

BETWEEN:



GAYE PRUDENCE LYONS
Appellant

10 AND:

STATE OF QUEENSLAND
Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION FOR INTERNET PUBLICATION

1. These submissions are in a form suitable for publication on the Internet.

PART II: CONCISE STATEMENT OF ISSUES

- 20 2. The central issue is whether a deaf person, who requires the special service of an Auslan interpreter to communicate, is eligible to be a juror in Queensland.
3. If that be so, the question is whether the decision by the Deputy Registrar of the Ipswich Courthouse to exclude the Appellant as ineligible to perform jury service on 15 February 2012 by reason of s.4(3)(l) of the *Jury Act 1995 (Qld)* (**Jury Act**) constituted unlawful direct and/or indirect discrimination in contravention of ss. 10(1) and/or 11(1) and s. 101 of the *Anti-Discrimination Act 1991 (Qld)* (**AD Act**).

PART III: CERTIFICATION REGARDING S78B OF THE *JUDICIARY ACT 1903*

- 30 4. The Appellant does not consider that any notice need be given in compliance with section 78B of the *Judiciary Act 1903 (Cth)*.

Filed on behalf of the Appellant by
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Dated: 15 April 2016

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PART IV: CITATION OF JUDGMENTS

5. The citation of the judgments below are:
 - a. *Lyons v State of Queensland (No 2)* [2013] QCAT 731
 - b. *Lyons v State of Queensland* [2014] QCATA 302
 - c. *Lyons v State of Queensland* [2015] QCA 159

PART V: BRIEF FACTUAL BACKGROUND

6. The Appellant is deaf and has been so since she was 10 years of age. She is an active member of the community.
- 10 7. Prior to her retirement from work in February 2014, the Appellant was in full-time employment as an office administrator.
8. Due to her impairment, the Appellant is unable to communicate using hearing and conventional speech. She is a proficient lip reader but her primary method of communication is Australian Sign Language (**Auslan**). When communicating with persons who cannot use Auslan, the Appellant requires an Auslan interpreter.
9. The Respondent is the State of Queensland through the Department of Justice and Attorney-General (**DJAG**), which is a department pursuant to ss. 14 and 15 of the *Public Service Act 2008* (Qld). The Sheriff of Queensland and the Deputy Registrar of the Ipswich Courthouse (**Deputy Registrar**) are public service employees of DJAG.
- 20 10. The Appellant was on the Queensland Electoral Roll in 2012 and remains so.
11. The Appellant was and is, subject to any exclusion under s. 4(3) of the *Jury Act*, qualified and eligible to be selected as a prospective juror: s. 4(1) of the *Jury Act*.
12. By delegation from the Sheriff of Queensland, the Deputy Registrar summonsed the Appellant for jury service on 25 January 2012.
13. On 6 February 2012, the Appellant notified the Deputy Registrar of her impairment and her requirement for an Auslan interpreter.
14. The Deputy Registrar determined to exclude the Appellant as a potential juror by reason of s. 4(3)(l) of the *Jury Act* and, on 15 February 2012, notified the Appellant that the decision had been made because:

- (a) there was no provision in the *Jury Act* to swear in an interpreter for a juror; and
- (b) it was not possible to have another person in the jury room other than the jurors and bailiff whilst deliberating.

15. On 22 February 2012, the Appellant sought an explanation for her exclusion from the jury selection process from the Deputy Registrar.

16. On 27 February 2012, the Deputy Registrar advised the Appellant that she had been excluded by reason of s. 4(3)(l) of the *Jury Act* which stipulates that a person is not eligible for jury service if they have: “..a physical or mental disability that makes the person incapable of effectively performing the functions of a juror.”

10 17. The Appellant commenced proceedings in the Queensland Civil and Administrative Tribunal (QCAT) alleging that the conduct of the Deputy Registrar constituted both direct and indirect discrimination on the grounds of impairment in contravention of the *AD Act* and in reliance on ss. 6(1), 7(h), 8, 9, 10 and 11 of the *AD Act*. The unlawful discrimination was alleged to have occurred in the provision of services, contrary to ss. 9 and 46 of the *AD Act*, or alternatively, in the administration of a State law (being the *Jury Act*) and program (the administration of the jury system) contrary to ss. 9 and 101 of the *AD Act*.

