IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO: B16 of 2016**

BETWEEN: **GAYE PRUDENCE LYONS**
Appellant

AND

THE STATE OF QUEENSLAND
Respondent

RESPONDENT'S SUBMISSIONS

Part 1: Certification for publication

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

Part II: Statement of issues

2. The Respondent contends that the appeal presents the following issues:
   a. Does s.4(3)(1) of the *Jury Act 1995* (Qld) render ineligible for jury service a person who is deaf?
   b. If it does, does such exclusion constitute unlawful discrimination under the *Anti-Discrimination Act 1991* (Qld)?
   c. If it does not, did the Deputy-Registrar's decision involve unlawful discrimination because her decision rested upon her wrong interpretation of the *Jury Act* as containing a prohibition against interpreters being permitted to remain in the jury room?

Part III: Section 78B notices

3. Not applicable.

Part IV: Facts

4. The Respondent does not contest any of the material facts set out in the Appellant's narrative of facts.

Part V: Applicable provisions

5. The provisions identified by the Appellant are accepted. Further provisions are relevant, namely ss. 6, 10, 15, 16, 24, 36, 51, 42, 43, 44, and 47 of the *Jury Act*, s. 106 of the *Anti-Discrimination Act* and s. 604 of the Criminal Code (Qld). Also relevant are s. 10 of *Juries Act* 1967 (ACT), Schedule 7 *Juries Act* 1967 (NT), s. 13 *Juries Act* 1927 *(SA),* Schedule 2 *Juries Act* 2003 (Tas), Schedule 2 *Juries Act* 2000 (Vic), s. 34E *Juries Act* 1957 (WA). Copies of those provisions are attached to these submissions.

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Part VI: Statement of Respondent's argument[1]

6. It has been held that section 80 of the Constitution adopts trial by jury "with all that was connoted by that phrase in constitutional law and in the common law of England".[2] Although it is impossible to comprehensively define all that is involved in trial by jury, in the context of s.80 of the Constitution this Court has held that, when an issue arises concerning whether something is consistent or is inconsistent with trial by jury, it is necessary to distinguish "an essential element of trial by jury" from an inessential feature.[3] In a passage cited with approval by Gaudron, Gummow and Hayne JJ in *Brownlee v The Queen*[4], Professor AW Scott said:

> Only those incidents which are regarded as fundamental, as inherent and of the essence of the system of trial by jury, are placed beyond the reach of the legislature. The question of the constitutionality of any particular modification of the law as to trial by jury resolves itself into a question of what requirements are fundamental and what are unessential, a question which is necessarily, in the last analysis, one of degree. The question, it is submitted, should be approached in a spirit of open-mindedness, of readiness to accept any changes which do not impair the fundamentals of trial by jury. It is a question of substance, not of form.[5]

7. The question in this appeal is not whether a State Act that disqualifies a deaf person from jury service is unconstitutional; it is whether a State statute should be construed as having that effect. It is submitted that that task of interpretation is informed by the identification of the essential features of trial by jury that are relevant to issue at hand. The statute should not be interpreted so that it impinges upon an essential feature of a jury trial – whether by excluding or by including the Appellant as a qualified person.

8. In *Butera v DPP (Vic)*[6], Mason CJ, Brennan and Deane JJ said:

> The adducing of oral evidence from witnesses in criminal trials underlies the rules of procedure which the law ordains for their conduct. A witness who gives evidence orally demonstrates, for good or ill, more about his or her credibility than a witness whose evidence is given in documentary form. Oral evidence is public; written evidence may not be. Oral evidence gives to the trial the atmosphere which, though intangible, is often critical to the jury's estimate of the witnesses. By generally restricting the jury to consideration of testimonial evidence in its oral form, it is thought that the jury's discussion of the case in the jury room will be more open, the exchange of views among jurors will be easier, and the legitimate merging of opinions will more easily occur than if the evidence were given in writing or the jurors were each armed with a written transcript of the evidence. And there are, of course, logistical and financial obstacles to the provision of general transcripts for each juror. If the general body of evidence is given orally, a written transcript of a part of the evidence available in the jury room tends to give an emphasis and perhaps an undue air of credibility to that part.[7]

