REIGNITING THE LAMP:[1] THE CASE FOR INCLUDING PEOPLE WHO ARE BLIND OR DEAF AS JURORS

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This article presents the case for including people who are blind or deaf as jurors. It does so in the context of the High Court's recent decision in Lyons v Queensland [2016] HCA 38. We also consider the impact of the Convention on the Rights of People with Disabilities (CRPD), to which Australia is a signatory, the steps taken in the United States to accommodate deaf and blind jurors, and recent law reform and legislative developments in Australia.

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[1] This is a reference to Sir Patrick Devlin, who described a jury as a 'lamp that shows that freedom lives': Patrick Devlin, *Trial by Jury* (Methuen, 1st ed, 1966) 165.

I INTRODUCTION

The prevailing wisdom is that jury duty, like going to the dentist,[2] is to be avoided whenever possible.[3] A reluctant attitude towards jury service seems to be ingrained in our society:[4] the internet is littered with 'how-to' guides on evading jury service,[5] there are radio shows 'devoted to the topic of how to avoid jury service',[6] and a 'new cottage industry' in jury jokes is flourishing.[7] However, for some, the opportunity to serve on a jury is a privilege[8] and is worthy of a fight all the way to the Australian High Court. Indeed, in *Lyons v Queensland*, the 'profoundly deaf' applicant, Gaye Lyons, did just that.[9] In early 2012, Ms Lyons was summoned for jury service in the Ipswich District Court. However, after the Deputy Registrar and Sheriff became aware of Ms Lyon's hearing impairment, they notified her that she was unable to serve on a jury.[10] Ms Lyons appealed the decision to the Queensland Civil Administrative Tribunal Appeals on the grounds that her exclusion from the jury amounted to discrimination.[11] The Tribunal dismissed Ms Lyon's appeal. After four years of appeals, Ms Lyons reached the High Court, which unanimously upheld the decision of the Tribunal and found that Ms Lyons was ineligible to serve on a jury.[12]

The decision in *Lyons* is problematic for the following reasons. First, the blanket exclusion of a class of persons is antithetical to the spirit of a jury, which is required to be representative of the community. Second, *Lyons* sets a dangerous precedent, which could justify excluding persons with other disabilities from serving on a jury. This would be particularly inappropriate, as recognition of the underestimated capacities of persons with a disability is growing and disability will become a characteristic of a greater number of citizens as society ages. Third, excluding persons for the sole reason of their disability is not conducive to the spirit of the Convention on the Rights of

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[2] Faye Silas, 'Ducking Jury Duty' (1984) 70 *The American Bar Association Journal* 41, 41.
[3] Alexander Preller, 'Jury Duty is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury' (2012) 46(1) *Columbia Journal of Law and Social Problems* 1, 1.
[4] David Sams, Tess Neal and Stanley Brodsky, 'Avoiding Jury Duty: Psychological and Legal Perspectives' (2013) 25 *The Jury Expert* 1, 2.
[5] See, eg, Dave Cheng, *Here's Your Guide To Getting Out Of Jury Duty* (1 January 2014) Business Insider Australia <https://www.businessinsider.com.au/how-do-i-avoid-jury-duty-2013-12#v8AhmFr2i2AIA7T1.99>; Justin Becker, *How To: Get Out Of Jury Duty* (1 February 2006); AskMen Australia <http://au.askmen.com/money/how_to_60/98_how_to.html>; Ugur Nedim, *How To Get Excused from Jury Duty* (27 November 2014) Sydney Criminal Lawyers <http://www.sydneycriminallawyers.com.au/blog/how-to-get-excused-from-jury-duty/>.
[6] Peter McClellan, 'The Australian Justice System in 2020' (2008) 23 *New South Wales Judicial Scholarship*, 12.
[7] Valerie Hans, 'Jury Jokes and Legal Culture' (2013) 61 *Depaul Law Review* 391, 391.
[8] D Nolan Kaiser, 'Juries, Blindness, and the Juror Function' (1984) 60(2) *Chicago-Kent Law Review* 191, 191.
[9] *Lyons v Queensland* [2016] HCA 38 (*Lyons*) [1] (French CJ, Bell, Keane and Nettle JJ).
[10] *Lyons v State of Queensland* [2014] QCATA 302 [1]-[2].
[11] Ibid [4].
[12] *Lyons*, above n 9.

Persons with a Disabilities ('CRPD'),[13] to which Australia is a signatory. Fourth, it demonstrates that Australia is increasingly out of step with comparable nations.[14]

In the wake of *Lyons*, this article considers how the Australian legal system can better accommodate blind or deaf jurors. It adopts a comparative approach, drawing upon the normative framework of the CRPD and the experience of the United States (US). Our focus is not on the practical courtroom accommodations required to enable blind or deaf jurors to participate on juries, which have been explored by others.[15] Rather, this article describes the legal barriers and argues that the current framework should be reformed to create a more inclusive policy that lives up to the standards of the CRPD, overseas practice, and modern Australian values.

The article proceeds as follows. Part II uses the normative framework established by the CRPD to contend that the exclusion of persons who are blind or deaf from jury service constitutes discrimination and violates their right to participate in political life and to access justice. We concede that the CRPD only requires 'reasonable accommodations', but argue that empirical evidence shows that facilitating participation of deaf and blind jurors does not represent an excessive cost, especially when factoring in the democratic benefits. Part III adopts a comparative perspective to detail how US jurisdictions have approached the issue of jurors who are blind or deaf, with a particular focus on the *Americans with Disabilities Act* and the judicial response to interpreters in the jury room. Part IV outlines the Australian position in relation to jurors who are blind or deaf and recent law reform developments. We argue that it is disappointing that the Australian judiciary has been unresponsive to the spirit of the CRPD and the example set by the US courts in developing doctrine and practice in a way that reconciles the historical *raison d'etre* of juries with the modern disability rights movement. It is therefore incumbent on all Australian legislatures to facilitate the ability of persons who are blind or deaf to participate in juries. We outline the steps to be taken to make Australian juries more inclusive and representative.

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[13] *Convention on the Rights of Persons with a Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD*').

[14] For example, the US, considered extensively in this article. For examples of recent developments in other nations, see Japan: 'Deaf Man Serves As Quasi-juror, First Sign Language Iinterpreter in Tokyo District Court' (choukaku shogai no dansei ga saibanin tsutomeru, toukyou chisai, hatsu no tsuwatuuyaku) Asahi Digital News, 16 March 2017 <http://www.asahi.com/articles/ASK3642S6K36UTIL01D.html> and New Zealand: Annie Guest, 'Deaf Jurors Serve in US and New Zealand, but High Court Block Australian Gale Lyons' Bid' *ABC News* (online), 5 October 2016 <http://www.abc.net.au/news/2016-10-05/deaf-jurors-allowed-in-us,-nz/7905810>.

[15] See, eg, New South Wales Law Reform Commission (NSWLRC), *Blind or Deaf Jurors*, Report No 114 (2006) 14-48; NSWLRC, *Deaf Jurors' Access to Court Proceedings via Sign Language Interpreting: An Investigation*, Research Report No 14 (2007).

II JURIES AND THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)

Just as trial by jury has a long lineage,[16] so too does the exclusion of persons who are blind or deaf from juries. Yet, as with other exclusions from full citizenship, such as the disenfranchisement of persons with mental disabilities,[17] this is a historical contingency, rather than a result of inherent reasonableness or logic. The exclusion of persons who are deaf or blind from jury service seems to have its roots in early canon law, which rejected the testimony of the 'blind and the deaf and dumb'.[18] By the 12th Century, jurors could be excluded on the same grounds as witnesses in the Christian courts.[19] For potential jurors (though not witnesses), this rule came to be applied automatically, for example in the 19th Century English case of *Mansell*, ostensibly to prevent 'scandal and the perversion of justice which would arise from compelling or permitting such a juryman to be sworn…'.[20]

This historical exclusion must now be reevaluated in light of the CRPD coming into force. This was the 'first comprehensive human rights Convention of the twenty-first century'[21] and ushered in a 'paradigm shift' in States' responsibility towards

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[16] The true origins of the trial by jury are unclear. The prevailing view is that the material necessary to 'fashion' the jury system was 'modestly hidden among the baggage of the Norman invaders' of England in 1066: W.J.V. Windeyer, *Lectures on Legal History* (Law Book Company, 2nd ed, 1957) 60, quoting CHS Fifoot, *English Law & its Background* (C. Bell & Sons, 1st ed, 1932) 68. However, commentators such as Matthew Hale rejected this contention nearly two centuries earlier, and argued that trial by jury was not a Norman institution, as it was present in England 'long before' the Norman invasion: Sir Matthew Hale, *The History of the Common Law and an Analysis of the Civil Part of the Law* (Butterworth, 6th ed, 1820) 148-149. Others still view the genesis of the trial by jury as originating in ancient Germany and the Norse God of Odin or Woden: George Crabb, *A History of English Law or an Attempt to Trace the Rise, Progress, and Successive Changes of the Common Law* (Chauncey Goodrich, 1st ed, 1831) 34-35. Nevertheless, what these various accounts bring into sharp focus is that the history of the trial by jury is not only rich, but also ancient and long-lived.