18. In relation to the allegation of indirect discrimination, the Appellant alleged that the Deputy Registrar imposed a “term” that the Appellant be able to communicate by conventional speech in the jury room, that such a condition was unreasonable and
20 that the Appellant was unable to comply with it.

19. During the proceedings, it was common ground that:

(a) Auslan communication is a characteristic that persons who are deaf generally have, within the terms of s. 8(a) of the *AD Act*, in the sense that it is a primary means of communication for such persons;

(b) Auslan is a “special service” within the meaning of s. 10(5) of the *AD Act*;

(c) no part of the Deputy Registrar’s decision was concerned with the faithful and correct interpretation of evidence by the Auslan interpreter; and

30 (d) no assessment had been undertaken to determine whether or not the Appellant’s deafness would impair her ability to understand the evidence and arguments and deliberate as a juror.

20. There is also no issue that but for the need for an Auslan interpreter the Appellant would have been able to perform the functions of a juror.¹

21. QCAT at first instance (**Tribunal**) found that the Deputy Registrar had erroneously interpreted the *Jury Act* but dismissed the complaint² on the following grounds:

(a) the Deputy Registrar's decision was not based on the Appellant's impairment but rather on the Deputy Registrar's application of the *Jury Act* to the effect that it did not permit an additional person in the jury room during deliberations;³

(b) the Appellant's impairment was not a substantial reason for the decision;⁴

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(c) the requirement for an Auslan interpreter was to be taken into account in determining whether there had been less favourable treatment;⁵

(d) the Appellant was bound by the precise formulation of her pleaded "term" for the purposes of determining indirect discrimination and no such term had been imposed by the Deputy Registrar.⁶

22. The QCAT Appeal Tribunal (**Appeal Tribunal**) dismissed the Appellant's appeal.⁷ In so doing it adopted the reasoning in *Re: the Jury Act 1995 and an application by the Sherriff of Queensland* [2014] QSC 113 (*Re Jury Act*). The QCAT Appeal Tribunal also found that:

(a) the decision by the Deputy Registrar to exclude the Appellant was not based on the Appellant's impairment, but upon the application of the *Jury Act*;⁸

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(b) the Appellant's requirement for an Auslan interpreter in the jury room was, by application of the principles in *Purvis v New South Wales*⁹ (**Purvis**), to be compared to another juror (who was not deaf) who wanted an additional person in the jury room and, in those similar or not materially different circumstances, there was no less favourable treatment of the Appellant;¹⁰

¹ *Lyons v State of Queensland* [2016] HCATrans 60 (11 March 2016) p. 11

² *Lyons v State of Queensland (No 2)* [2013] QCAT 731 at [211]

³ *Lyons v State of Queensland (No 2)* [2013] QCAT 731 at [169] and [171]

⁴ *Ibid.*

⁵ *Lyons v State of Queensland (No 2)* [2013] QCAT 731 at [138]

⁶ *Lyons v State of Queensland (No 2)* [2013] QCAT 731 at [177]

⁷ *Lyons v State of Queensland* [2014] QCATA 302 at [52]

⁸ *Lyons v State of Queensland* [2014] QCATA 302 at [32]-[34] and [41]

⁹ *Purvis v New South Wales* (2003) 217 CLR 92

¹⁰ *Lyons v State of Queensland* [2014] QCATA 302 at [49]

(c) s. 10(5) of the *AD Act* did not preclude a comparison based on the presence of the Auslan interpreter in the jury room, that is, an additional person in the jury room;¹¹

(d) the Deputy Registrar did not impose a term that the Appellant be able to communicate by conventional speech.

23. The Queensland Court of Appeal refused leave to appeal¹² because:

(a) it was available to the Tribunal and the Appeal Tribunal to find that the Deputy Registrar did not impose a term when she was applying the *Jury Act* to the Appellant;¹³

10 (b) the Deputy Registrar's decision was not based on the Appellant's deafness or her need for an Auslan interpreter and accordingly, the Appellant's impairment was not a substantial reason for the impugned conduct;¹⁴

(c) notwithstanding s. 10(5) of the *AD Act*, to take the Auslan interpreter (as an additional person in the jury room) out of the comparison was to disregard a relevant circumstance. Applying the principles in *Purvis* required leaving that additional person as part of the hypothetical comparator, and therefore there had been no less favourable treatment;¹⁵ and