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[1] The Respondent seeks the Court's leave to file the notice of contention annexed to the affidavit of Ms Hamilton. Ms Hamilton deposes to the Registry refusing to allow the notice to be filed when an attempt was made to do so two business days out of time. Ms Hamilton deposes that the failure to file the notice in time was due to an oversight as to the period for filing the notice. The contentions set out in the notice are in accordance with the Respondent's pleaded case at first instance and on appeal (see Respondent's amended response to applicant's points of claim at paragraph 12(p), submissions to the Appeal Tribunal at paragraphs 63-76, the Respondent's notice of contention to the Court of Appeal, the Respondent's submissions to the Court of Appeal at paragraph 43, and pages 49-50 of the transcript of the Court of Appeal proceedings). Further, it is in the public interest that the contentions be decided.

[2] *R v Snow* (1915) 20 CLR 315 at 323 per Griffiths CJ.

[3] *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375 per O'Connor J; *Cheatle v The Queen* (1993) 177 CLR 541 at 552; *Brownlee v The Queen* (2001) 207 CLR 278 at [9], [28], [53], [54], [64].

[4] *Brownlee v The Queen* at [55].

[5] *Trial by Jury and the Reform of Civil Procedure*, (1918) 31 Harvard Law Review 669.

[6] (1987) 164 CLR 180 at 189.

[7] and see the *dictum* of Heydon J in *Gately v The Queen* (2007) 2332 CLR 208 at [121].

9. The question in this case may be re-stated as follows: would the use of an interpreter to inform a deaf juror about the content of all aural evidence given at a trial impinge upon any of the essential features of a jury trial?

10. It is an essential feature of a jury trial that evidence that can be given orally must, in general and subject to statutory exceptions, be given *viva voce*[8] and must be given directly to the jury under the supervision and control of a judge. It is submitted that judicial consideration of the status, as evidence, of recordings of noises and of speech is informative for the resolution of this appeal.

11. In *Conwell v Tapfield*[9], the New South Wales Court of Appeal considered the admissibility of transcripts of recorded conversations. Street CJ said:

> In my view the question is to be answered by the application of the best evidence rule. What is the best evidence of the sounds entrapped in the record? It seems to me that there can be only one answer to this question, namely, the best evidence is the reproduction of those sounds as sounds when the record is played... Much of the confusion that has crept into the cases stems from the fact that normally it is the human voice that is recorded and, when reproduced, this is commonly done in writing. But if, say, the relevant evidence was a screech of tyres before a collision and that had been recorded, there would be no denying that the best method of placing this evidence before the court would be by playing the record. There is not the slightest difference in basic principle where the recorded sound is the human voice.[10]

12. Street CJ also considered the problem raised by indistinct recordings:

> Again, if the record is not audible and intelligible to a degree to be meaningful when the sounds are directly reproduced from it, it is permissible to provide whatever expert aids the judge considers to be necessary in order to gain access to the sounds entrapped in it. This could involve admitting into evidence the results of expert examination of the record outside of court... It would, of course, be necessary for the expert to be called to give an account in evidence of what was involved in his examination outside the court and the results of it. It may be that the best evidence, in the sense of the only practicable evidence, of the result would be the oral evidence of the expert of the words he was able to discern and identify outside the court, and that as an aid to giving his oral evidence he could be permitted to refer to the transcription made by him outside the court of those words. But this does not involve the transcription itself being admitted into evidence.[11]

13. In *Gately v The Queen*[12], this Court considered the character of the pre-recorded evidence of a complainant child to be adduced under Div.4 Part 2 of the *Evidence Act* (Qld) and the use that could be made of it by a jury. The question concerned the significance of having permitted the jury to have the recording in the jury room. Hayne