[17] See, eg, Trevor Ryan, Andrew Henderson, and Wendy Bonython, 'Voting With An "Unsound Mind"? A Comparative Study of the Voting Rights of Persons with Mental Disabilities' (2016) 39(3) *University of New South Wales Law Journal* 1038.

[18] John Salmond, *Essays in Jurisprudence and Legal History* (Stevens & Haynes, 1st ed, 1891) 27. Although Salmond unconditionally states that a blind person's testimony would be rejected, the term 'deaf and dumb' provides considerable difficulty. Five centuries before Salmond, Bracton provided that 'deaf and dumb' means someone who is born deaf, and if 'someone [becomes deaf] accidentally, there must be an enquiry as to what he was like before the accident': Henry de Bracton, *On the Laws and Customs of England* (Samuel E Thorne trans, Belknap Press, 1968) vol 4, 309. This could connote that English Law, from its earliest beginnings, did not view deafness as irrefutable evidence of incapacity, but rather as a rebuttable presumption.

[19] John Beames (ed), *A Translation of Glanville* (W. Reed, 1812) 60-61.

[20] *Mansell v The Queen* (1857) 120 ER 20, 30. Well into the 20th and 21st Centuries, *Mansell* has been cited with approval in courts in Australia and the United Kingdom: see especially *Vella v State of Western Australia* [2007] WASCA 59 [70]; *R v Searle* (1993) 2 VR 367 (Marks and McDonald JJ); *Johns v The Queen* [1979] HCA 33 [15] (Gibbs J). See generally *R v Ford* (1989) 89 Cr App R 278; *R v Mason* (1980) 71 Cr App R 157; *R v Burns* (1883) 9 VLR 191, 193-194.

[21] Rachel Heather Hinckley, 'Evading Promises: The Promise of Equality under the US Disability Law and How the United Nations Convention on The Rights of Persons with Disabilities can Help' (2010) 39 *The Georgia Journal of International and Comparative Law* 185, 189.

persons with disabilities.[22] Two of the most significant contributions of the CRPD, which entered into force in 2008, were to enshrine a presumption that all disabled persons have capacity[23] and to facilitate a shift in conceptions of disability from a 'medical' model to a 'social' model.

The medical model views disability as a wholly individual experience, with any dysfunction regarded as an inherent aspect of the individual's medical condition or impairment.[24] Disability is the thus the responsibility of the individual and 'devoid of social cause or responsibility'.[25] The medical model induces the view that disabled persons are dependent on others and presupposes that their natural disadvantage can only be remedied through medical assistance or 'charitable donations intended to compensate the victims of disability for their inevitable and pitiable conditions'.[26]

The social model of disability is a reaction against this approach[27] and draws a clear distinction between 'impairment' and 'disability'.[28] The social model recognises an impairment as a functional 'limitation within an individual caused by physical, mental or sensory impairment'.[29] However, under this model, a person's disability is not a direct result of the person's impairment, but rather the way in which society is constructed. As Oliver explained, '[it] is not individual limitations, of whatever kind, which are the cause of the problem but society's failure to provide appropriate services and adequately ensure [that] the needs of disabled people are fully taken into account in its social organisation'.[30] The CRPD reflects the social model of disability.[31] It adopts the view that persons with disabilities are equals, entitled to exercise all rights on an equal basis,[32] with positive duties upon states to construct society in a manner conducive to that spirit.[33]

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[22] *Nicholson & Ors v Knaggs & Ors* [2009] VSC 64 **[13] (Vickery J).**
[23] Penelope Weller, 'The Convention of the Rights of Persons with Disabilities and the Quiet Revolution in International Law' (2009) 4 *Journal of Law and Social Justice* 74, 88.
[24] Kathryn Sullivan, 'The Prevalence of the Medical Model of Disability in Society' (2011) 13 *AHS Capstone Projects Paper* 1, 2.
[25] Bradley Areheart, 'When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma' (2008) 83(1) *Indiana Law Journal* 181, 186.
[26] Ron Amundson, 'Disability, Ideology, and Quality of Life: A Bias in Biomedical Ethics' in David Wasserman, Jerome Bickenbach and Robert Wachbroit (eds), *Quality of Life and Human Difference* (Cambridge University Press, 2005) 101, 102.
[27] Louise Humpage, 'Models of Disability, Work and Welfare in Australia' (2007) 41(3) *Social Policy and Administration* 215, 217.
[28] Dimitris Anastasiou and James M. Kauffman, 'The Social Model of Disability: Dichotomy between Impairment and Disability' (2013) 38 *Journal of Medicine and Philosophy* 441, 442.
[29] Gary Albrecht et al (eds), *Encyclopaedia of Disability* (Sage Publications, 2006) vol 3, 1104.
[30] Mike Oliver, *Understanding Disability: From Theory to Practice* (Palgrave Macmillan, 1996) 32.
[31] Sarah Fraser Butlin, 'The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments?' (2011) 40(4) *Industrial Law Journal* 428, 428.
[32] *CRPD*, above n 13, Art 1.
[33] Ibid Art 4.

While the CRPD does not cover jury duty expressly, it is arguably implied from related rights relating to participation in political and public life and access to justice. For example, jury participation should be regarded as integral to the right of persons with disabilities to participate in political and public life enshrined in Article 29. This is because the opportunity to serve on a jury allows citizens to reflect the public conscience within the context of criminal trials and scrutinise laws as applied to individual cases. Jury service 'reaffirms some fundamental norms about what it means to be a citizen and to participate in our own governance,'[34] and 'with the exception of voting … [is citizens'] most significant opportunity to participate in the democratic process'.[35] Indeed, to some commentators, it equals voting in importance.[36] Jury duty also reinforces the obligation dimension of citizenship. According to Tocqueville, it engenders a feeling of 'duties which they are bound to discharge towards society; and the part which they take in the Government'.[37]

Participation on juries is also a vehicle for access to justice (defined broadly) for persons with disabilities. This is enshrined in Article 13 of the CRPD 'through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.'[38] Commentary suggests that the CRPD seeks here to remedy the historic exclusion of persons with disabilities from the justice system, including the opportunity to serve on a jury.[39] This position is reflected in the opinion of the UN Special Rapporteur to the CRPD.[40]

Other rights in the CRPD reinforce the argument that enabling participation on juries is required of states parties. Article 9 provides that states must enable persons with 'disabilities to live independently and participate fully in all aspects of life'[41] and requires that states provide assistance to disabled persons in the form of 'guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public'.[42] Article 5 prohibits discrimination on the basis of

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[34] Alexandra Lahav, 'The Jury and Participatory Democracy' (2014) 55(3) *William and Mary Law Review* 1029, 1059.
[35] *Powers v Ohio* (1991) 499 US 400, 407.
[36] Vikram David Amar, 'Jury Service as Political Participation Akin to Voting' (1995) 80(2) *Cornell Law Review* 203.
[37] Alexis De Tocqueville, *Democracy in America* (Henry Reeve, Little & Brown, 4th ed, 1841) vol 1, 309 [trans of: La Démocratie en Amérique (first published 1838)].
[38] *CRPD*, above n 13, Art 9 (emphasis added).
[39] Katherine Guernsey, Marco Nicoli and Alberto Ninio, 'Convention on the Rights of Persons with Disabilities: Its Implementation and Relevance for the World Bank' (Discussion Paper No 0712, The World Bank, June 2007) 13.
[40] Mohammed Al-Tarawneh et al, *Decision of the Special Rapporteur on the Rights of Persons with Disabilities*, UN Doc CRPD/C/15/11 (25 April 2016) 17 [8.9].
[41] *CRPD*, above n 13, Art 9(1).
[42] Ibid Art 9(2)(e).

a person's disability,[43] while Article 2 provides that 'denial of reasonable accommodation' amounts to discrimination.[44]

The rights in the CRPD are not absolute. Hence, the idea of 'reasonable accommodation' is a common thread throughout the Convention and other international human rights instruments. This is defined as:

> necessary and appropriate modification and adjustments *not imposing a disproportionate or undue burden*, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.[45]

The contentions that deaf or blind jurors are incapable of functioning as jurors and thus compromise the interests of the accused or that to facilitate full participation would be excessively costly are empirical claims with no support. Research carried out by the New South Wales Law Reform Commission ('NSWLRC') has found that deaf jurors, with the aid of interpreters, have the same level of comprehension as non-deaf persons.[46] Blind persons can be supported by 'a sighted guide within the vicinity of the court, the provision of written material in an appropriate format, and descriptions of visual evidence'.[47] The capacity of blind or deaf persons to serve as jurors, with appropriate support, is incongruous with their blanket exclusion from serving on a jury.

