

# HIGH COURT OF AUSTRALIA

FRENCH CJ,  
BELL, GAGELER, KEANE AND NETTLE JJ

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GAYE PRUDENCE LYONS

APPELLANT

AND

STATE OF QUEENSLAND

RESPONDENT

*Lyons v Queensland*  
[2016] HCA 38  
5 October 2016  
B16/2016

## ORDER

*Appeal dismissed.*

On appeal from the Supreme Court of Queensland

### **Representation**

K T Nomchong SC with B E Fogarty for the appellant (instructed by Australian Centre for Disability Law)

W Sofronoff QC with K A Mellifont QC and A D Scott for the respondent (instructed by Crown Law (Qld))

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## **CATCHWORDS**

### **Lyons v Queensland**

Discrimination law – Disability discrimination – Where deaf person summoned for jury service – Where deaf person required assistance of Auslan interpreters to participate as juror – Where deaf person excluded from jury panel – Whether exclusion was unlawful discrimination.

Juries – Persons constituting jury – Jury deliberations – Whether permissible for interpreter to be present in jury room during deliberations – Whether deaf person who requires assistance of interpreter in jury room eligible for jury service under *Jury Act 1995 (Q)*.

Words and phrases – "deaf person", "direct discrimination", "functions of a juror", "indirect discrimination", "jury deliberations", "jury service", "separation of the jury".

*Anti-Discrimination Act 1991 (Q)*, ss 10, 11, 101.

*Jury Act 1995 (Q)*, ss 4(3), 54, 70.



1 FRENCH CJ, BELL, KEANE AND NETTLE JJ. It is unlawful for a person performing any function or exercising any power under Queensland law to discriminate against a person on the basis of the person's impairment<sup>1</sup>. The question in this appeal is whether the Deputy Registrar of the Ipswich District Court Registry ("the Deputy Registrar") unlawfully discriminated against the appellant by excluding her from a jury panel because the appellant, a profoundly deaf person, requires the services of an Australian Sign Language ("Auslan") interpreter. For the reasons to be given, a deaf person who requires the services of an interpreter in order to communicate with others is not eligible for jury service in Queensland. The Deputy Registrar's decision not to include the appellant in a jury panel did not constitute unlawful discrimination in the performance of her functions or the exercise of her powers under Queensland law.

### The Anti-Discrimination Act

2 The *Anti-Discrimination Act* 1991 (Q) ("the ADA") prohibits discrimination on the basis of any of the attributes that are specified in s 7. One such attribute is "impairment"<sup>2</sup>. "Impairment" includes the total or partial loss of a person's bodily functions<sup>3</sup>. Discrimination on the basis of an attribute includes direct and indirect discrimination on the basis of a characteristic that a person with the attribute generally possesses or a characteristic that is often imputed to a person with the attribute<sup>4</sup>. The appellant's deafness is an impairment and communication by means of Auslan is a characteristic that persons who are deaf generally possess.

3 A person directly discriminates against another on the basis of an attribute if the person treats, or proposes to treat, the person with the attribute less favourably than another person without the attribute is, or would be, treated in circumstances that are the same or not materially different<sup>5</sup>. It is not necessary that the discriminator considers that the treatment is less favourable<sup>6</sup>. His or her

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1 *Anti-Discrimination Act* 1991 (Q), s 7(h).

2 ADA, s 7(h).

3 ADA, Schedule.

4 ADA, s 8(a) and (b).

5 ADA, s 10(1).

6 ADA, s 10(2).

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motive for discriminating is irrelevant<sup>7</sup>. If there is more than one reason why a person treats, or proposes to treat, another person with an attribute less favourably, that less favourable treatment will be on the basis of the attribute if the attribute is a substantial reason for the treatment<sup>8</sup>. Section 10(5) is prominent in the way the appellant puts her case. It provides that in determining whether a person treats, or proposes to treat, a person with an impairment less favourably, the fact that the person with the impairment may require special services or facilities is irrelevant. It is common ground that Auslan interpretation is a "special service".