(d) the Appellant had not established that she had any prospect of success in proving a misconstruction or misapplication of the *Jury Act*.¹⁶

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PART VI: ARGUMENT

Proper Construction of the Relevant Legislation

Anti-Discrimination Act, 1991 (Qld)

24. One of the purposes of the *AD Act* is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity: s. 6

25. International treaties including the *Declaration of the Rights of Disabled Persons* and

¹¹ *Lyons v State of Queensland* [2014] QCATA 302 at [38]-[40]

¹² *Lyons v State of Queensland* [2015] QCA 159 at [48]-[50]

¹³ *Lyons v State of Queensland* [2015] QCA 159 at [26] and [27]

¹⁴ *Lyons v State of Queensland* [2015] QCA 159 at [29] and [33]

¹⁵ *Lyons v State of Queensland* [2015] QCA 159 at [38]-[39]

¹⁶ *Lyons v State of Queensland* [2015] QCA 159 at [45]-[47]

the *International Covenant on Civil and Political Rights (ICCPR)* were relied upon by the Queensland Parliament as the basis for the obligations and provisions in the ADA. This is made clear in the Preamble to the Act.

26. The treaties were subsequently elaborated by *Convention on the Rights of Persons with Disabilities (CRPD)* and they stipulate the manner in which the human rights of people with disabilities ought be promoted and how adjustments ought be made to ensure that those rights are able to enjoyed. There are specific provisions that deal with how those rights extend to full participation in the legal and civic processes of society and equal treatment before the law.¹⁷

10 27. In the context of this case, the relevant provisions of the *AD Act* commence with section 7 which prohibits discrimination on the grounds of an attribute, and identifies “impairment” as one such attribute.

28. “Impairment” is defined in the Dictionary and relevantly includes the following:

(a) *the total or partial loss of the person's bodily functions, including the loss of a part of the person's body;*

.....

whether or not arising from an illness, disease or injury or from a condition subsisting at birth”

20 29. Discrimination on the basis of an attribute includes discrimination on the basis of a characteristic that a person with an attribute generally has or is often imputed to have: s. 8 of the *AD Act*.

30. Both direct and indirect discrimination are prohibited: s. 9, 10 and 11 of the *AD Act*.

31. Of particular importance in this case is s. 10(5) of the *AD Act* which provides that:

In determining whether a person treats, or proposes to treat a person with an impairment less favourably than another person is or would be treated in circumstances that are the same or not materially different, the fact that the person with the impairment may require special services or facilities is irrelevant.

32. The term “special services” is not defined in the *AD Act* but it was common ground between the parties that an Auslan interpreter is a “special service”.¹⁸

¹⁷ *Convention on the Rights of Persons with Disabilities: Preamble (b), (e), (h) & (k) and Articles 1, 2, 3, 4, 5, 12, 13, 21 and 29; International Convention on Civil and Political Rights Article 16, 25, 26*

¹⁸ *Lyons v State of Queensland (No 2)* [2013] QCAT 731 at [7] and *Lyons v State of Queensland* [2015] QCA 159 at [9]

33. A person who performs any function or exercises any power under a State law must not discriminate in the performance of that function or in the exercise of the power: s. 101 AD Act.

Jury Act 1995 (Qld)

34. The predecessor of the *Jury Act 1995 (Qld)* was the *Jury Act 1929 (Qld)*. Section 8(1)(s) of the *Jury Act 1929 (Qld)* exempted from jury service “persons who are blind, deaf, or dumb, or are of unsound mind or are otherwise incapacitated by disease or infirmity”

35. In contradistinction, s. 4(3)(l) of the *Jury Act* stipulates that certain persons are not eligible for jury service including “a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror.”

36. It must be inferred that Parliament incorporated this functional test as one designed to ensure that persons with a disability are not excluded from jury service merely on the basis of their status as a person with a particular impairment. Indeed part of the purpose of the *Jury Act* was to ensure more “representative juries”.¹⁹

37. In *Cheatle v The Queen*²⁰ this Honourable Court considered representativeness to be an essential feature of trial by jury:

“The relevant essential feature or requirement of the institution [of trial by jury] was, and is, that the jury be a body of persons representative of the wider community. It may be that there are certain unchanging elements of that feature or requirement such as, for example, that the panel of jurors be randomly or impartially selected rather than chosen by the prosecution or the State. The restrictions and qualifications of jurors which either advance or are consistent with it may, however, vary with contemporary standards and perceptions.”