Arguments for continued exclusion effectively invoke the caveat of 'reasonableness' under the CRPD, albeit expressed mainly in terms of economic cost. For example, Justice Hulme in a submission to the NSWLRC argued that permitting blind or deaf persons to serve on juries 'would impose a cost on the community vastly out of proportion to any benefit which could be achieved'.[48] Yet the NSWLRC highlighted that the cost of permitting deaf persons to serve on a jury 'in proportion to the total cost of court administration is marginal and therefore no cause for concern'.[49] Similarly, the costs for allowing blind persons 'would likely be minimal'.[50]

Even if costs were significant, viewing this issue solely through an economic lens is problematic. As Mendelle QC noted, '[s]ome values of a democratic society are beyond price. We would not countenance restriction of the right to vote because elections were too costly. Nor should we remove right for jury trial simply on grounds

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[43] Ibid Art 5.
[44] Ibid Art 2.
[45] Ibid (emphasis added).
[46] NSWLRC (2007), above n 15. For discussion of what courtroom accommodations are required to service deaf jurors, see NSWLRC (2006), above n 15, 14-48.
[47] NSWLRC (2006), ibid, 49 citing the Royal Blind Society.
[48] Ibid 6.
[49] Ibid 36.
[50] Ibid 54.

of cost'. [51] If a cost-benefit analysis is even the appropriate yardstick, what is a 'reasonable accommodation' must also factor in the non-economic democratic benefits of the jury system described above.

What this also reveals is that the historical exclusion of deaf and blind jurors is in fact inconsistent with the jury's very *raison d'etre*. A jury system that automatically excludes persons who are blind or deaf is not 'representative of community conscience';[52] nor does it live up to the representative character of a trial by one's peers. As Marshall J stated in the US case of *Peters v Kiff*, '[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable'. [53]

Another common objection to deaf or blind persons serving as jurors is that the support person they may require in the deliberation room would infringe the principle of jury secrecy, a practice that can be traced further back to the early 1300s. [54] The modern foundations for this rule can be found in the 18th Century English judgment of Lord Mansfield in *Vaise v Deleval.*[55] In that case, two jurors swore an affidavit that the jury had flipped a coin to decide the outcome of the case. Lord Mansfield rejected the evidence, basing his decision on the doctrine that a 'witness shall not be heard to allege his own turpitude' ('nemo turpitudiem suam alligans audietu'). At least indirectly, Lord Mansfield is thus the 'chief architect and proponent, stimulating, singlehandedly, a broader common law convention of jury secrecy',[56] or at least that evidence of what occurred during deliberations is inadmissible.

It is evident from these origins that jury secrecy should not be regarded as sacrosanct where exceptions have compelling justifications such as ensuring the genuine representativeness of juries and avoiding discrimination. The following section traces the responsiveness of US Courts to such arguments in developing doctrine and practice to facilitate the participation of deaf and blind jurors.

III DEAF AND BLIND JURORS IN THE UNITED STATES

[51] Paul Mendelle quoted in Tricia Harris, 'Trial by jury: has the lamp lost its glow?' (2010) 3(2) *University of Central Lancashire Journal of Undergraduate Research* 1, 9. See also *R v Marshall* (1986) 43 SASR 448, 499.
[52] Jacqueline Horan and Jane Goodman-Delahunty, 'Challenging the Peremptory Challenge System in Australia' (2010) 34 *Criminal Law Journal* 167, 173.
[53] *Peters v Kiff*, 407 US 493, 503 (Marshall J) (1972).
[54] Diane Courselle, 'Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform' (2005) 57 *South Carolina Law Review* 203, 215.
[55] *Vaise v Deleval* (1785) 99 ER 944.
[56] Jill Hunter, 'Jury Deliberations and the Secrecy Rule: The Tail that Wags the Dog?' (2013) 35(4) *Sydney Law Review* 809, 810, citing John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little, Brown & Co, 3rd ed, 1940) vol 8, 684–5 [2352].

Trial by jury is 'deeply embedded' in the democratic spirit of the US.[57] Indeed, it was so revered that one of the reasons which impelled the founding fathers to break the bonds with England was the deprivation as a colony of the right to trial by jury.[58] The right to trial by jury is constitutionally guaranteed by the sixth amendment of the US Constitution.[59] The US Supreme Court has long held that 'in the use of juries as instruments of public justice the jury [should] be a body truly representative of the community'.[60] Indeed, it is considered 'an essential component of the sixth amendment' that the selection of a jury be 'from a representative cross section of the community'.[61] Historically, certain states did afford blind or deaf persons the right to serve on juries.[62] Yet US courts did not interpret the Constitution to require this.[63] Nor did the landmark *Civil Rights Act* of 1964 or even the disability-focused *Rehabilitation Act* of 1973[64] operate to facilitate political participation of persons with disabled persons.[65]

It was not until the passage of the *Americans with Disabilities Act* ('ADA') in 1990[66] that the foundations were laid for judicial development of doctrine and practice facilitating jury participation for persons who are deaf or blind. When the ADA was passed in 1990, it was considered 'the most far-reaching legislation ever enacted against discrimination of people with disabilities'.[67] Indeed, some commentators went so far as to describe the ADA as the 'Emancipation Proclamation for those with disabilities'.[68] Its passage showed that a much stronger political will for reform in the area had developed, catalysed by changing social values and grassroots activism.[69] It

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[57] Valerie P Hans and Neil Vidmar, *Judging the Jury* (Plenum, 1st ed, 1986) 31. See also Alexander Hamilton, quoted in Albert Alschuler and Andrew G. Deiss, 'A Brief History of the Criminal Jury in the US' (1994) 61 *University of Chicago Law Review* 867, 871.
[58] *Declaration of Independence* (US 1776).
[59] *United States Constitution* Amendment VI.
[60] *Smith v Texas*, 311 US 128, 130 (1940).
[61] *Taylor v Lousiana*, 419 US 522, 697 (1975).
[62] See *Code of Civil Procedure*, 3/1 Cal Civ Pro Code § 224(a)-(b). See generally Michael Goldbas, 'Due Process: The Deaf and Blind as Jurors' (1981) 17(1) *New England Law Review* 119.
[63] See, eg, *Commonwealth v Brown*, 231 Pa Super 431 (Pa Sup Ct, 1974); *Rhodes v State*, 128 Ind 189 (Ind Sup Ct, 1891); contra *Safran v Meyer*, 103 SC 356 (Cal Sup Ct, 1916).
[64] *Rehabilitation Act of 1973*, 29 USC (1973).
[65] Robert Rains, 'A Pre-History of the American with Disabilities Act and some Initial Thoughts as to its Constitutional Implication' (1992) 11 *St. Louis University Public Law Review* 185, 188.
[66] *American with Disabilities Act of 1990*, 42 USC (2016).
[67] The Office of Technology Assessment, quoted in Scott Burris and Kathryn Moss, 'The Employment Discrimination Provisions of the Americans with Disabilities Act: Implementation and Impact' (2007) 25(1) *Hofstra Labor and Employment Law Journal* 1, 1.
[68] Tom Harkin, quoted in Lisa Montanaro, 'The Americans with Disabilities Act: Will the Court Get the Hint? Congress' Attempt to Raise the Status of Persons with Disabilities in Equal' (1995) 15(2) *Pace Law Review* 621, 622.
[69] See, eg, Lynn Harris, 'The Americans with Disabilities Act and Australia's Disability Discrimination Act: Overcoming the Inadequacies' (1999) 22(1) *Loyola of Los Angeles International and Comparative Law Review* 51, 65; Bonnie Poitras Tucker, 'The Disability Discrimination Act: Ensuring Rights of Australians with Disabilities, Particularly Hearing Impairments' (1995) 21(1) *Monash University Law Review* 15, 16. This is in stark contrast to the approach taken by the Australian Government in passing the *Disability Discrimination Act 1992* (Cth), which was passed without input from persons with

remedied many of the weaknesses of the previous legislation by affording protection to persons with disabilities in all facets of society. A primary strength of the ADA, similar to the CRPD, was that it attempted enshrine a social model of disability.[70] As Schlesinger noted, '[t]he ADA's legislative history incorporates the social model's approach to disability discrimination as a by-product of external environmental factors and pressures that had long relegated disabled individuals to the sidelines of society'.[71]

The courts' initial response to the attempt to institute a social model of disability through the ADA was lukewarm. The courts 'employed a traditional medical model of disability that focused on the limitations of disabled plaintiffs',[72] justified by the four-step test in the text of the Act,[73] namely:

- a plaintiff needed to prove they had a disability;
- the plaintiff had to be qualified to carry out the relevant duties;
- third, the accommodations requested by the plaintiff needed to be reasonable; and
- the accommodations requested could not cause undue hardship.