- 4 Indirect discrimination on the basis of an attribute happens if a person imposes, or proposes to impose, a term with which a person with the attribute does not or is unable to comply and with which a higher proportion of people without the attribute comply or are able to comply and that term is not reasonable<sup>9</sup>. Whether a term is reasonable depends on all the relevant circumstances of the case, including the consequences of failing to comply with the term, the cost of alternative terms and the financial circumstances of the person who imposes or proposes to impose the term<sup>10</sup>. It is not necessary that the discriminator is aware that he or she is indirectly discriminating by the imposition, or proposed imposition, of the term<sup>11</sup>.

#### The Deputy Registrar's powers under the Jury Act

- 5 The Deputy Registrar, acting pursuant to a delegation, was exercising powers that are conferred on the Sheriff of Queensland under the *Jury Act* 1995 (Q) ("the Jury Act")<sup>12</sup>. The Deputy Registrar had the responsibility of preparing lists of prospective jurors for the Ipswich jury district<sup>13</sup>. The names of the persons included in those lists were drawn from the jury roll for the Ipswich jury

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7 ADA, s 10(3).

8 ADA, s 10(4).

9 ADA, s 11(1).

10 ADA, s 11(2).

11 ADA, s 11(3).

12 Jury Act, s 72.

13 Jury Act, s 15.

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district. The Deputy Registrar was required to give each prospective juror a written notice informing the recipient that he or she had been summoned for jury service accompanied by a questionnaire and an application form<sup>14</sup>. The questionnaire was designed to find out whether the recipient was qualified to serve as a juror<sup>15</sup>. The application form provided the recipient with a means of applying to be excused from jury service<sup>16</sup>. Upon application, the Deputy Registrar had the power to excuse a person from jury service<sup>17</sup>.

6 The Deputy Registrar was required to revise the list of prospective jurors after the return of the questionnaires<sup>18</sup>. She was required to exclude from the list the names of persons who in her opinion were not qualified for jury service<sup>19</sup>. She was empowered to make reasonable inquiries to find out if a person was not qualified for jury service<sup>20</sup>. The revised list of prospective jurors formed the basis for the issue of summonses for jury service in the Ipswich jury district<sup>21</sup>.

7 The appellant's name was included in the list of prospective jurors for the Ipswich jury district and she was sent a notice stating that she may be summoned for jury service. The appellant did not apply to be excused from jury service. Her answers to the questions in the questionnaire did not suggest that she was not qualified for jury service.

8 The Deputy Registrar was required to summon enough prospective jurors to enable the selection of juries for trials starting in the Ipswich jury district in a jury service period<sup>22</sup>. The appellant was summoned for jury service by summons

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14 Jury Act, s 18(1) and (2).

15 Jury Act, s 18(2)(a).

16 Jury Act, s 18(2)(b).

17 Jury Act, s 19(1).

18 Jury Act, s 24(1).

19 Jury Act, s 24(2).

20 Jury Act, s 24(3).

21 Jury Act, s 25(1).

22 Jury Act, s 26(1).

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which required her to be available to attend the District Court at Ipswich for a period of three weeks commencing on 13 February 2012.

9 The appellant wrote to the Ipswich Courthouse following receipt of the summons stating that she was "[l]ooking forward to sitting on the Jury" and advising that she is deaf and would require the services of two Auslan interpreters.

10 The Deputy Registrar responded to the appellant's request by email stating:

"After confirming with the Sheriff at the Brisbane Supreme & District Courts, unfortunately you won't be able to perform jury service.

There is no provision in the Jury Act to swear in an interpreter for a juror. It also isn't possible to have another person in the jury room other than the jurors and bailiff whilst deliberating.

I will need to excuse you on that basis. If, in the future, you get another jury questionnaire, please note on it that you are a deaf person."

11 The appellant asked the Deputy Registrar to supply her with "a copy of the Jury Act that says [she is] not allowed to be on the Jury". In response to this request, the Deputy Registrar supplied the appellant with an extract of s 4(3)(1) of the Jury Act.

12 Section 4(1) of the Jury Act provides that a person is qualified to serve as a juror at a trial within a jury district if the person is enrolled as an elector, the person's address as shown on the electoral roll is within the jury district and the person is eligible for jury service. Section 4(3) relevantly provides:

"The following persons are not eligible for jury service –

...

