the person himself the kind of person that would experience trepidation more than any other reasonable person?" should have appeared at the end of BT59 not mid-way through BT60. It confuses the subjective with the objective test. The summation had it in the right order. I do not think it is hugely damaging because the objective test is clarified, particularly in BT63 – it is just a bit confusing.*

### **Key legal concept No 7 – clarifying the written directions: was it reasonable for the victim to seek to escape?**

[S49] The first issue is what Mr Kerr did. The second issue is, whatever he did, did that give rise to a well-founded apprehension of fear of physical harm. Then you get to the third issue, which is a related issue, and it comes from the phrase which you will see in that paragraph "such that it was reasonable for the victim", that is Mr Harris, "to seek escape". Again, that is an objective matter, and it depends upon reasonableness. Was it reasonable for a person in the

position of Mr Harris, having been confronted by that conduct, having felt that fear of physical harm, to seek to escape? That is the next issue, the third issue, being reasonableness and escaping.

[BT64] So the first issue is in regard to what Mr Kerr did or didn't do, and the second issue is, regardless of what he did, whether then his behaviour was causally linked to the fear for personal safety on the part of the victim.

[BT65] The third issue is perhaps related to the first two concerns. It comes from section 2 again, meaning whether it was reasonable for the victim to have felt his only course of escape was to do what he did. Again, this is an objective test. You are not a subjective party in this incident. You need to consider whether the course of action was appropriate in that situation, that as the accused approached the victim and as the sense of apprehension on the part of the victim developed to such an extent that he was fearful of his personal safety given what he was hearing and what he was seeing. That he was fearful of physical harm and that this led him to react in the way that he did by fleeing. That is essentially the third key issue for you to consider, how reasonable it was for him to seek to escape.

*Comment: The use of the word "causally" in BT64 is wrong – again not hugely damaging but confusing as the issue of well-founded apprehension of fear is not determinative alone of the issue of causation – it merely contributes to the issue of the presence of causation. Otherwise, no problems.*

### **Key legal concept No 8 – clarifying the written directions: was the method of escape reasonable and proportionate?**

[S50] The fourth issue assumes to some extent that you answered the question: Well, that is what he did, that is the fear he felt, 'yes' or 'no' it was reasonable. If you felt it was not reasonable for him to want to escape, then that would be the end of that, but if you believed it was reasonable for him in that circumstance to seek to escape then you come to the fourth issue. This is the issue which concerns the mode of escape. We know the mode of escape chosen by Mr Harris was to cross the tracks to safety on platform 5. We know that in doing that he met his death. But what the Crown must prove beyond reasonable doubt is that the death was caused by the conduct of the accused, and what that paragraph in the middle which is the subject of your questions says, there will be a break in the chain of causation, unless the Crown satisfies you beyond reasonable doubt that the response of Mr Harris in choosing to cross the tracks to the safety of platform 5 was reasonable or proportionate, having regard to the conduct of the accused and the fear it is likely to have induced, so you are going back to the conduct of the accused and the fear it is likely to have induced.

[S51] Again, that is an objective inquiry. It is a question of reasonableness. It is a question of your view as to whether that was reasonable or proportionate for him to do, he having chosen to escape. It is a matter for your judgment as to whether that was reasonable or proportionate, having regard to the conduct of the accused and the fear that it induced.

[BT66] The fourth matter for you to consider is dependent on how you answer whether it was reasonable for him to feel such a sense of fear and to try and escape. Perhaps you consider it was reasonable to seek escape given the circumstances. However, you may feel it was not reasonable for him to try to escape – that his apprehension wasn't well-founded or that it was based on a weakness in the character of the victim, then you do not need to consider the matter any further.

[BT67] However, if in regard to the third issue, that you do believe his sense of apprehension was well-founded, and that it was legitimate for him to seek a route of escape from the situation due to the accused's conduct, then you do need to consider a fourth issue.

[BT68] The fourth issue is essentially how the victim chose to escape and what his possible options for escape were. We know how he ultimately decided to flee – he jumped down onto the train tracks, perhaps in an endeavour to cross the tracks and to reach the next platform along, platform 5. We know that's how he died, whilst on the track. However, the Crown must prove beyond a reasonable doubt that the deceased's death occurred as a result of the accused's conduct.

[BT69] The paragraph in the middle of page 2 addresses a question to me as presented yesterday afternoon. The question is in regard to if you are not satisfied that the victim's death was caused by the accused's actions. The Crown must satisfy you beyond a reasonable doubt that the victim's decision to flee to safety over on platform 5 was reasonable and was substantially caused by the accused's conduct, which induced a well-founded apprehension in the victim. Once again then we return to the initial consideration of the accused's conduct in this instance and whether the victim's apprehension was reasonably induced from the acts of the accused.

[BT70] Again it is an objective test. A consideration taking into account all the circumstances and the notion of 'reasonableness'. Your perception of whether the victim's response was reasonable and in proportion with the nature of the accused's conduct, leading to his decision to escape, is important. Members of the jury, it is for you to decide whether the response in seeking to escape was reasonable and proportionate having regard to the nature of the conduct of the accused and the fear it is likely to have provoked.

*Comment: The reference to the victim escaping because of a “weakness in character” in BT66 is wrong and was not mentioned in the summation. This is an objective test not an assessment of the victim’s character as to whether it was reasonable to escape the threat posed by the accused. Otherwise, no problems.*

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