The courts seized on the first limb of the test — the presence of a disability, defined in the Act as a 'physical or mental impairment' which 'substantially limits one or more major life activities'[74] — to minimise any contextual or social assessment of disability. In the US Supreme Court's words, 'whether a person has a disability under the ADA is an individualized inquiry'.[75] In response, the US Congress passed the *ADA*

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disabilities or any public input for that matter: Bonnie Poitras Tucker, 'The Disability Discrimination Act: Ensuring Rights of Australians with Disabilities, Particularly Hearing Impairments' (1995) 21(1) *Monash University Law Review* 15, 16.

[70] John Bricout, Shirley Porterfield, Colleen Tracey, and Matthew Howard, 'Linking Models of Disability for Children with Developmental Disabilities' (2004) 3(4) *Journal of Social Work in Disability and Rehabilitation* 45, 50.

[71] Lisa Schlesinger, 'The Social Model's Case for Inclusion: "Motivating Factor" and "But For" Standards of Proof under the Americans with Disabilities Act and the Impact of the Social Model of Disability on Employees with Disabilities' (2014) 35 *Cardozo Law Review* 2115, 2131-2132.

[72] Bradley Areheart, 'When Disability Isn't "Just Right": The Entrenchment of the Medical Model of Disability and the Goldilocks Dilemma' (2008) 83(1) *Indiana Law Journal* 181, 208.

[73] First, a plaintiff must prove they have a disability; second, the plaintiff must be qualified to carry out the relevant duties; third, the accommodations requested by the plaintiff must be reasonable; fourth the accommodations requested must not cause undue hardship.

[74] Alternatively, the plaintiff may have 'a record of such impairment, or be… regarded as having such an impairment': *American with Disabilities Act of 1990*, 42 USC §§ 35.108(a)(1) (2016).

[75] *Sutton v United Air Lines Inc*, 527 US 471, 483 (1999); Incidentally, the Court also relied on this definition to narrow the scope of protection afforded under the Act: 'substantially limits' is in *Toyota*, to 'be interpreted strictly to create a demanding standard': *Toyota Motor Mfg v Williams*, 534 US 184, 197 (2002). This 'demanding standard' led to somewhat absurd results. In *Holt*, because of the test under the ADA, an individual with cerebral palsy was not found to have a disability: *Holt v Grand Lake Mental Health Ctr Inc*, 443 F 3d 762, 767 (10th Cir, 2006). In *Littleton*, an individual with 'mental retardation', in the Court's opinion, was not disabled: *Littleton v Wal-Mart Stores*, 231 F App'x 874, 878 (11th Cir, 2007).

Amendments Act in 2009 to repudiate this restrictive approach[76] and reinforce the social model approach to disability, as originally envisioned under the ADA: 'the primary object of attention … should be whether public entities have complied with their obligations and whether discrimination has occurred, not the extent to which an individual's impairment substantially limits a major life activity'.[77]

Whatever the courts' approach to the definition of disability, Title II of the ADA expressly requires that public institutions, including courts, abstain from discrimination and facilitate the participation of deaf or blind persons. Specifically, it 'prohibits … state courts, from discriminating against qualified individuals with disabilities, and … requires them to make their facilities and programs accessible'.[78] It also imposes positive duties on the part of the state: all public entities are required to take steps 'to ensure that communications… with participants … with disabilities are as effective as communications with others'.[79] For persons who are blind or deaf, the ADA provides that public entities must provide, among other things, audio recordings, Brailed materials, displays, and qualified interpreters.[80] These specific, positive duties mean that public entities cannot allege that accommodating persons who are blind or deaf is unduly burdensome. Hence, in *Galloway*,[81] the US District Court for the District of Columbia found that the 'categorical exclusion of all blind persons from Superior Court juries violates the ADA'.[82] The District of Columbia and the Superior Courts of the District of Columbia were subsequently enjoined from categorically excluding persons who are blind from serving on a jury.[83]

Still to be overcome, however, was the argument that an 'external' person providing support in the jury room would infringe the principle of jury secrecy upheld in numerous cases where the presence of an additional person in the jury room has been held to violate an accused person's right to a trial by jury.[84] Having experienced a conversion from their earlier ambivalent approach to the ADA, the courts proceeded from first principles to carve out an exception for persons giving support to deaf and blind persons as follows. The 'predominant rationale' for jury secrecy is to foster and promote robust discussion.[85] The legitimacy of a jury decision stems from the fact that it has evolved from open and frank discussions, in the absence of outside coercion or

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[76] *Americans with Disabilities Act of 1990*, 42 USC § 12101(a)(4)–(5) (2016).
[77] Ibid **§ 35.108 (**d)(1)(ii).
[78] Peter Blanck, Ann Wilichowski & James Schmeling, 'Disability Civil Rights Law and Policy: Accessible Courtroom Technology' (2004) 12 *William & Mary Bill of Rights Journal* 825, 830–831.
[79] *American with Disabilities Act of 1990*, 42 USC § 35.160(a)(1) (2016).
[80] Ibid § 35.104(1)–(2).
[81] *Galloway v Superior Court*, 816 F Supp 12, 19 (DC Dist Ct, 1993).
[82] Ibid.
[83] Ibid 20.
[84] See, eg, *Eckstein v Kirby*, 452 F Supp 1235, 1244 (ED Ark, 1978); *People v Knapp*, 42 Mich 267 (1879); *Acosta v State*, 126 Tex Crim 618, 623 (1934); *United States v Beasley*, 464 F 2d 468, 470 (10th Cir, 1972).
[85] Courselle, above n 54, 218.

pressure.[86] As Cardozo J noted, '[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world'.[87] Yet, when it comes sign language interpreters for deaf jurors, the Federal 10th Circuit Court of Appeals in *Dempsey* found that the 'critical question' is whether the presence of an interpreter in the jury room would have a 'chilling effect' on the deliberative process.[88] The Court held that those to whom the exclusion was primarily directed were parties who could 'inhibit the frankness of the discussion and deprive the eventual verdict of legitimacy'.[89] All the cases the Court surveyed involved 'the presence of a judge, bailiff, or lawyer whose mere presence as persons learned in the law or connected with the court system might well affect deliberations'.[90] The Court found that, in the 'television-age', jurors would be so accustomed to seeing interpreters for deaf persons 'translating to sign political speeches, newscasts, and the like that virtually all of us have come to view such interpreters more as part of the background than as independent participants'. [91] Accordingly, the Court found that the presence of an interpreter in the jury room did not violate the secrecy rule.