(1) a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror".

13 The Deputy Registrar was required to arrange for the attendance before the District Court at Ipswich of a jury panel formed from among the persons summoned for jury service for the period beginning 13 February 2012 and who had not been excluded from the list of prospective jurors by reason of being not



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qualified for jury service<sup>23</sup>. The Deputy Registrar did not arrange for the attendance of the appellant as a member of the jury panel.

14 The Deputy Registrar is an officer of the Queensland Department of Justice and Attorney-General for whose conduct the State is vicariously liable under the ADA<sup>24</sup>.

#### The procedural history

15 A person who is the subject of an alleged contravention of the ADA may complain to the Anti-Discrimination Commissioner ("the Commissioner")<sup>25</sup>. If the Commissioner believes that a complaint may be resolved by conciliation, the Commissioner must try to resolve the complaint in that way<sup>26</sup>. If the complaint has not been resolved by conciliation following a conciliation conference, the complainant may give the Commissioner a written notice requiring that the complaint be referred to the Queensland Civil and Administrative Tribunal ("the Tribunal")<sup>27</sup>.

16 The appellant complained to the Commissioner that the State of Queensland ("the State") had unlawfully discriminated against her directly and indirectly in the administration of Queensland law and Queensland Government programs contrary to s 101 of the ADA. The appellant's complaint was not resolved by conciliation and she gave notice to the Commissioner requiring that it be referred to the Tribunal<sup>28</sup> for determination<sup>29</sup>. The Commissioner referred the complaint to the Tribunal on 16 July 2012.

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23 Jury Act, s 36.

24 ADA, s 133.

25 ADA, s 134.

26 ADA, s 158.

27 ADA, s 164A.

28 ADA, s 164A(2).

29 ADA, s 174A(a); *Queensland Civil and Administrative Tribunal Act 2009* (Q), s 10(1)(b).

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17 The appellant lodged a statement of contentions with the Tribunal. The statement particularised the law as the Jury Act and the Government program as the administrative arrangements associated with the assembly and formation of juries and the conduct of jury trials pursuant to the Jury Act. The appellant asserted that a necessary incident of the power to summon persons for jury service is the requirement that the State provide facilities and services to enable those persons to participate in the jury selection process. She stated that she had requested Auslan interpretation of proceedings and that the Deputy Registrar had refused to provide it and had purported to excuse her from jury service.

18 The Tribunal accepted the expert evidence led in the appellant's case that there is no significant difference between the capacity of deaf persons for whom proceedings are interpreted in Auslan and hearing persons in their respective capacities to understand legal proceedings. This evidence was said to be in accord with the Report of the New South Wales Law Reform Commission<sup>30</sup> and the experience in jurisdictions in which deaf persons perform jury duty.

19 The Tribunal found, however, that the Deputy Registrar's decision to exclude the appellant's name from the jury panel was not made on the basis of the appellant's impairment. The Tribunal found that the decision was made because the Deputy Registrar considered that under s 4(3)(1) of the Jury Act, the appellant was not eligible for jury service: she did not have the capacity to effectively perform the functions of a juror in circumstances in which there is no provision to administer an oath (or affirmation) to a person interpreting for a juror and the Jury Act does not permit a 13th person to be kept together with the jury. The Tribunal found that the Deputy Registrar's understanding of the scope of s 4(3)(1) was incorrect but that this did not affect the Tribunal's conclusion that the appellant had not been subject to less favourable treatment on the basis of her impairment. The Tribunal said that the appropriate comparator was a prospective juror who requested the assistance of another person in the jury room in case the prospective juror did not understand all that was said there.

20 The appellant's case in indirect discrimination contended that the Deputy Registrar imposed a condition on her participation in the jury selection process that she be able to communicate with others by means of conventional speech, a condition with which she was unable to comply and with which a higher proportion of people who are not deaf are able to comply. The Tribunal rejected

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30 New South Wales Law Reform Commission, *Deaf jurors' access to court proceedings via sign language interpreting: An investigation*, Research Report 14, (2007).