38. Section 4(3)(l) of the *Jury Act* contemplates that there are circumstances in which a person with physical and/or mental disabilities will be incapable of performing the functions of a juror. The test requires an evaluation of the ability of the prospective juror to perform the functions of a juror. Such an approach is entirely consistent with the objectives of the *AD Act*²¹ in eliminating discrimination on the basis of irrelevant characteristics.

¹⁹ Explanatory Memorandum p. 1

²⁰ [1993] HCA 44; (1993) 177 CLR 541 at [19]

²¹ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71]; *Carr v Western Australia* (2007) 232 CLR 138 at 142-143; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193 at 207 [31] and 230 [124].

39. The Court retains the power to excuse a juror pursuant to s. 20 of the *Jury Act* but that provision was not enlivened in this matter. The Deputy Registrar's decision resulted in the refusal to allow the Appellant to be part of the jury selection process.
40. Jurors are sworn not to disclose anything about the jury's deliberations "*except as allowed or required by law*": s. 50 of the *Jury Act*. When the jury is together, other persons must not communicate with the jury "*without the judge's leave*": s. 54 of the *Jury Act*.
41. Whilst s. 70(3) of the *Jury Act* prohibits a person from seeking disclosure of jury information from a member of the jury, an interpreter would not be engaged in that conduct. Their role is strictly limited to the interpretation of what was being said.
42. There is no Australian common law rule that prohibits an Auslan interpreter from providing communication assistance to a deaf juror.
43. There is no prohibition on a "*13th person*" being in the jury room. An officer of the court is present and the judge may direct any other arrangement: s. 55 of the *Jury Act*. Correctly, the Tribunal held:

*"I accept the submission made on behalf the Complainant that there was nothing in the Jury Act per se which provides a complete prohibition upon there being any person in the jury room other than jurors during their deliberations. Nor is there any conclusive statutory result that would flow were such a person permitted. It is true that were another person present whose presence might lead to a miscarriage of justice might result in the verdict being vitiated, however, it is not immediately obvious why the presence per se of an interpreter who did nothing more than interpret, and did not for example personally participate in the deliberations, would mean that a verdict would be vitiated."*²²

44. The Appeal Panel took a different view in reliance on a decision of the Supreme Court of Queensland in *Re: the Jury Act 1991 and an application by the Sheriff of Queensland* [2014] QSC 113 (*Re: the Jury Act*). The Court of Appeal similarly placed reliance on that decision in which Douglas J misapprehended the interpreter as a "*13th juror*" and determined that express legislative provisions were required to ensure that the interpreter kept the jury deliberations secret.²³ With respect, His Honour does not appear to have been assisted by submissions as to the proper construction of the *Jury Act* in the context of the *Oaths Act* and the *AD Act*. The decision is wrong.

²² *Lyons v State of Queensland (No 2)* [2013] QCAT 731 at [170]

²³ *Re: the Jury Act 1991 and an application by the Sheriff of Queensland* [2014] QSC 113 at [6]

Oaths Act 1867 (Qld)

45. The *Oaths Act, 1867 (Qld)* (**Oaths Act**) provides for the swearing of jurors.²⁴ It also provides for oaths for interpreters “to interpret and true explanation make between the witness [or plaintiff or defendant] and the court and the jury and all persons conversant with the English language.”²⁵ (with a similar provision including “prisoners” for criminal trials).²⁶

46. There is an oath for a bailiff in charge of jury not to communicate with the jury or allow another to so communicate “unless such communication is authorised by the court or is otherwise authorised by law.”²⁷

10 47. There is no specific provision for an oath for an interpreter for jury deliberations.