Finally, the least compelling obstacle to persons who are deaf or blind serving as jurors is the absence of any established oath or affirmation for a support person, such as a sign interpreter, which would reinforce jury secrecy. In *Dempsey*, the Court surmounted this problem with some minor judicial innovation, finding that '[t]he trial court can and should administer an oath requiring that the interpreter will neither interfere with the deliberations nor reveal the confidences of the jury'.[92] The Court deemed it sufficient to adapt to the purpose an existing oath that applied to interpreters generally during court proceedings.[93] The Court also held that interpreters present during deliberations are included in the prohibitions on disclosure contained in the *Federal Rules of Evidence*.[94]

The position in the US is that federal disability laws informed by a social model of disability with specific, positive duties on the part of all levels of government have

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[86] Harvard Law Review Association, 'Public Disclosures of Jury Deliberations' (1983) 96 *Harvard Law Review* 886, 889.
[87] *Clark v United States*, 289 US 1, 13 (1933).
[88] *United States v Dempsey*, 830 F 2d 1084, 1090 (10th Cir, 1987).
[89] Ibid 1090.
[90] Ibid 1090 citing Harold Manson, 'Jury selection: The Courts, the Constitution, and the Deaf' (1980) 11 *Pacific Law Journal* 967, 979.
[91] Ibid 1091.
[92] Ibid 1090.
[93] The reasoning of the Court in *Dempsey* was affirmed and applied in *DeLong v Brumbaugh*, 703 F Supp 399, 405 (WD Pa, 1989).
[94] *United States v Dempsey*, 830 F 2d 1084, 1090 (10th Cir, 1987). Specifically, *Federal Rules of Evidence*, 28 USCA r 606(b) (1975) prohibits a juror from testifying as to any matter occurring during jury deliberations which acted upon the juror's mind which influenced them to assent or dissent from the verdict.

required the courts to make accommodations for deaf and blind jurors without recourse to specious arguments of economy, jury secrecy, and procedural technicalities. While initially stalled by a judiciary slow to adjust to a social model of disability, this trend has been enabled by several factors, including grassroots activism expressing contemporary social values, as well as judges ultimately embracing the spirit of the human rights norms embodied in legislation to make practical and doctrinal accommodations.

The experience in the US provides a practical example of how a medical model of disability does not lend itself to an inclusionary environment for persons with disabilities. A medical model of disability upturns the traditional approach to discrimination and as a threshold focusses on the individual and the extent of their disability, not whether discrimination has occurred. Further, the medical model fails to appreciate that disability is a result of social environments which can impede inclusion in society. In summary, the ADA has it weaknesses and there is still significant work required to make the ADA the 'emancipation proclamation' for persons with disabilities as some have imagined. Nevertheless, the ADA also has significant strengths, which become evident when considering jurors who are blind or deaf under the ADA.

We have taken a comparative approach in this article, as '[c]omparative analysis is essential in order to evaluate the relative effectiveness of different legal approaches to protection against discrimination for persons with disabilities'.[95] In this case, the benefit of a comparative approach is twofold. First, an examination of the CRPD provides an international normative framework, or moral yardstick, by which it is possible to measure Australia's treatment of potential jurors who are deaf or blind, and persons with disabilities more broadly. Second, an analysis of the US system gives a practical grounding to these normative lessons and provides guidance on how to implement the best practice which the CRPD codifies. Taking this approach, we see from a comparative and normative standpoint that Australia should provide for jurors who are blind or deaf. It is to the Australian position that we now turn.

IV THE POSITION IN AUSTRALIA

A Case Law

Before *Lyons*, the issue of whether a deaf person who required an Auslan interpreter was permitted to serve as a juror was first considered judicially in Australia by the Supreme Court of Queensland in 2014 in *Re Application by Sheriff (Qld)*. In that case, Douglas J held that in the absence of a clear legislative directive, a jury is bound

[95] Richard Sahlin, 'Legislating Discrimination Protection for Persons with Disabilities in Australia and Sweden: A Comparative Analysis' 2008 13(2) *Australian Journal of Human Rights* 209, 209.

to deliberate in private.[96] Douglas J rejected the applicant's argument that s 54 of *Jury Act 1995* (Qld), which prohibits communication a jury member without the judge's leave,[97] was consistent with judicial discretion to allow an interpreter to be present during deliberations. In Douglas J's view, the principle of jury secrecy was paramount: the 'complicating feature … is that there is no explicit power … to require such an interpreter to swear an oath or to make an affirmation to maintain the secrecy of the jury's deliberations'.[98] The applicant was therefore lawfully excluded from jury service under s 4(3)(l) of the Queensland *Jury Act*, which provides that a person is ineligible for jury service if they have a 'physical or mental disability that makes the person incapable of performing the functions of a juror'.[99]

Lyons v Queensland largely affirmed *Re Application by Sheriff*. *Lyons* began as a discrimination claim before the Queensland Civil and Administrative Tribunal (QCAT) after the Deputy Registrar of the Ipswich District Court disqualified Ms Lyons from jury duty, citing s 4(3)(l) of the Queensland Act described above. In addition, the Deputy Registrar determined that there was 'no provision in the *Jury Act* to swear in an interpreter for a juror' and that it was not 'possible to have another person in the jury room other than the jurors and bailiff whilst deliberating'.[100]

Queensland's anti-disability discrimination framework is enshrined in the *Anti-Discrimination Act 1991* (Qld) (the Act). The Act prohibits discrimination on the basis of a person's protected attributes, including impairment.[101] An 'impairment' is defined as including a 'total or partial loss of the person's bodily functions'.[102] A person who is blind or deaf would be considered to have an impairment under section 4. Section 7 prohibits discrimination on the basis of certain attributes in some areas of activity, including work,[103] education,[104] accommodation,[105] and the administration of state laws and programs.[106] The Act distinguishes between two forms of discrimination: direct and indirect discrimination. Under s 10(1) of the Act, direct discrimination occurs if 'a person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different'.[107] A finding of direct discrimination is a comparative process which requires 'the construction of a "notional person" whose treatment can

[96] *Re Application by Sheriff* (2014) 241 A Crim R 169, 170 [3], citing *Goby v Wetherill* [1915] 2 KB 674, 675.
[97] *Jury Act 1995* (Qld) s 54(1).
[98] *Re Application by Sheriff* (2014) 241 A Crim R 169, 170 [5].
[99] *Jury Act 1995* (Qld) s 4(3)(l).
[100] *Lyons v State of Queensland (No 2)* [2013] QCAT 731 [38].
[101] Ibid s 7(h).
[102] Ibid s 4.
[103] *Anti-Discrimination Act 1991* (Qld) div 2.
[104] Ibid div 3.
[105] Ibid div 8.
[106] Ibid div 10.
[107] Ibid s 10(1).

be compared' to the person complaining of discrimination.[108] All states, territories, and the Commonwealth have enacted similar anti-discrimination legislation,[109] also utilizing the concepts of direct and indirect discrimination.

The QCAT at first instance accepted that Ms Lyons had an impairment for the purposes of the Act, and therefore a protected attribute. In order to prove she had been discriminated against on the basis of her impairment, Ms Lyons needed to prove that because of her attribute (deafness), she was treated less favourably than another hypothetical person (without the attribute) would have been treated in materially the same circumstances. According to the QCAT, the appropriate comparator was a person without Ms Lyons' impairment,[110] but who requested another person in the jury room because they did not have as sound grasp on the English language as might be thought appropriate.[111] If, hypothetically, the reasoning of the Registrar was applied to the comparator, they too would have been excluded from jury service on the basis that the additional person would not be permitted to accompany them.[112] This brought into focus, in the QCAT's opinion, that Ms Lyons' rejection from jury service was not because of a protected attribute (deafness), but rather because she required assistance in the jury room. As such, 'the basis for the decision here was not the relevant attribute in the sense contemplated by section 10 of the Act. The claim therefore based upon direct discrimination must fail'.[113] This position was upheld by the Appeals Tribunal[114] and the Queensland Court of Appeal.[115]

Ms Lyons appealed to the High Court that this was an incorrect application of the direct discrimination test under the Act. She relied on section 10(5), which provides that in determining whether direct discrimination has occurred, 'the fact that the person with the impairment may require special services or facilities is irrelevant'. Ms Lyons submitted that her requirement of an Auslan interpreter, was a 'special service', and therefore '[o]ne cannot separate the interpreter from the person. The fact that this makes them an additional person in the jury room is rendered irrelevant for the comparative analysis'.[116]

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[108] *Purvis v New South Wales* [2003] HCA 62 [114].
[109] See, eg, *Discrimination Act 1991* (ACT); *Anti-Discrimination Act* (NSW); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1998* (Tas); *Anti-Discrimination Act* (NT); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1991* (Qld); *Disability Discrimination Act 1992* (Cth).
[110] *Lyons v State of Queensland* (No 2) [2013] QCAT 731 [147].
[111] Ibid.
[112] Ibid.
[113] Ibid [171].
[114] *Lyons v State of Queensland* [2014] QCATA 302 [47].
[115] *Lyons v State of Queensland* [2015] QCA 159 [39].
[116] Transcript of Proceedings, *Lyons v Queensland* [2016] HCATrans 165 (25 July 2016) [150]-[155].

The second issue for the High Court was whether indirect discrimination had occurred, namely where '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'.[117] Ms Lyons argued that the Deputy Registrar's decision effectively required that she either serve without an Auslan interpreter or communicate using conventional speech.[118] Ms Lyons, being profoundly deaf, would not be able to comply with these terms, constituting indirect discrimination.