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this contention, finding that the Deputy Registrar had not imposed any condition on the appellant's participation in the jury selection process. The appellant's complaint was dismissed.

21 The appellant appealed to the Appeal Tribunal (Cullinane PJM and Oliver SM)<sup>31</sup>. The State filed a notice of contention seeking to uphold the Tribunal's reasons on the ground that the Deputy Registrar's construction and application of the Jury Act was correct.

22 In the interval between the publication of the Tribunal's reasons and the hearing before the Appeal Tribunal, the Supreme Court of Queensland (Douglas J) determined the like question in a proceeding initiated by the Sheriff<sup>32</sup>. His Honour held that a deaf person who required the services of an Auslan interpreter was not eligible for jury service under s 4(3)(1) of the Jury Act because the person is unable to effectively perform the functions of a juror<sup>33</sup>. His Honour reasoned that, in the absence of legislative provision, the necessity to maintain the secrecy of its deliberations does not permit an interpreter to be present in the jury room during the jury's retirement<sup>34</sup>. The absence of statutory provision to administer an oath or affirmation requiring an interpreter to keep the jury's deliberations secret reinforced this conclusion<sup>35</sup>. The Appeal Tribunal agreed with Douglas J's analysis, which provided a complete answer to the appellant's complaint.

23 The Court of Appeal of the Supreme Court of Queensland (Holmes and Gotterson JJA and Mullins J) refused leave to appeal from the Appeal Tribunal's orders. Although it was not necessary to the decision, Holmes JA (as her Honour then was), giving the leading judgment of the Court of Appeal, considered that the Appeal Tribunal was right to hold that a deaf person who requires an Auslan interpreter in order to communicate in the course of deliberations in the jury room is incapable of effectively performing the functions of a juror<sup>36</sup>.

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31 *Queensland Civil and Administrative Tribunal Act 2009 (Q)*, s 142(3)(b).

32 *Re Application by Sheriff (Qld)* (2014) 241 A Crim R 169.

33 *Re Application by Sheriff (Qld)* (2014) 241 A Crim R 169 at 171 [9].

34 *Re Application by Sheriff (Qld)* (2014) 241 A Crim R 169 at 170 [4], [6].

35 *Re Application by Sheriff (Qld)* (2014) 241 A Crim R 169 at 170 [5].

36 *Lyons v Queensland* (2015) 328 ALR 550 at 563 [47].

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24 The appellant appeals by special leave from the orders of the Court of Appeal<sup>37</sup>.

#### The appellant's case

25 The appellant submits that it is ineluctable that her deafness was the "true basis" or "real reason" for the Deputy Registrar's decision to exclude her from the jury panel. The Tribunal's error, in her submission, was to fail to give effect to s 10(5) of the ADA. The Tribunal was required to treat the appellant's need for Auslan interpretation as irrelevant to the determination of whether she was subjected to less favourable treatment. Given that Auslan interpretation cannot be separated from the person who provides it, the Tribunal erred in selecting as a comparator a hearing person who asked to have another person present to assist him or her during the jury's deliberations. Alternatively, the appellant submits that the Tribunal erred by rejecting her indirect discrimination case. She contends that it was not necessary that the Deputy Registrar in terms convey to her a requirement that she satisfy a specified condition for inclusion in the jury panel. The Deputy Registrar's conclusion that an Auslan interpreter may not be present in the jury room amounted to the imposition of a condition that the appellant not require an Auslan interpreter<sup>38</sup>.

26 In either way the appellant's case is framed, the antecedent issue is the correctness of the Appeal Tribunal's conclusion that, under Queensland law, an Auslan interpreter is not permitted to be present during the jury's deliberations. This directs attention to the provisions of the Jury Act governing the conduct of jury trials.

#### The Jury Act

27 Section 50 of the Jury Act provides:

"The members of the jury must be sworn to give a true verdict, according to the evidence, on the issues to be tried, and not to disclose anything about the jury's deliberations except as allowed or required by law."