Harmonious operation of the relevant legislation

48. The *Jury Act*, when construed consistently with the relevant provisions of the *AD Act*, allows for an Auslan interpreter to facilitate communication between a deaf juror and other jurors in their jury room deliberations so that a deaf juror has an equal opportunity to participate in the jury system, protected from unfair discrimination.²⁸

49. The restrictions on disclosure and communications with third parties contained in s. 50, 54 and 70 of the *Jury Act* are directed to communications with third parties about jury deliberations. It does not preclude information being given to the jury in the course of proceedings. Therefore there would be no prohibition on an Auslan interpreter being present during the course of the court proceedings. In relation to the jury room deliberations, the legislation contains sufficient powers to allow for the translation of information.

20 50. Section 50 permits disclosure “as allowed or as required by law”. If, as is contended, the *AD Act* requires that an Auslan interpreter be permitted for the Appellant to perform the functions of a juror, then disclosure in that limited circumstance is permissible. Similarly, the restriction contained on communication contained in s. 54 of the *Jury Act* and s. 31 of the *Oaths Act* is readily overcome by leave being granted by the Court to allow for the interpretation of communications between jurors in the jury room. In any event, in this circumstance, there is a real question as to whether

²⁴ ss. 21, 22,

²⁵ s. 26

²⁶ s. 29

²⁷ s.31

²⁸ In keeping with the purpose of the *AD Act* as set out in subsection 6(1).

translation would amount to disclosure or communication. Properly construed, an interpreter is a mere conduit of communication.

51. The absence of any provision in the *Oaths Act* to swear in an interpreter ought not be construed as amounting to a prohibition on an Auslan interpreter.²⁹ Clearly the combination of the extant oath for interpreters in the *Oaths Act*, combined with directions or orders from the Court granting the leave for the disclosure of jury deliberations to the interpreter or noting that it was allowed, would adequately deal with the issue of oaths and secrecy. In that regard, the findings *Re: the Jury Act 1995*³⁰ was misplaced. The Court of Appeal misdirected itself in finding that it was not necessary to form a concluded view about the correctness of that decision.
52. There is no inconsistency between the relevant provisions of the *Jury Act*, the *Oaths Act* and the provisions of the *AD Act*. A construction that gives effect to apparently competing statutes must be preferred where available.³¹ In this matter, the statutes are entirely capable of sensible and concurrent operation.³²
53. The harmonious construction of the *Jury Act*, the *Oaths Act* and the *AD Act* particularly in the context that a broad construction is to be afforded to the beneficial purposes of the *AD Act*,³³ tend to a conclusion that people with disabilities (and in particular people who are deaf and require interpreters) are not to be excluded from jury service.³⁴ It is a construction consistent with the common law principle of the protection of the representativeness of the jury system as stipulated in *Cheatle*. It is also a construction that is consistent with the common law recognition of human rights.³⁵

²⁹ By analogy, this Honourable Court held that the absence of any provision for a person with ambiguous gender identification in the Births, Deaths and Marriages Act (NSW), did not prohibit the recording of “non-specific” sex: *Registrar of Births, Deaths and Marriages (NSW) v Norrie* [2014] HCA 11 at [33]-[37] and [46]

³⁰ *Re the Jury Act and an application by the Sheriff of Queensland* [2014] QSC 113

³¹ *Australian Oil Refining Pty Ltd v Cooper* (1987) 11 NSWLR 277 at 280; *Kutner v Phillips* [1891] 2 QB 267 at 271-72; *Sarris v Penfolds Wines Ltd* [1963] SR (NSW) 10 at 11; *Parramatta City Council v Stauffer Chemical Co (Aust) Pty Ltd* [1971] 2 NSWLR 500 at 508-09; and *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue* [2003] NSWSC 697, [109]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [70]; see also *State of Queensland v Attrill & Anor* [2012] QCA 299

³² *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 585.

³³ *Waters v Public Transport Corporation* (1991) 173 CLR 349 per Dawson & Toohey JJ at 394

³⁴ *Rylands Brothers (Aust) Ltd v Morgan* (1927) 27 SR (NSW) 161 at 168-169.