Ultimately these arguments were unable to be tested because the majority of the High Court, French CJ, Bell, Keane and Nettle JJ, determined that the 'antecedent issue' was whether the QCAT was correct in concluding that an Auslan interpreter is not permitted under Queensland law to be present during the jury's deliberations.[119] The majority found that, absent specific legislative intention to the contrary, the longstanding common law rule of jury secrecy forbids an Auslan interpreter from being present in the jury room. The High Court thus concurred with Douglas J in *Re Application by Sheriff* that the jury secrecy provisions in s 54(1) of the Queensland *Jury Act* do not confer on the courts a power to permit an interpreter to be present in the jury room, given the absence any oath by which to swear in an interpreter for jury deliberations and any offences which apply to interpreters regarding disclosure of jury information. The Deputy Registrar's decision, therefore, was required by law and could not be a contravention of the Act. [120] This finding would be equally applicable to other states because, except for South Australia, all state and territory anti-discrimination laws provide that acts which are done to comply with the relevant state or territory laws are excluded from a discrimination assessment.[121]

In arriving at its decision, the High Court majority affirmed a number of British cases upholding the secrecy rule. Significantly for the purposes of our discussion, the majority cited the case of *Ketteridge* with approval.[122] In that case, the court found that if a juror 'is in a position to converse with other persons [other than a juror], it is an irregularity, which in the opinion of the Court renders the whole proceedings abortive'.[123] Their Honours also upheld the UK decision in *Goby*, where Shearman J found that 'it is a cardinal principle of the jury system that a jury must deliberate in

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[117] *Anti-Discrimination Act 1991* (Qld) s 11(1).
[118] Transcript of Proceedings, *Lyons v Queensland* [2016] HCATrans 165 (25 July 2016) [36]-43].
[119] *Lyons*, above n 9, [26] (French CJ, Bell, Keane and Nettle JJ).
[120] Ibid [38].
[121] See, eg, *Discrimination Act 1991* (ACT) s 30; *Anti-Discrimination Act* (NSW) s 54; *Equal Opportunity Act 2010* (Vic) s 75; *Equal Opportunity Act 1984* (WA) s 66ZS; *Anti-Discrimination Act 1998* (Tas) s 24; *Anti-Discrimination Act* (NT) s 53; *Anti-Discrimination Act 1991* (Qld) s 106; *Disability Discrimination Act 1992* (Cth) s 47(2).
[122] *Lyons*, above n 9, [33] (French CJ, Bell, Keane and Nettle JJ).
[123] *R v Ketteridge* (1916) 11 Cr App R 54, 57, affd *R v Neal* (1949) 33 Cr App R 189, 193.

private'.[124] Even when the rule of complete separation of the jury was relaxed, the 'cardinal principle' of secrecy during deliberations remained. In Osman, the Court considered the very issue of whether an interpreter is permitted to enter the jury room during deliberations.[125] Verney RL came to the conclusion that, because of the principle of jury secrecy, 'the court cannot allow… for this juror to have an interpreter retire with him to the jury room to interpret the deliberations'.[126]Again, this position was endorsed by the High Court in *Lyons*,[127] thereby consolidating the position that it is a rule of law that an additional person cannot be present in the jury room during jury deliberations.

In light of the arguments for inclusion presented in this article, the decision in *Lyons* is unpersuasive. The Court was unswayed by international human rights norms, though the role of such guidelines in shaping the common law was established in *Teoh*.[128] It is clear from the US experience that the Court had a range of options available to shape the law and practice. Indeed, by invoking old common law precedents, the High Court implicitly recognised that the exclusion itself is a construct of the courts. As a corollary of separation of powers theory, courts possess considerable autonomy over the procedural matters that could facilitate greater inclusion. In such cases, there is much to be said for Dworkin's view that the interpretation of precedent that should be chosen is the one based on principles that portray the relevant tradition in a positive light.[129] We have sought to show that the jury tradition can be interpreted primarily as a vehicle for lay representation consistent with a modern, inclusive approach. 'Representation' in this sense is a concept that has evolved, much like the franchise itself.[130]

It might be expected that Australian courts would be inclined to await legislative imprimatur before embarking on reforms perceived to have significant ramifications for the rights of the accused or court budgets. Indeed, the High Court in *Lyons* and the Queensland Supreme Court in *Sheriff (Qld)*) both made it very clear that any change to the jury secrecy principle must flow from legislative redesign. Yet, this approach suggests the lurking influence of anachronistic values underpinning the courts' approach to jurors who may be deaf or blind. As in the case of the US, it may be that this hurdle needs to be overcome through the law reform process. It is to this issue that we now turn.

B Recent Law Reform and Legislative Developments

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[124] *Goby v Wetherill* [1915] 2 KB 674, 675-6. See *Lyons*, above n 9, [33]. See also *Brownlee v The Queen* [2001] HCA 36 [131] (Kirby J).
[125] *Osman, Re* (1996) 1 Cr App R 126.
[126] Ibid 126.
[127] *Lyons*, above n 9, [33].
[128] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 288.
[129] Ronald Dworkin, *Taking Rights Seriously* (Gerald Duckworth & Co, 1977) 115.
[130] See, eg, *Roach v Electoral Commissioner* (2007) CLR 162.

This issue has been explored on several occasions in recent years by Australian law reform bodies.

1 NSW

In 2006, the NSWLRC published a report that focused specifically on jurors who are blind or deaf.[131] In anticipation of the obstacles evident in *Sheriff (Qld)* and *Lyons*, namely the lack of an oath and the principle of jury secrecy, the NSWLRC recommended that the *Jury Act 1977* (NSW) be amended to:

- qualify people who are blind or deaf to serve on juries, and not prevent them from doing so on the basis of that physical disability alone;[132]
- create an oath to administer to interpreters in the jury room;[133]
- permit interpreters in the jury room during deliberations without infringing on jury secrecy;[134] and
- create new offences in relation to third parties soliciting information from interpreters and interpreters disclosing information concerning jury deliberations.[135]

The NSWLRC also recommended that the Sheriff develop guidelines for providing reasonable adjustments for deaf or blind jurors and that all relevant personnel be provided with the opportunity for training on practical measures to facilitate the inclusion of such jurors.[136]

In response to the NSWLRC's report, the NSW Government passed the *Jury Amendment Act 2010* (NSW). In parliamentary debates on the Bill, it was noted:

> The Government supports the intent of the recommendations of the Law Reform Commission report. …Two groups currently listed as ineligible will now have to show cause to be excused. They are a person who is unable to read or understand English, and a person who is unable, because of sickness, infirmity or disability, to discharge the duties of a juror.[137]

[131] NSWLRC (2006), above n 15.
[132] Ibid Recommendation 1(a).
[133] Ibid Recommendation 1(d).
[134] Ibid Recommendation 1(e).
[135] Ibid Recommendation 1(f).
[136] Ibid Recommendations 2, 4.
[137] Barry Collier MP (Parliamentary Debates, NSW Legislative Assembly, 3 June 2010).

The relevant provisions are now contained in sections 14 and 14A of the *Jury Act 1977* (NSW). However, there does not appear to have been any implementation of the NSWLRC's recommendations in respect of oaths and the creation of new offences.

2 Western Australia

In 2010, the Law Reform Commission of Western Australia (LRCWA) completed its report on eligibility and exemption of jurors,[138] in which it noted that Australia had recently ratified the CRPD. The LRCWA recommended that a person should not be disqualified from serving on a jury on the basis that he or she suffers from a physical disability, but a physical disability that renders a person unable to discharge the duties of a juror will constitute a sufficient reason to be excused by the summoning officer or trial judge.[139]

The Western Australian Government subsequently passed the *Juries Legislation Amendment Act 2011* (WA), which amended the provisions in respect of eligibility. It removed 'disease or infirmity as a ground for exclusion and introduced section 32G(2)(f), which provides that a judge or the summoning officer must excused a person from jury duty satisfied that s/he a person 'is not capable of serving effectively as a juror because he or she has a physical disability or a mental impairment'.

3 Queensland

In 2011, the Queensland Law Reform Commission (QLRC) recommended amending s 4(3)(l) of the Queensland *Jury Act 1995* (Qld), which excludes persons with a physical disability[140] The QLRC also recommended that a person with a physical disability should be excluded if service is impossible even with reasonable accommodations, an assessment to be made by the trial judge of Sheriff.[141] An aggrieved individual would be able to apply to the same trial judge for a different decision.[142]

There have been no relevant recommendations to the *Jury Act*. As discussed above, the two recent cases that have considered the issue of whether people who are deaf should be able to serve as jurors were Queensland cases.