28 Provisions of the Jury Act govern the segregation of the jury in criminal cases. Section 53(1) enacts the common law rule that after the jury in a criminal trial has been sworn, it must not separate until it has given its verdict or been

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37 [2016] HCATrans 060 per Kiefel and Nettle JJ.

38 *Catholic Education Office v Clarke* (2004) 138 FCR 121.

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discharged. The rigour of that rule is ameliorated by the remaining sub-sections, which variously provide for separation subject to the judge not being of the opinion that separation would prejudice a fair trial. Section 55 provides that while the jury is kept together outside the courtroom, the jurors must be kept in a private place under the supervision of an officer of the court or as the judge directs.

29 Section 54 relevantly provides:

"(1) While a jury is kept together, a person (other than a member of the jury or a reserve juror) must not communicate with any of the jurors without the judge's leave.

(2) Despite subsection (1) –

(a) the officer of the court who has charge of the jury may communicate with jurors with the judge's leave; and

(b) if a juror is ill – communication with the juror for arranging or administering medical treatment does not require the judge's leave."

#### The parties' submissions

30 The appellant submits that Douglas J's interpretation of the Jury Act, on which the Appeal Tribunal relied, should not be accepted because it fails to give the Jury Act an harmonious operation with the ADA. The latter Act has as its object the promotion of equality of opportunity for everyone by protecting them from unfair discrimination in areas of activity including in the performance of functions and the exercise of powers under Queensland law. In light of the command of the ADA to treat the need of a person with an impairment for special services as irrelevant to the determination of unlawful discrimination, communications made in the presence of an Auslan interpreter while the jury is kept together should be understood as disclosures that are "allowed by law". Alternatively, the judge's power under s 54(1) is said to be sufficiently wide to permit the grant of leave permitting an Auslan interpreter to be present in the jury room throughout the jury's deliberations. The grant of leave, it is said, would not prejudice a fair trial given that the interpreter acts merely as a conduit through which communications are conveyed and is subject to professional obligations of confidentiality.

31 The appellant's argument accepts that her impairment may prevent her from effectively performing the functions of a juror in some cases. She instances a trial at which voice identification is expected to be an issue. In such a case, she

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observes, the court retains the power to excuse her<sup>39</sup>. Her complaint is that the Deputy Registrar's decision prevented her from being included in the process of jury selection regardless of whether the issues at any trial for which she was selected might disqualify her from jury service. The predecessor to the Jury Act<sup>40</sup> exempted from jury service "persons who are blind, deaf, or dumb, or are of unsound mind or are otherwise incapacitated by disease or infirmity"<sup>41</sup>. The appellant argues that the legislative choice reflected in the present Act, to impose a functional test rather than to exclude from jury service all persons having some form of impairment, reflects a legislative intention that juries be representative of the community as a whole<sup>42</sup>. She submits that s 4(3)(l) requires a case by case evaluation of the ability of the prospective juror to perform jury service and, consistently with the ADA, serves to eliminate discrimination on the basis of irrelevant characteristics.

32 The State adopts Douglas J's analysis in *Re Application by Sheriff (Qld)*. Additionally, by notice of contention, the State seeks to have the Court of Appeal's decision affirmed on the ground that the phrase "perform the functions of a juror" for the purposes of s 4(1)(c) of the Jury Act describes both listening to oral evidence and participating in the deliberations of the jury without the need for a non-juror to be present. The State's argument is that a deaf juror who has the evidence mediated through the services of an Auslan interpreter is not able to give a true verdict based upon his or her assessment of the evidence. Interpretation of the evidence to a juror is said to result in a trial that is no longer wholly under the supervision of the judge. The trial at which the evidence of one or more witnesses is interpreted is distinguished, in the State's argument, on the basis that in such cases each juror gives a true verdict according to the same evidence. Moreover, in such cases a party who is dissatisfied with the accuracy of the interpretation may challenge it. There is no way to challenge the accuracy of the interpretation of communications made in the jury room.

### Consideration

33 In the event, the State's contention is not reached. Absent specific statutory provision, the contention that disclosure of the jury's deliberations to an

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39 Jury Act, s 20.

40 *Jury Act 1929 (Q)*.

41 *Jury Act 1929 (Q)*, s 8(1)(s).