³⁵ *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1

Indirect Discrimination: the failure to find the imposition of a term

54. The Court of Appeal erroneously determined that the Deputy Registrar did not impose a term or condition and did no more than apply s. 4(3)(l) of the *Jury Act*.³⁶
55. However, this was not a straightforward application of legislation. There was no explicit provision excluding people who are deaf from jury service, as was the case under the former *Jury Act 1929 (Qld)*.³⁷
56. Rather, the exercise undertaken by the Deputy Registrar involved her making an assessment of whether it was lawfully permissible for the Appellant to have an Auslan interpreter to enable her to perform the functions of a juror.³⁸
- 10 57. The Deputy Registrar determined:
- (a) that the presence of an Auslan interpreter was not permitted under the *Jury Act*; and
 - (b) there was no provision for the administration of an oath for an Auslan interpreter for a juror.³⁹
58. In adopting that interpretation, the Deputy Registrar was, axiomatically, imposing a term or condition on the Appellant that she not require an Auslan interpreter or, put another way, that she be able to communicate by conventional hearing and speech, in order to be able to “*effectively perform the functions of a juror*”.
59. As the Tribunal acknowledged, it may well have been that the Appellant would have
20 been permitted to participate in the jury selection process if she had been able to communicate with others by means of conventional speech.⁴⁰
60. Further, no part of the Deputy Registrar’s decision (nor of the Respondent’s case) involved a contention that an Auslan interpreter would not provide a faithful and accurate translation. The Respondent specifically disavowed any such contention.
61. A “term” includes a condition, requirement or practice, whether or not written: s. 11(4) of the AD Act. It is to be construed broadly. It can be explicit or implicit. It requires consideration of whether the alleged discriminator imposed “*any form of*

³⁶ *Lyons v State of Queensland* [2015] QCA 159 at [26] and [27]

³⁷ *see s. 8(1)(s)*

³⁸ Witness Statement of Katrina Britton dated 3 May 2013 at [43]

³⁹ Witness Statement of Katrina Britton dated 3 May 2013, Annexure KB29

⁴⁰ *Lyons v State of Queensland (No 2)* [2013] QCAT 731 at [177]

qualification or prerequisite to the aggrieved person obtaining the status or benefit to which he or she claims entitlement: *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 360, 393 and 407.

62. Whilst the term must be formulated with some precision⁴¹, an applicant is not to be bound by his or her pleaded formulation. It is the role of the Tribunal or Court to ascertain whether a term has been imposed: *New South Wales v Amery* (2006) 230 CLR 174 per Callinan J at 233 at [208].
63. Whether the Deputy Registrar was aware of the imposition of the term or discriminatory effect of it is irrelevant: s. 11(3) of the AD Act.
- 10 64. The effect of the Deputy Registrar's interpretation of the *Jury Act* was to impose a term on the Appellant's ability to effectively perform the functions of a juror because the corollary of not having an Auslan interpreter was that the Appellant was obliged to be able to communicate by conventional hearing or speech.
65. The Full Court of the Federal Court in *Catholic Education Office & Anor v Clarke* (2004) 138 FCR 121, found unlawful indirect discrimination as a result of the imposition of a condition or requirement⁴² to the effect that a student undertake schoolroom instruction without the assistance of an Auslan interpreter. The Court of Appeal misconstrued s. 11 of the AD Act in not adopting that or a similar construction.
- 20 66. Given that there was no contention that the other criteria in s. 11 of the AD Act were satisfied,⁴³ if it is determined that such a term was imposed, then it follows that the Respondent engaged in unlawful indirect discrimination.

Direct Discrimination: failure to find causation

67. The Tribunal, the Appeal Tribunal and the Court of Appeal found that the decision of the Deputy Registrar was made by reason of the application of s. 4(3)(l) of the *Jury Act* and not because of the Appellant's deafness. As such, causation was not established.
68. The Tribunal reached this conclusion despite also finding that the interpretation of the

⁴¹ *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 at 185

⁴² Pursuant to s. 6 of the *Disability Discrimination Act, 1992 (Cth)* but the notion of a term or condition is effectively the same

⁴³ *Lyons v State of Queensland (No 2)* [2013] QCAT 731 at [190] in terms of reasonableness and it is self evident that the Appellant and other persons who are deaf could not comply with the term.

Jury Act adopted and applied by the Deputy Registrar was incorrect.⁴⁴ The Court of Appeal held that it was immaterial as to whether the Deputy Registrar's interpretation was correct or incorrect.⁴⁵ With respect, that is a flawed approach. It cannot be a straightforward application of the legislation if the very decision impugned involved an incorrect interpretation of the Act.

69. The conduct complained of was the Deputy Registrar's decision-making in relation to the Appellant's request for an Auslan interpreter.