4 Commonwealth

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[138] Law Reform Commission of Western Australia (LRCWA), *Eligibility and Exemption of Jurors*, Final Report No 99 (2010).
[139] Ibid Recommendation 56(1).
[140] Queensland Law Reform Commission, *Review of Jury Selection*, Report No 68 (2011) Recommendation 8-8.
[141] Ibid Recommendations 8-10 and 8-11.
[142] Ibid Recommendation 8-12.

Australia's ratification of the CRPD has provided a catalyst for revisiting this issue at a national level. In 2014, the Australian Law Reform Commission (ALRC) examined the treatment of persons with disability in Australian laws,[143] with the explicit remit of making Australia compliant with the CRPD. The ALRC endorsed the NSWLRC recommendations that 'new legislative provisions requiring the taking of oaths by interpreters and stenographers, extending duties of secrecy to them, and creating new offences'.[144] With regard to assessments of fitness to serve as a jury member, it advocated the use of an updated, general test of capacity applicable to decision-making by persons of mental and physical disability. In this context, the ALRC recommended that the *Federal Court of Australia Act 1976* (Cth) be amended to provide that a person is qualified to serve on a jury if, in the circumstances of the trial for which that person is summonsed, the person can be supported to:

a. understand the information relevant to the decisions that they will have to make in the course of the proceedings and jury deliberations;
b. retain that information to the extent necessary to make these decisions;
c. use or weigh that information as part of the jury's decision-making process; or
d. communicate the person's decisions to the other members of the jury and to the court.[145]

The ALRC also recommended amendments to the Federal Court Act to provide:

- that the trial judge may order that a communication assistant be allowed to assist a juror to understand the proceedings and jury deliberations;[146]
- that communication assistants, allowed by the trial judge to assist a juror, should swear an oath or affirm to faithfully communicate the proceedings or jury deliberations; and be permitted in the jury room during deliberations without breaching jury secrecy principles, providing they are subject to and comply with requirements for the secrecy of jury deliberations;[147] and
- provide for offences in relation to the soliciting by third parties of communication assistants for the provision of information about the jury deliberations and the disclosure of such information by communication assistants.[148]

[143] ALRC, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report No 124 (2014).
[144] Ibid [7.239].
[145] Ibid Recommendation 7-12.
[146] Ibid Recommendation 7-13.
[147] Ibid Recommendation 7-14.
[148] Ibid Recommendation 7-15.

Elsewhere in its report, it is evident that the ALRC has adopted the 'supported decision-making' or social model of disability infusing the CRPD.[149] The ALRC's test of capacity to serve as a juror, therefore, should be understood to apply in the context of current understandings of what blind or deaf people are truly capable of, given 'reasonable' support; inferentially, the ALRC would appear to endorse the view that this should be understood not merely in an economic sense, nor divorced from the fundamental significance of juries as a vehicle of representation in law and governance.

C Future Directions

Former High Court Justice Michael McHugh noted, 'Law is a social instrument — a means, not an end. As society changes, so must the instruments which regulate it'.[150] Indeed, the jury system, as a legal instrument governing our society, has followed this process. Not long ago women could not serve on a jury,[151] with their exclusion being justified by reasoning which is abhorrent by today's standards.[152]

In the previous section, we set out the recent law reform and legislative developments in respect of deaf or blind people's participation in juries in NSW, Western Australia and Queensland, as well as at the federal level. This highlights a patchwork process, which could have been resolved with a more responsive High Court approach in *Lyons*. As the Court elected not to step boldly, however, we now set out the future directions that are required to bring Australia in line with the CRPD and contemporary thinking about people with disabilities.

1 Jury Eligibility Rules

As the experience of the US demonstrates, jurors who are deaf can serve just as impartially and fairly as any other person. As Justice Lauriat of the Massachusetts Superior Courts noted, 'I have always been impressed by the commitment of the deaf jurors to being fair and impartial. Indeed, they appear to be paying even more careful attention to the evidence and the judge's instructions on the law'.[153] To that end, there is no reason why persons who are blind cannot serve as jurors. Accordingly, we endorse

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[149] Ibid Recommendation 6-5.
[150] Michael McHugh, 'The Law-Making Function of the Judicial Process — Part II' (1988) 62 *Australian Law Journal* 116, 116.
[151] For example, in NSW, women could not serve on juries until the passage of the *Jury (Amendment) Act 1947* (NSW). In Western Australia, women could not serve on a jury until =the passage *Juries Act 1957* (WA).
[152] In Western Australia, one Parliamentarian felt that 'women are far too illogical to sit on a jury. They are apt to judge rather by intuition than by reasoning out the evidence placed before them. …I doubt whether they are quite competent to carefully reason out the pros and cons put before them…Numbers of women judge a man by his face': Western Australia, Parliamentary Debates, Legislative Assembly, 4 September 1924, 627 (Mr Teesdale, Member for Roeburne).
[153] NSWLRC (2006), above n 15, 42 [2.76].

the NSWLRC's recommendation that relevant state and territory legislation be amended to recognise that persons who are blind or deaf should be considered as qualified for jury service.

In addition, recognising that the CRPD enshrines a presumption of capacity, the relevant provisions which exclude persons with a physical or mental disability under state and territory jury legislation should be qualified by a section which acknowledges that persons with a disability are presumed capable and competent until proven otherwise.

2 Interpreters' Presence in the Jury Room

Australian legislatures should now bestow upon judges the power to allow a non-juror in the jury room as an assistant where this would not inhibit free and frank discussion or put undue influence upon jurors. This power would need to need to be discretionary, as judges 'are best placed to consider the particular facts of any given case, to identify what fairness may require in the circumstances'.[154] This discretion is especially important in criminal trials, where the trial judge would need to balance the defendant's right to a fair trial and a person's solemn right to serve on a jury. Nevertheless, the comparative method shows that this balance can be forged in theory and practice.

We would suggest that the legislative test should follow the test used by the US Court in *Dempsey*, adopting a purposive approach by considering whether the presence of an additional person would jeopardise the quality of justice served by a jury:

a. It is at the discretion of the judge to allow a non-juror to be present during jury deliberations for, and only for, the sole purpose of assisting a jury member to carry out the functions of a juror. In exercising this discretion, the judge must consider:
    i. whether the presence of the non-juror would inhibit or restrict full and frank discussion;
    ii. whether the presence of the non-juror would put undue pressure or influence upon any of the jurors; and
    iii. any other issues the judge considers relevant.
b. For the purpose of sub-section (iii), the common law rule against an additional person in the jury room is not a relevant consideration.

[154] Wendy Lacey, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' (2004) 5 *Melbourne Journal of International Law* 108, 113.

Enshrining a clear mandate that a sign language interpreter is permitted in the jury room would also ensure that our jury system lives up to the social model of disability espoused by the CRPD. Recognising that 'disability' is a product of social forces, including judicial attitudes that inform practice and case law, shows that a person who is deaf does not have a disability that makes them incapable of serving as a juror. Rather, society is constructed in a manner which disables competent and capable potential jurors from serving. By eliminating this exclusionary and anachronistic barrier, allowing persons who are deaf to serve would be an affirmation of the social model of disability.

3 Interpreters' Oath and Confidentiality

A further impediment in Lyons' case was the absence of an oath which could be administered to an additional person. This is a relatively minor barrier and, without judicial innovation, would require the legislature to enshrine an oath/affirmation for an additional person to keep the jury deliberations confidential, and to not participate in the deliberations. Some may question the strength of an oath/affirmation, or its ability to govern the conduct of an interpreter. Yet, oaths/affirmations are administered to witnesses and interpreters regularly in trials. If the system has faith in those oaths, it is reasonable to have faith in oaths taken by interpreters.

The proposed new oath/affirmation would need to be coupled with a legislative mandate which holds additional persons in the jury room to the same standard of confidentiality as jurors themselves. In all jurisdictions, it is an offence for a juror to disclose information about jury deliberations if they believe it is likely to be published, and it is an offence for a person to solicit information from jurors about deliberations.[155] Identical offences should be enacted in the relevant state and territory legislation which apply to interpreters and aids who have assisted in the jury room during deliberations. Similarly, in jurisdictions where it is an offence to solicit information from a juror,[156] comparable offences should be introduced in respect of interpreters.