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[8] It is submitted that this feature is part of an overarching requirement of courts founded upon the common law tradition that evidence that is adduced be the "best evidence" that can be adduced. This has resulted in the requirements contained in the rule against hearsay, the parol evidence rule, the secondary evidence rule concerning documents, and so on. Common law "exceptions" to such rules generally constitute occasions when an apparent infringement of the principle is in truth not an infringement. Statutory exceptions are examples of restrictions upon the operation of the principle by reference to the demands of proportionality; eg, the statutory provisions that permit recorded evidence of children to be tendered in cases involving sexual offences. A discussion of "best evidence" as a foundation for oral evidence in *Butera (supra)* at 195-197 *per* Dawson J; at 202-207 *per* Gaudron J; and *per* Street CJ in *Conwell v Tapfield, post.*

[9] (1981) 1 NSWLR 595. In 1966, the English Court of Appeal ruled, for the first time, that tape conversations containing confessional material could be proved by the production of tape recordings. The Court also considered whether a transcript of the recorded conversation was admissible "as a matter of law". The Court answered that question in the affirmative "[p]rovided that a jury is guided by what they hear themselves and upon that they base their ultimate decision: *R v Maqsud Ali* (1966) 1 QB 688 at 701.

[10] *ibid.* at 598 E-F.

[11] *ibid.* at 599 E to G; cited with approval by Mason CJ, Brennan and Deane JJ in *Butera, (supra),* at 185.

[12] (2007) 232 CLR 208.

J[13] said that "the evidence is what the child says, and ... the record itself is not the evidence"[14] and observed that that conclusion was reinforced by the fundamental characteristics of a criminal trial.[15] As a result, "seldom, if ever, will it be appropriate to admit the record of that evidence as an exhibit"[16].

14. In *Butera,* Mason CJ, Brennan and Deane JJ had also said:

> But it is not the tape, it is the sounds produced by playing it over, which is the evidence admitted to prove what is recorded ...
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> ... A tape recording which is indistinct may not yield its full content to the listener on its first playing over. It may need to be played over repeatedly before the listener's ear becomes attuned to the words or other sounds recorded. This situation has led courts to receive transcripts not as evidence of the conversation or other sounds recorded but as a means of assisting in the perception and understanding of the evidence tendered by the playing over of the tape.
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> ... In *Hopes v Her Majesty's Advocate* [citation omitted] the evidence (set out in a transcript) of a person who listened to an indistinct tape played over out of court was held to be "very doubtfully competent" on the ground that it was primary evidence by an ad hoc expert of the tape's content. With respect, it seems better to acknowledge that such a transcript is merely an aid to the jury's understanding of the evidence derived from playing over the tape in court.[17]

15. These authorities acknowledge and apply, to a specific problem, the fundamental principle that each juror is required to sense for himself or herself the content of the oral evidence that is adduced and then apply that personal appreciation to the deliberation of the question of guilt or innocence. A jury's deliberations as well as the jury's verdict are based upon every juror's own appreciation of what he or she has sensed, has understood and has concluded about the evidence. So entrenched is this principle of juror autonomy that this Court's consideration of its application to the relatively recent issue raised by electronic recordings has resulted in a requirement to treat such recordings, the medium containing the recording and also any transcripts of recordings in a particular way.

16. Yet, in the case of a deaf juror there is an obvious inability of deaf persons, as jurors, "to be guided by what they hear themselves", to use the words of the English Court of Appeal in *R v Maqsudal*[18].

17. Indeed, but for the existence of this principle as an essential feature of trial by jury the problem in this case could be made to go away by the provision of an official transcript of proceedings to the appellant. The use of an interpreter is *a fortiori* because of the risk of inaccuracy of interpretation and other obstacles dealt with below. Because of the principle demonstrated by these cases, it is submitted that only legislation could authorise the wholesale reception of evidence by transcript and even then the constitutional validity of such legislation would be in issue.