70. The Deputy Registrar excluded the Appellant from the jury selection process because the Deputy Registrar formed the view that there was no provision in the *Jury Act*⁴⁶ (sic) to swear in an Auslan interpreter and that it was not possible to have another person in the jury room other than the jurors and bailiff whilst the jury was deliberating.⁴⁷ The decision was therefore directed to the Appellant's need for an Auslan interpreter.

71. The need for an Auslan interpreter is a characteristic that a deaf person generally has or is often imputed to a person who is deaf. That is common ground.⁴⁸

72. This was made plain in the Deputy Registrar's email to the Appellant directing her that if a new jury summons was issued to the Appellant, she should note on her return questionnaire that she is a deaf person.⁴⁹

73. There was also a failure to properly construe s. 10(4) of the *AD Act* which provides that it is not necessary that the only or all of the reasons for the less favourable treatment be referable to a prohibited attribute, it is only necessary for the prohibited attribute to be a substantial reason.

74. In addition, the Appeal Tribunal confused and merged its inquiry about causation (s. 10(4) of the *AD Act*) with the inquiry as to who was the correct comparator (s. 10(1) of the *AD Act*). Instead of asking itself whether the Appellant's deafness formed part of the decision-making to exclude her from the jury selection process, it asked itself the wrong question being whether a person who was not deaf but wanted to have an additional person with them as part of the jury process would be treated less favourably. This analysis also involved a misconstruction of s. 10(5) of the *AD Act* and

⁴⁴ *Lyons v State of Queensland (No 2)* [2013] QCAT 731 at [70], [180] – [182], [187] and [201]

⁴⁵ *Lyons v State of Queensland* [2015] QCA 159 at [40]-[44]

⁴⁶ Witness Statement of Katrina Britton dated 3 May 2013, Annexure KB29

⁴⁷ *Lyons v State of Queensland (No 2)* [2013] QCAT 731 at [38]

⁴⁸ *Lyons v State of Queensland (No 2)* [2013] QCAT 731 at [6];

⁴⁹ Witness Statement of Katrina Britton dated 3 May 2013, Annexure KB29

a misapplication of the principles in *Purvis* (discussed below). The Court of Appeal failed to find error in that approach.

75. The High Court in *Waters v Public Transport Corporation*⁵⁰ held that a discriminator ought not be allowed to evade the implications of anti-discrimination legislation by re-defining for itself the activities of which the aggrieved person complained. That is what occurred in this matter.
76. It is ineluctable that the Appellant's deafness (attribute) was the basis for the Deputy Registrar decision with respect to the Appellant and deciding the Appellant would not be able to perform jury service and excusing her from jury attendance. Applying *Dovedeen Pty Ltd & Anor v GK*⁵¹ and *JM v QFG and GK*⁵² on the question of causation and Dovedeen's "even narrower approach to the resolution of what actuated particular conduct"⁵³ led the Court of Appeal and Tribunals below into this error. Both of those decisions were wrong.
77. The only test for causation that ought to have been applied was that set out in *Purvis*, in which, having had regard to *Australian Iron & Steel Pty Ltd v Banovic*⁵⁴ and *Waters v Public Transport Corporation*,⁵⁵ this Court held it was the 'true basis' or 'real reason' for the act or decision.
78. The Deputy Registrar's decision to exclude the Appellant from the jury selection process cannot be isolated from the matters that gave rise to that decision including and significantly, the Appellant's deafness. To do otherwise would frustrate the purpose of the legislation, set out in s. 6 of the AD Act. It would permit the Respondent to avoid its responsibilities under the AD Act by means of a highly artificial, technical, non-normative and reductive theory of causation.