4 Reform of Disability Discrimination Legislation

It seems doubtful that a stronger anti-discrimination framework, other than a bill of rights that trumps other legislation, could have assisted Ms Lyons, considering that the actions of the Deputy Registrar were deemed lawful and outside the purview of the anti-discrimination framework. A lesson to be learnt from the CRPD and the US is therefore the importance of enshrining positive obligations. In fact, Article 9 of the

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[155] See, *Juries Act 1967* (ACT) s 42C; *Criminal Law Consolidation Act 1935* (SA) s 246; *Juries Act 2003* (Tas) s 58; *Juries Act* (NT) s 49A; *Juries Act 1957* (WA) s 56B-D; *Juries Act* 2000 (Vic) s 78; *Jury Act 1977* (NSW) s 68A-B; *Jury Act 1995* (QLD) s 70.
[156] See eg *Jury Act 1977* (NSW) s 68A.

CRPD requires Australia to provide 'guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public'.[157] This feature of positive obligations is one of the main strengths of the ADA and Australia should follow suit to achieve convergence with the US and other members of the international community which have begun to implement their obligations under the CRPD. For those reasons, the Australian states and territories should enact legislative provisions which would lay out a bare minimum required to be provided by public buildings and public services, including materials printed in Braille, guides, qualified interpreters and displays. As our earlier discussion highlighted, a strong objection to permitting jurors who are blind or deaf was that their inclusion would come at too high a cost. Setting out a legislative minimum requirement for public services, including courts, would ensure that jurors who are blind or deaf could not be turned away on the basis that accommodating them would be too expensive or unduly burdensome.

We recommend that the following provisions be enacted in the anti-discrimination legislation of each state and territory to bring them into compliance with the CRPD. It is recommended that a provision similar to § 35.104 of the ADA be enacted, which would be in compliance with Articles 4 and 9 of the CRPD. This would enshrine positive obligations upon public buildings and public services, such as courts, and would require them to provide, *inter alia*:

- qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;[158] and
- qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials or other effective methods of making visually delivered materials available to individuals who are blind or have low vision.[159]

Second, the concept of access to justice needs to be reconsidered in light of the CRPD. The CRPD has attached a new meaning to the term, and defines 'access to justice' in an inclusionary manner and extends to 'indirect participants'. This recognition of broader meaning to access to justice needs to be enshrined in the anti-discrimination legislation of all states and territories to recognise that 'access to justice' encompasses a person's 'effective access to the systems, procedures, information and

[157] *CRPD*, above n 13, Art 9.
[158] *American with Disabilities Act of 1990*, 42 USC § 35.104.
[159] Ibid.

locations used in the administration of justice'.[160] This would permit not only persons who are blind or deaf, but other persons with disabilities to serve as jurors.

Third, a subtle but powerful element of the CRPD is that it enshrines a presumption of the capacity of persons with disabilities. As we noted earlier, rules in respect of blind or deaf witnesses and jurors have historically followed each other in a parallel fashion, with potential jurors or witnesses being automatically excluded by reason of their impairment. However, they diverged in the 1800s, with blind or deaf witnesses presumed competent until proven otherwise. Today, we still see that persons who are blind or deaf are automatically excluded from jury service, with the basis of such exclusion emanating from provisions in the relevant jury acts which exclude persons with a mental or physical disability. Although these provisions do not create a blanket exclusion to persons with disabilities, it should still be recognised within state and territory legislation governing juries that persons with a physical or mental disability are presumed capable and competent to serve on a jury. This would broadly comply with the CRPD, and it would put the burden upon the state to justify their actions, rather than leaving it to a person who is blind or deaf to demonstrate their capacity to serve.

5 Public Education

It is evident that legislative reform must be accompanied by a grassroots movement that can 'educate communities about the nature of the barriers faced by people with disabilities and how the participation of people with disabilities can be achieved with beneficial results'.[161] This educative role should not be confined to the grassroots level, but should also extend to governments, which ought to promote their legislative decree.

This is especially pertinent for Australia for two reasons. First, Australian society lacks awareness about disability discrimination. Indeed, when the Federal *Disability Discrimination Act*[162] was passed in 1992, most Australians were unaware that it existed,[163] while recent research into Australian 'community attitudes has highlighted the often paternalistic and patronising attitudes towards people with disability'.[164] Second, on the international stage, and within Australia, there has been a recent radical

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[160] Stephanie Ortoleva, 'Inaccessible Justice: Human Rights, Persons with Disabilities and the Legal System' (2011) 17 *Journal of International & Comparative Law* 281, 284.
[161] Ibid.
[162] *Disability Discrimination Act 1992* (Cth).
[163] Bonnie Poitras Tucker, 'The *Disability Discrimination Act*: Ensuring Rights of Australians With Disabilities, Particularly Hearing Impairments' (1995) 21(1) *Monash University Law Review* 15, 16–17.
[164] Denise Thompson et al, 'Community Attitudes to People with Disability: Scoping Project' (Occasional Paper No 39, Social Policy Research Centre, Disability Studies and Research Centre, 2011) 9.

shift in society's obligations to persons with disabilities, which is manifested in the CRPD. Although the CRPD is broadly comprehensive, it cannot be relied on solely to end discrimination on the basis of disability. This underscores that for disability rights generally, Australia needs to take a more robust approach in education and raising awareness to erode and abolish outdated views and stereotypes.

To ensure the effectiveness and vitality of Australia's anti-discrimination framework and the CRPD in Australia, it is recommended that a far more comprehensive education regime be pursued to complement both the CRPD and anti-discrimination legislation. This, of course, is an area which requires future research to best determine the most effective manner in which to educate the wider society.

V CONCLUSION

Lyons was an opportunity missed. Jury secrecy is important, but not a value that should override human rights. The inclusion of deaf or blind people (and people with other disabilities) as jurors is mandated by the *raison d'etre* of juries as 'trial by peers'. Adopting a more inclusive approach would also function as a vehicle for improvement of law and governance through lay participation. Furthermore, it is consistent with the conceptual basis for jury secrecy, with no empirical basis for the assertion that inclusive juries jeopardise the interests of the accused.

An assessment about whether a person who is blind or deaf can function as a juror needs to be made on the basis of actual, individual capacity, not a discriminatory generalisation. This should be informed by the 'supported', social model of disability adopted by the CRPD, which has implications for what is a 'reasonable' accommodation. It is understandable that the courts would defer to the legislature on this issue, particularly as there has been some momentum for reform in Australia. However, as the US experience shows, judges are also capable of adopting the more activist doctrinal approach advocated by theorists such as Dworkin and should recognise that there is ample scope within the current law for recognition of deaf or blind jurors.

American jurist and statesman Jeremiah Black observed that the trial by jury ' has borne the test of a longer experience, and borne it better than any other legal institution that ever existed among men'.[165] It is hard to pinpoint the secret to the longevity of trial by jury; maybe it is, as Blackstone suggested, merely a self-evident mode of trial in a civilised society.[166] However, it seems more likely, and less exceptionalist, that the durability of the trial by jury can be attributed to its inherent flexibility and the ease

[165] *Ex parte Milligan*, 71 US 2, 65 (1866).
[166] Sir William Blackstone, *Commentaries on the Laws of England* (Butterworth & Son, 16th ed, 1825) vol 3, 349.

with which it can adapt to the society in which it operates. History has shown that trial by jury has never remained inert; it has constantly evolved and expanded to include a broader range of people, to ensure a final judgement in the spirit of democratic representation. History has also shown, with the clarity of hindsight, that when a certain class of people were not brought into the fold, it was for irrational and prejudicial reasons.

Society has undergone a significant change in the form of the CRPD and the jury system needs to change and adapt. For Australia to comply with the CRPD does not require any kind of significant upheaval, and indeed the rather simple steps to do so can be found in the comparative lessons of the US and other members of the international community. First, the ancient rule of jury secrecy needs to be applied purposively to allow assistance to persons with a disability to fully exercise their solemn democratic right and duty as full members of the polity. Second, oaths/affirmations need to be created to ensure that interpreters and assistants are held to the same standard of confidentiality as jurors' themselves. Third, a broad enshrinement of particular CRPD obligations is necessary, such as enacting a positive obligation to provide for basic communication services and an inclusive definition of access to justice. Taking this course of action would bring Australia, in the context of jury service, into compliance with the CRPD. Indeed, the arguments presented in this article have broader application to enhancing the inclusion of all persons with disabilities in juries and society at large.

Finally, as the experience in the US highlights, a powerful legislative mandate cannot, in itself, solve the issue of disability discrimination. Appreciation and awareness of disability discrimination in the broader society is just as vital. Therefore, to nurture and crystallise the collective conscience of Australian society, it is necessary that a more forceful educative approach be taken towards disability rights in Australia.