18. In *Butera,* the problem of adducing evidence by way of recorded conversations was heightened by the fact that the recorded speakers used several foreign languages. Two interpreters interpreted the words and gave oral evidence of their respective translations. They were cross examined about the accuracy of those interpretations. They also

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[13] with whom Gleeson CJ [3] and Crennan J [126]and, on this point, Heydon J [111] agreed.
[14] *Ibid.* at [89].
[15] His Honour had referred to the dictum from *Butera* (1987) 164 CLR at 189 cited above.
[16] *Ibid.* at [92].
[17] *Butera (supra)* at 186, 187, 188.
[18] (1966) 1 QB 688 at 701.

produced written versions of their interpretations which were admitted as documentary evidence. On appeal, the admissibility of these written translations was in issue.

19. In *Butera* there had also been a controversy at trial about the accuracy of the translation. In the Punjabi language meaning is sometimes inferred from context. Some Punjabi words bore meanings in addition to those adopted in the translations.[19] An issue of bias in translation also arose.[20]

20. Dawson J said that for a transcript to be admissible, it must be proved that:

> ... it faithfully transcribes what is on the tape and, if it is a translation, that it properly translates the language used. The person giving that evidence will be subject to cross-examination and, if the transcription or translation, or a combination of both, is contested, then the matter may be fully aired as it was in this case. The weight given by a jury to the evidence constituted by the transcript may be much affected by such a cross examination.[21]

21. Gaudron J said:

> Although a translation is not merely the giving of a dictionary equivalent of each foreign word used, none the less evidence as to meaning is not properly characterised solely as opinion evidence. It is more appropriately characterised as expert evidence... When translation evidence is given it is given as to the English words which have, as between speakers of the English language, the same effect as the foreign words in fact have as between speakers of the foreign language ...[22]

22. Because of these features of evidence by interpreter, a jury is never left unsupervised and unassisted to consider an interpretation that might be questionable. The translation can be subjected to testing by an opposing translation and the jury has the benefit of its own appreciation of the force of any cross-examination on differences to draw upon. Even the interpretation of a sworn court interpreter giving a translation of oral evidence can be the subject of monitoring if a party chooses to engage another interpreter for that purpose.

23. The translations are given as part of the evidence in the hearing of the parties and of the judge as part of the trial. Errors can be detected and dealt with during the trial itself. The possibility for differences in interpretation is even acknowledged in the court's processes itself; in Queensland, juries are directed that when witnesses give evidence by interpreter the evidence that they must "consider is that provided through the Court appointed interpreter.[23]" They are directed that even if they "know the non-English language used" they must base their "decision on the evidence presented in the interpretation" and "disregard any other meaning of the non-English words"[24].

24. As a consequence of all of these protective steps, every single juror has heard exactly the same evidence and relies only upon that commonly received and perceived evidence.

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[19] *Butera* at 212 per Gaudron J.
[20] *ibid.* at 213.
[21] *ibid.* at 198.
[22] *ibid.* at 208-209.
[23] Supreme and District Courts Benchbook, 21.1. That refers to *US v Franco* 136 F3d 622, 626 (9th Cir 1998).
[24] *Ibid.*

25. Here, the evidence at trial showed that an Auslan interpreter is not a mere "conduit", as submitted by the Appellant[25]. At the hearing at first instance, the Appellant called Professor Napier, an expert in Auslan interpretation. According to Professor Napier's evidence, Auslan interpretation:

    a. is not literal interpretation[26];

    b. does not correspond precisely with the spoken word[27];

    c. involves "adaptation" of the source text to make the "deeper meaning...felt in the target language and culture" [28];

    d. involves "rendering of the message of the source text...as perceived by the interpreter" [29];

    e. involves alteration of the message to convey the interpreter's perception of the tone of that message (such as anger, sadness or sarcasm) [30]; and

    f. involves alteration of the message to reflect the interpreter's perception of the significance of pauses in the way that the evidence is given[31].

When it was put to Professor Napier that an interpreter merely conveys his or her perception of the significance of matters such as the tone in which words are spoken, Professor Napier responded:

> Well, yes. To a degree that the interpreters are trained to understand the way that language works and what the significance is of different elements of speech or sign.