Direct discrimination: "special services" and the misapplication of *Purvis*

79. The Court of Appeal misconstrued s. 10 of the AD Act by:

(a) construing subsection 5(2) of the *Disability Discrimination Act, 1992 (Cth)* as "having precisely the same effect as s 10(5) [of the AD Act], of rendering the

⁵⁰ (1991) 173 CLR 349 at 394

⁵¹ [2013] QCA 116

⁵² [1998] QCA 228

⁵³ *Lyons v State of Queensland (No 2)* [2013] QCAT 731 [124]

⁵⁴ (1989) 168 CLR 165

⁵⁵ (1991) 173 CLR 349 per McHugh and Kirby JJ (at [147], [157] and [167], and Gleeson CJ (at [13]

requirement for services irrelevant”⁵⁶ and applying *Purvis*;

- (b) construing the “*presence of an outsider in the jury room*” in the context of the Appellant’s circumstances *as not a question of needing a special service*⁵⁷; and
- (c) adopting the Tribunal’s “*regard to that consideration [the perceived impossibility of an interpreter, as a person extraneous to the jury, being present in the jury room] as part of the circumstances of the relevant treatment in formulating the comparator of a person with hearing seeking the assistance of another in the jury room.*”⁵⁸

10 80. Subsection 10(5) of the *AD Act* must have work to do. Auslan interpretation is a special service provided as a form of live assistance by a natural person. The service of Auslan interpretation is not separate and cannot be divorced from the person who provides it. However, that is precisely what the Court of Appeal did in construing the relevant circumstances of comparison between the Appellant and the hypothetical comparator as including the presence of a mere outsider or 13th person in the jury room.

20 81. The Appellant’s circumstances and impairment are distinguishable from those in *Purvis*. In that case, the same or not materially different circumstances at issue (violent and anti-social behaviour) were a characteristic and manifestation of the child’s disability. That behaviour was not a “special service or facility”. Accordingly and properly, “[h]is violent actions towards teachers and others formed part of the circumstances in which it was said he was treated less favourably than other pupils”.⁵⁹ The requirement for an Auslan interpreter is not in that category. Auslan interpretation is a special service facility assimilated to the protected attribute.

82. Section 10(5) of the *AD Act* is a statutory protection against evasion of the prohibition on discriminatory conduct by using “characteristics as “proxies” for discriminating on the basic grounds covered by the legislation”.⁶⁰

⁵⁶ *Lyons v State of Queensland* [2015] QCA 159 at [38].

⁵⁷ *Lyons v State of Queensland* [2015] QCA 159 at [39].

⁵⁸ *Ibid.*

⁵⁹ *Purvis* at 161 [225] per Gummow, Hayne and Heydon JJ.

⁶⁰ *Purvis* at 134 [130] per McHugh and Kirby JJ.

PART VII: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

83. The applicable statutory provisions, as in force as at 15 February 2012 (and as still in force are set out in Annexure A:

- a. *Anti-Discrimination Act 1991 (Qld): ss. 6(1), 7(h), 8, 10, 11, 46 & 101*
- b. *Jury Act 1995 (Qld): ss. 4(1), 4(3)(l), 20, 50, 54, 55, 56 and 70*
- c. *Oaths Act 1867 (Qld) ss. 21, 22, 26, 27, 28, 29, 30, 31, 31A, 35, 37, 38, 39 & 40*
- d. *Convention on the Rights of Persons with Disabilities: Preamble (b), (e), (h) & (k) and Articles 1, 2, 3, 4, 5, 12, 13, 21 and 29*
- e. *International Convention on Civil and Political Rights Article 16, 25, 26*

10 84. Other materials contained in Annexure A are:

- f. *The Jury Act 1929 (Qld) (repealed): s. 8*
- g. *Explanatory memorandum to Jury Bill 1995 (Qld)*

PART VIII: ORDERS SOUGHT

85. The Order made by the Court of Appeal on 28 August 2015 be set aside.

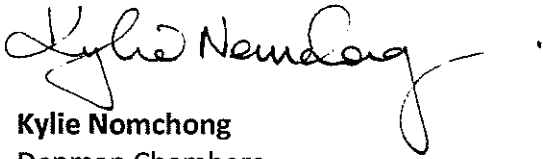
86. In substitution thereof, an Order be entered that the Respondent contravened ss. 10 and 11 of the *Anti Discrimination Act 1991 (Qld)* when, on 15 February 2012, it refused to permit the Appellant to participate in the jury selection process.

20 87. An Order remitting the proceedings to the Queensland Civil and Administrative Tribunal for the purposes of determining the question of remedy pursuant to s. 209 of the *Anti Discrimination Act 1991 (Qld)*.

PART IX: ESTIMATE OF TIME

88. It is estimated that the Appellant's oral argument will require 1 hour to present.

Dated: 15 April 2016



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