42 Queensland, Legislative Assembly, *Jury Bill 1995*, Explanatory Notes at 1.

Auslan interpreter is "allowed by law" must be rejected. The common law has long required that the jury be kept separate<sup>43</sup>. The possibility that, while the jury is kept together, one or more jurors may have communicated with a person other than a fellow juror (or officer of the court) is an irregularity which has been held to vitiate the verdict<sup>44</sup>. The presence of a person other than a juror in the jury room during the course of deliberations is an incurable irregularity regardless of whether the person takes any part in the jury's deliberations<sup>45</sup>. The prohibition on the presence of a 13th person in the jury room protects the jury from the suggestion of external influence and promotes the frank exchange of views. It is the latter consideration that informs the exclusionary rule which precludes the admission of evidence of the deliberations of the jury<sup>46</sup>. Each member of the jury is free to speak in the knowledge that no one other than fellow jurors, each of whom is bound by the oath taken at the commencement of the trial and each of whom will be responsible for the ultimate verdict, hears what is said.

34 The appellant's contention that s 54(1) of the Jury Act extends to the grant of leave to an Auslan interpreter to be present during the jury's deliberations must also be rejected. Section 54(1) states a rule that while the jury is kept together no person other than a juror or reserve juror may communicate with any of the jurors without the judge's leave. The rule is subject to specific exception in the case of the officer who has the charge of the jury. That officer is permitted to communicate with the jurors with the judge's leave. The efficient conduct of the trial would be impeded were there no provision of that kind. However, the power to grant leave, whether to the officer who has charge of the jury or to another person, is to communicate with a juror or jurors while the jury is kept

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43 Devlin, *Trial by Jury*, rev ed (1966) at 41-42; Holdsworth, *A History of English Law*, (1938), vol 11 at 553-554; Blackstone, *Commentaries on the Laws of England*, 15th ed (1809), bk 3 at 375.

44 *R v Ketteridge* [1915] 1 KB 467 at 470 per Lush J (delivering the judgment of the Court); *R v Neal* [1949] 2 KB 590 at 595-596 per Lord Goddard CJ (delivering the judgment of the Court) and see *R v Crippen* [1911] 1 KB 149 at 155 per Darling J (delivering the judgment of the Court).

45 *Goby v Wetherill* [1915] 2 KB 674; *R v McNeil* [1967] Crim LR 540; *In re Osman* [1995] 1 WLR 1327.

46 *Smith v Western Australia* (2014) 250 CLR 473 at 481 [30]-[31]; [2014] HCA 3; *R v Pan* [2001] 2 SCR 344 at 373 per Arbour J (delivering the judgment of the Court); *R v Mirza* [2004] 1 AC 1118.

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together. It is not a power to grant leave to a person to be present during any part of the jury's deliberations.

35 The conclusion is reinforced by the absence of provision to administer an oath to an interpreter assisting a juror. This is by way of contrast with the elaborate provision that is made in the *Oaths Act* 1867 (Q) for the form of oaths to be administered in judicial proceedings to interpreters: in civil causes<sup>47</sup>; in civil causes on the voir dire<sup>48</sup>; on the arraignment of any person<sup>49</sup>; between a prisoner, defendant or witness and others in a criminal trial<sup>50</sup>; and where the witness and the prisoner are speakers of different languages<sup>51</sup>. The omission is of any provision to administer an oath requiring the interpreter to swear (or affirm) that he or she understands Auslan and shall "well and truly interpret" the proceedings and the jury's deliberations to the juror. The omission is also of any provision to administer an oath requiring the interpreter to swear (or affirm) that he or she shall not participate in the jury's deliberations or disclose anything about those deliberations except as allowed or required by law.

36 The conclusion is also reinforced by the treatment of the disclosure of jury information under s 70 of the Jury Act. Jury information, relevantly, is information about statements made, opinions expressed, arguments advanced, or votes cast, in the course of a jury's deliberations<sup>52</sup>. Section 70(2) makes it an offence for a person to publish jury information to the public. An Auslan interpreter in possession of jury information would be precluded from publishing that information on pain of criminal sanction. However, the prohibition on seeking the disclosure of jury information from a member or former member of the jury<sup>53</sup> would not apply to an Auslan interpreter. Nor would the prohibition on the disclosure of jury information if the person has reason to believe that any of

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47 *Oaths Act* 1867 (Q), s 26.