26. That an Auslan interpretation is not a direct translation is illustrated by evidence tendered of some studies in which Professor Napier was involved. Those studies examined the accuracy of an Auslan interpreter's interpretation of a judge's summation to a jury. The first study found only 80% accuracy[32]. That study was considered to be flawed because it was based on texts taken from different parts of the trial and therefore the interpreters' ability to render an accurate interpretation was hampered[33]. In the two subsequent studies, it was found that an Auslan interpretation of a judge's summation did not convey 9 of the 72 legal concepts referred to in the summation[34]. The following is an example of the difference between the words spoken by the Judge and the Auslan translation[35]:

Actual words used by the judge:

> 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

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[25] Appellant's submissions at paragraph 50.
[26] Transcript day 1, page 48.41.
[27] Transcript day 1, page 49.1.
[28] Transcript day 1, page 48.20-35.
[29] Transcript day 1, page 50.20-25.
[30] Transcript day 1, page 50.30-40.
[31] Transcript day 1, page 50.40-45.
[32] Transcript day 1, page 52.20.
[33] *Ibid.*
[34] Transcript day 1, page 53.1 and 55.5
[35] Figure 2 on page 41 of Exhibit "JN-2" to Professor Napier's statement (Research Report 114 "Deaf juror's access to court proceedings via sign language interpreting: An investigation". See also the translation transcripts appearing on pages 39-40 of that report.

> 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.

Interpretation of Auslan interpreter:

> 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".

27. Such an error if made by the judge would involve a substantial miscarriage of justice[36].

28. The version of the evidence heard by the Appellant might not only contain errors of this kind; it might also include the interpreter's opinion of the "deeper meaning" of the words spoken by witnesses. It would also include the interpreter's alteration of the source text to convey the interpreter's personal feeling of the witnesses' tone (such as anger, sadness or sarcasm) and use of pauses.

29. Alone of the 12 jurors, the Appellant would hear her own, private, non-aural re-presentation of the oral evidence, counsel's questions and speeches and the judge's directions, possibly wrong, and without supervision or hope of correction for error[37].

30. There are other potential obstacles to a deaf juror being seized of the evidence. Some evidence might involve not only recordings of sound but descriptions of sound. This might range from descriptions of the quality of noises heard or the quality, volume or accent of a voice, or the nature of a piece of music. All of these kinds of evidence would be incomprehensible to any person who has always been deaf.

31. The use of interpreters, attended as it is with the risk of inaccuracy, is accepted by legal rules when the risk of inaccuracy inherent in such use is proportionate to the weighty requirement that a court ought to consider all the relevant evidence[38]. When these factors are disproportionate, the interpreted evidence is rejected. Such a balancing of the rights of one of the parties to restrict evidence, against the right of the other party to adduce relevant evidence, and the overriding requirement that trials be fair, has no parallel in this case. In construing the statutory provision, the right of a citizen to serve as a juror (which it can be accepted exists as inherent in the concept of representativeness as part of trial by jury) cannot outweigh the respective rights of the parties to a trial that is fair. There can be no justification for construing the clause to

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[36] *Handlen v The Queen* (2011) 245 CLR 282.

[37] It is inconceivable that such a translation could be monitored by a consultant engaged for that purpose by the defence or Crown and that the trial could be interrupted as any alleged inaccuracy is subjected to judicial adjudication upon some novel form of *voir dire*.

[38] *Cf. Proportionality: constitutional rights and their limitations, Cambridge University Press,* Aharon Barak, 2012, at 389; *The Constitutional Structure of Proportionality,* Oxford University Press, Klatt and Meister, 2012, at 8.

qualify the Appellant for jury service if to do so means trimming one of the essential features of trial by jury. The right of persons to serve on a jury is overridden on a daily basis to ensure a fair trial – by way of peremptory challenge, challenge for cause, removal for misconduct or perceived bias, by disqualification based upon employment or office and many other factors. Typically, the right is given very little weight in the calibration of proportionality.

32. An accused who pleads not guilty is deemed to have demanded that the issues raised by the plea be tried by a jury[39]. That demand enlivens the mandatory entitlement of the accused to have those issues tried by a jury constituted in accordance with law[40].

33. One of the essential features of a trial by jury is that the trial is conducted under the supervision of a judge who controls what the jury sees and hears and who controls the use that can be made by the jury of what it sees and hears[41]. The translation provided to a deaf juror by an Auslan interpreter in court and in the jury room during deliberations will be beyond the supervision of the trial judge.

34. Section 4(3)(1) of the Act requires, as a condition of eligibility to serve, that a person can perform "the functions of a juror". Having regard to the nature and object of a jury trial, it is submitted that those functions are non-delegable. It follows that a juror cannot rely on others, particularly non-jurors, to be told what the evidence is.

35. Moreover, an Auslan interpreter is not a randomly selected layperson subject to the accused's rights of challenge to the composition of the jury. But the Auslan interpreter would become part of the tribunal of fact by:

    a. Interpreting the evidence; and

    b. Interpreting what others say in deliberations.

36. In addition, the Appellant's use of an Auslan interpreter to participate in jury deliberations would result in the presence in the jury room of a non-layperson whose services are paid for by the State and whose presence in the jury room is not subject to the accused's rights of challenge. The extent to which such a person has influenced the deliberations of the jury can only be known by that person[42]. The issues raised concerning the interpretation of oral evidence would not be diminished once the jury retires to consider its verdict. The scope of error and loss of information would be exacerbated by the risk of an interpreter failing to pick up cross-talk.

37. In Queensland, presumably for reasons equally applicable to deaf jurors, s.4(3)(k) of the *Jury Act* disqualifies from jury service persons who are not able to read or write the English language. Statutes in the Australian Capital Territory, South Australia, Tasmania and Victoria make the same provision. The Northern Territory excludes persons who are deaf, blind or dumb expressly. Statutes in all States and Territories disqualify persons who are unable to perform the "duties" or the "functions" of jurors[43].

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[39] *Criminal Code* (Qld) s. 604; *Maher v The Queen* (1987) 163 CLR 221 at 228.
[40] *Maher v The Queen* (1987) 163 CLR 221 at 233.
[41] See eg *Capital Traction Co v Hof* (1899) 174 US 1 at 13-14; *Patton* (1930) 281 US 276 at 288.
[42] *Re: the Jury Act and an application by the Sheriff of Queensland* [2014] QSC 113 at [6].
[43] s. 10 of *Juries Act* 1967 (ACT), Schedule 7 *Juries Act* 1967 (NT), s. 13 *Juries Act* 1927 *(SA),* Schedule 2 *Juries Act* 2003 (Tas), Schedule 2 *Juries Act* 2000 (Vic), s. 34E *Juries Act* 1957 (WA). Copies of those provisions are attached to these submissions.

38. Finally, there is no warrant in the *Jury Act* for permitting the unsupervised presence of an interpreter in the jury room during the jury's deliberations. Section 54(1) of the *Jury Act* provides:

> 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.

39. The section must be construed in the context of Part 6 of the *Jury Act,* in which it appears. Part 6 makes provision in various ways for the keeping apart of the 12 members of a criminal jury. Section 53 constrains the members of the jury separating from each other. Section 54 authorises limited communication with a juror. Section 50 prohibits disclosure about the jury's deliberations to any person "except as allowed or required by law". There is no law which allows or requires disclosure of deliberations to an interpreter for one of the juror's. The nature of a jury, as a closed decision making group, and these provisions, militate against the discretion in s.54(1) being construed so as to permit a judge to authorise a general freedom of communication between juror and interpreter for the duration of a trial and during a jury's deliberations. Nor is there any provision for any form of oath to be taken by such a person. For these reasons also, the Appellant is not qualified for jury service.