48 *Oaths Act* 1867 (Q), s 27.

49 *Oaths Act* 1867 (Q), s 28.

50 *Oaths Act* 1867 (Q), s 29.

51 *Oaths Act* 1867 (Q), s 30.

52 Jury Act, s 70(17).

53 Jury Act, s 70(3).



the information is likely to be or will be published to the public<sup>54</sup> apply to an Auslan interpreter.

37 It may be, as the appellant submits, that the secrecy of the jury's deliberations would not be compromised by the presence of an accredited Auslan interpreter in the jury room during the jury's deliberations. Nonetheless, Douglas J was right to hold that, absent specific legislative provision for that to occur, Queensland law does not permit an Auslan interpreter to be present during the jury's deliberations.

38 The Deputy Registrar rightly concluded that Queensland law did not permit an Auslan interpreter to assist the appellant while the jury was kept together. It followed that the appellant was incapable of effectively performing the functions of a juror<sup>55</sup>. This conclusion made the appellant ineligible for jury service<sup>56</sup>. A person who is not eligible for jury service is not qualified to serve as a juror<sup>57</sup>. The Deputy Registrar was required to exclude from the jury panel a person not qualified for jury service<sup>58</sup>. The Deputy Registrar was required under Queensland law to exclude the appellant from the jury panel. The exercise of the Deputy Registrar's powers in conformity with the command of the Jury Act did not infringe the ADA's prohibition on unlawful discrimination in the performance of a function or exercise of a power under Queensland law.

#### Order

39 There should be the following order:

Appeal dismissed.

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54 Jury Act, s 70(4).

55 Jury Act, s 4(3)(1).

56 Jury Act, s 4(3).

57 Jury Act, s 4(1)(c).

58 Jury Act, s 36(2)(b).

40 GAGELER J. The reasons for judgment of the plurality demonstrate that, as one of the functions of a juror under the Jury Act is to deliberate with other jurors in isolation in order to give a verdict, a person who requires the assistance of an interpreter in order to communicate with other jurors is a person who is incapable of effectively performing the functions of a juror within the meaning of s 4(3)(1) of the Jury Act.

41 What follows are my reasons for considering that conclusion to answer Ms Lyons' claim that the Deputy Registrar contravened the prohibition against discrimination in s 101 of the ADA. The Deputy Registrar's application of that meaning of s 4(3)(1) to exclude Ms Lyons from jury service did not amount to discrimination in the administration of the Jury Act within the meaning of the ADA.

42 The ADA explains that it achieves its purpose, of promoting equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity<sup>59</sup>, by prohibiting discrimination that is on a ground set out in Pt 2 of Ch 2, of a type set out in Pt 3, and in an area of activity set out in Pt 4, unless an exemption set out in Pt 4 or Pt 5 applies<sup>60</sup>.

43 Part 2 of Ch 2 of the ADA explains the prohibited grounds of discrimination in terms of discrimination on the basis of any one of a number of listed attributes, one of which is impairment<sup>61</sup>. Part 3 explains the prohibited types of discrimination to comprise "direct discrimination" and "indirect discrimination"<sup>62</sup>, the elements of which are explained in the reasons for judgment of the plurality. Critical to the disposition of the present case is that an implicit element of direct discrimination is that the attribute is a "substantial reason" for the relevant treatment<sup>63</sup> and that an explicit element of indirect discrimination is that the term imposed not be "reasonable"<sup>64</sup>.

44 Of the numerous areas of activity set out in Pt 4, that relevant for present purposes is administration of State laws and State Government programs. That area is dealt with within Pt 4 by s 101, which provides:

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59 Section 6(1) of the ADA.

60 Section 6(2) of the ADA.

61 Section 7(h) of the ADA.

62 Section 9 of the ADA.

63 Cf s 10(4) of the ADA.

64 Section 11(1) of the ADA.

15.