40. It is submitted that s.4(3)(l) of the *Jury Act* should be construed so that the Appellant is not eligible for jury service. If that construction is accepted, then there was no relevant discrimination under the *Anti-Discrimination Act.* The provisions of that Act were repealed *pro tanto* by the *Jury Act.*

41. If the *Jury Act* does not disqualify the Appellant, there was nevertheless no discrimination against her for the following reasons.

42. Direct discrimination happens when a person with an impairment is treated less favourably than another person would be treated in circumstances that are the same or not materially different[44].

43. There is no dispute that the Deputy Registrar excluded the Appellant from jury service because she genuinely believed that the *Jury Act* did not permit a person with the Appellant's impairment to perform jury service.

44. Circumstances that are the same or not materially different must involve the circumstance that the Deputy Registrar believed that the *Jury Act* did not permit a person with the Appellant's impairment to perform jury service. This is supported by the reasoning of Gummow, Hayne and Heydon JJ in relation to cognate legislation in *Purvis v New South Wales*[45]:

> ... The circumstances...are all of the objective features which surround the actual or intended treatment of the disabled person by the person referred to in the provision as the 'discriminator'. It would be artificial to exclude (and there is no basis in the text of the provision for excluding) from consideration some of these circumstances because they are identified as being connected with that person's disability...

45. Accordingly, the Deputy Registrar did not treat the Appellant less favourably than a person without her impairment in the same or not materially different circumstances. The Deputy Registrar acted in accordance with her belief as to what the law required

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[44] *AD Act* s. 10.

[45] (2012) 217 CLR 92 at 160-161.

about the presence of persons in a jury room, a belief that she did not alter when performing her function in respect of the Appellant.

46. This reasoning is not affected by s. 10(5) of the *Anti-Discrimination Act*. Section 10(5) is similar to a provision considered in *Purvis*, namely s. 5(2), which the plurality noted at paragraph [217] of the judgment in that case:

> ...identifies one circumstance which does not amount to a material difference: "the fact that different accommodation or services may be required by the person with a disability."

47. Of that provision, the plurality held at [222]:

> Section 5(2) provides that the relevant circumstances are not shown to be materially different by showing that the disabled person has special needs. The appellant's contention, however, went further than that. It sought to refer to a set of circumstances that were wholly hypothetical – circumstances in which no aspect of the disability intrudes. That is not what the Act requires.

48. It was not the fact of the Appellant's impairment that was the reason for the Deputy Registrar's conduct. It was the fact that the Deputy Registrar believed that the law did not permit a person with the Appellant's disability to perform jury service.

49. There was no error in the conclusion of the Court of Appeal that the Deputy Registrar did not engage in direct discrimination.

50. Indirect discrimination is defined by s. 11 of the *Anti-Discrimination Act* as conduct involving the imposition of a term or condition that acts as a barrier to a person with a relevant attribute from participating in a relevant area of activity.

51. The Court of Appeal[46] found that it was not the role of the Deputy Registrar to determine the conditions of eligibility for jury service and therefore her conduct did not involve the imposition of any term or condition.

52. The Respondent adopts the reasoning of the Court of Appeal. The Deputy Registrar's function was to give effect to the requirements for eligibility for jury service in the Jury Act. The functions included that under s.36 of the Jury Act of excluding persons from jury service who have been summonsed but who are not qualified for jury service[47].

53. In the performance of that function, the Deputy Registrar could not impose a term or condition on eligibility for jury service. She had no power to do so.

54. If the Deputy Registrar was wrong in her belief as to the requirements of the Jury Act then she acted without power, but she did not engage in indirect discrimination.

Part VIII: Time estimate

55. It is estimated that the Respondent's oral argument will take approximately 1.5 hours.

Dated: 9 May 2016

W SOFRONOFF QC **K MELLIFONT QC** **A SCOTT**

[46] Court of Appeal reasons at [26] and [27].

[47] There are other powers to exclude persons who are not qualified however those powers are only available before the person has been summonsed (ss. 10(2) and 24). After they have been summonsed the only basis upon which they may be excluded because they are not qualified is by the exercise of the power in s. 36 or by challenges for cause under s. 47.