"A person who –

- (a) performs any function or exercises any power under State law or for the purposes of a State Government program; or
- (b) has any other responsibility for the administration of State law or the conduct of a State Government program;

must not discriminate in –

- (c) the performance of the function; or
- (d) the exercise of the power; or
- (e) the carrying out of the responsibility."

45 On the facts found by the Tribunal, the Deputy Registrar's exclusion of Ms Lyons from jury service was not in the performance of any function or the exercise of any power which she had as a delegate of the sheriff under the Jury Act. The exclusion rather occurred in the course of the Deputy Registrar carrying out responsibility for the administration of the Jury Act in a genuine attempt to give effect to s 4(3)(1)<sup>65</sup>.

46 There is no suggestion that any of the exemptions set out in Pt 4 or Pt 5 applied to the action of the Deputy Registrar. Nevertheless relevant is the exemption created by s 106, which provides:

"(1) A person may do an act that is necessary to comply with, or is specifically authorised by –

- (a) an existing provision of another Act; or

...

(2) In this section –

*existing provision* means a provision in existence at the commencement of this section."

47 At the time of the commencement of s 106 of the ADA in 1992, the Jury Act had not been enacted. Section 8(1)(s) of the *Jury Act* 1929 (Q) at that time prohibited the insertion in any jury list of the names of "persons who are blind, deaf, or dumb, or are of unsound mind or are otherwise incapacitated by disease

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<sup>65</sup> *Lyons v State of Queensland (No 2)* [2013] QCAT 731 at [57]-[58], [169].

or infirmity". Section 106(1)(a) of the ADA exempted a person who observed the prohibition in s 8(1)(s) in the course of administering that existing provision from compliance with s 101 of the ADA.

48 With the subsequent enactment of the Jury Act in 1995, s 106(1)(a) of the ADA had no application to exempt an act done by the Deputy Registrar in compliance with s 4(3)(l) of the Jury Act from the necessity for that act to comply also with s 101 of the ADA. Section 4(3)(l) was not an existing provision.

49 The question is then as to how those two statutory imperatives are to be reconciled. Ms Lyons answers that the application of s 4(3)(l) of the Jury Act by a person administering the Jury Act is controlled by s 101 of the ADA: s 4(3)(l) requires the making of a functional assessment and s 101 requires that assessment to be made in a non-discriminatory way. The State answers that the Jury Act impliedly repealed the ADA.

50 Ms Lyons' answer depends on reading s 4(3)(l) of the Jury Act as allowing for administrative choice in its application. That reading is not open. Functional though it is, s 4(3)(l) enacts no more than a definition. The definition is objective and self-executing. The definition is either met or not met independently of any action, inaction, knowledge or opinion of a person administering the Jury Act.

51 The State's answer is not compelling. It depends first on establishing that there is inconsistency between the Jury Act and the ADA and second on resolving that inconsistency in favour of the Jury Act. Establishing inconsistency encounters the presumption that the legislature intended both to operate<sup>66</sup>, a presumption which is reinforced by the limited carve-out from the operation of the ADA effected by s 106(1)(a). Resolving inconsistency in favour of the Jury Act would sit uncomfortably both with the enactment of the Jury Act against the background of s 101 of the ADA and with the avowed purpose of the Jury Act of ensuring that juries are more representative of the community<sup>67</sup>.

52 The better answer is that to act in the administration of the Jury Act solely to give effect to the definition in s 4(3)(l) is not to discriminate against the person to whom the definition applies either by way of direct discrimination or by way of indirect discrimination. Leaving the satisfaction of other elements of those two types of discrimination entirely to one side, the act cannot be direct discrimination because the sole reason for it is to give effect to the definition and

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66 *Saraswati v The Queen* (1991) 172 CLR 1 at 17; [1991] HCA 21; *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at 134 [4], 138 [18], 163 [109]; [2006] HCA 5.

67 Queensland, Legislative Assembly, Jury Bill 1995, Explanatory Notes at 1.

17.

the act cannot be indirect discrimination because (assuming the act to involve the imposition of a term) a term that does no more than give effect to the definition cannot be unreasonable.