

Appendix B

Law and practice in overseas jurisdictions

- 1 People who are deaf, hard of hearing, blind or who have low vision have successfully served on juries for some time overseas.

New Zealand

- 2 New Zealand sign language (NZSL) is recognised as an official language by the *New Zealand Sign Language Act 2006*. That Act formalises the right to use NZSL interpreters in courts in New Zealand, where it is the preferred language of a party, witness, counsel or member of the court, and any other person with leave of the court.¹
- 3 The New Zealand Court Service requests that the court is contacted ahead of time so it can arrange supports for prospective jurors. Examples of support mentioned on the court's online information page include:
 1. a sign language translator
 2. documents in other formats (such as Braille or bigger type) for people with a vision problem
 3. use of an accessible court room for people who have a mobility problem
 4. being seated near the witness or judge or getting sound reinforcement for people who have a hearing problem.²
- 4 The *Juries Act 1981* (NZ) provides the Registrar and Judge with various powers to excuse prospective jurors. The Registrar may permanently excuse a person on application if because of their disability or state of health they wouldn't be able to perform their duties satisfactorily.³ Disability is defined in the legislation to include a visual or aural impairment.⁴ The Registrar may also defer a summons on grounds of undue hardship or serious inconvenience to the person or public because of a person's disability or state of health.⁵
- 5 A judge may cancel the summons of a person with a disability if satisfied that the person is not capable of acting effectively as a juror because of disability.⁶ This can occur on the judge's own motion or in response to an application by the Registrar or staff responsible for jury service. The application must be made before the jury is constituted. It is heard in

1 Hayley Reffell and Rachel Locker McKee, 'Motives and Outcomes of New Zealand Sign Language Legislation: A Comparative Study between New Zealand and Finland' (2009) 10(3) *Current Issues in Language Planning* 272, 12; *Sign Language Act 2006* (NZ). The purpose of the Act is to 'promote and maintain the use of New Zealand Sign Language': at s(3), 'in any legal proceedings, any of the following persons may use New Zealand Sign Language' 'any other person with leave of the presiding officer': at s(7)(c).

2 'Disability Support', *New Zealand Ministry of Justice* (Web Page) <<https://www.justice.govt.nz/courts/jury-service/disability-support/>>.

3 *Juries Act 1981* (NZ) s 15A.

4 *Ibid* s 2.

5 *Ibid* s 14B(3).

6 *Ibid* s 16AA(1).

private and conducted at the discretion of the judge.⁷

- 6 After a panel has been selected, the judge has the power to move a trial to a different courtroom within the same jury district or beyond, if satisfied that there is no adequate courtroom and it would be more convenient to hold the trial elsewhere.⁸
- 7 In 2005 Dr David McKee received a summons to serve as a juror in the Wellington District Court. His involvement in the trial was facilitated by two Auslan interpreters and he was elected foreperson in the trial.⁹ The deaf studies teacher at Wellington University reported that he had been 'quite excited about the jury duty because [he] knew [he'd] be breaking down barriers and opening doors for other deaf people who in the future wanted to participate'.¹⁰ He also acknowledged that the judge might have been open to having him on the jury, and interpreters in the court and jury room, because of the New Zealand Sign Language Bill.¹¹
- 8 According to the NSW Law Reform Report, a blind juror with a service dog had also been empanelled in New Zealand, without challenge from counsel, in the 'Manawatu Case'.¹² It was reported that the juror required the exhibits to be read aloud in detail and to be informed by a fellow juror about the number of exhibits.¹³ Overall, the juror said that he had 'no problems whatsoever' carrying out his jury duty.¹⁴

England and Wales

- 9 In the United Kingdom (UK), the 13th person rule means that a juror with a disability cannot be assisted by a non-juror in the jury room. In the 1996 *Re Osman* case, the Court of Appeal held that it would be 'an incurable irregularity in the proceedings for the interpreter to retire with the jury to the jury room'.¹⁵ In the 1999 case *R v A Juror*¹⁶ the chairman of the British Deaf Association attempted to challenge his discharge as a juror on this basis, and was unsuccessful.
- 10 However, people with disabilities including those who are deaf, blind, of low vision or hard of hearing are not disqualified from serving under the *Juries Act 1974* in England and Wales.¹⁷ There are protocols in place to accommodate people with disabilities and enable them to serve on juries provided they do not need the assistance of an additional person in jury deliberations. This is in line with public service duties to ensure equal access to information and services.¹⁸
- 11 There are some differences between jury legislation in England and Wales, and Scotland and Northern Ireland,¹⁹ although jury selection processes are broadly similar across the UK with respect to jurors in the subject groups.

Process to accommodate jurors with disabilities

- 12 Jurors are summoned by the Lord Chancellor via the Jury Central Summoning Board (JCSB) from the electoral register.²⁰ In the summons form a person indicates if they require reasonable adjustments. This information is recorded into an information system and passed onto court staff, who subsequently contact the person to discuss their needs and

7 Ibid s 16AA(4).

8 Ibid s 16A(1).

9 Annie Guest, 'Deaf Jurors Serve in US and New Zealand, but High Court Blocks Australian Gale Lyons' Bid', *ABC News* (online, 5 October 2016) <<https://www.abc.net.au/news/2016-10-05/deaf-jurors-allowed-in-us,-nz/7905810>>.

10 S Travaglia, 'Deaf Person to Serve on Jury', *The Official Newsletter of the Disability Resource Centre Auckland* (2005) 5.

11 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 49–50 <<https://www.lawreform.justice.nsw.gov.au>>.

12 Ibid.

13 Ibid.

14 Ibid.

15 *Re Osman* 1 [1966] Cr App R 126.

16 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 31 citing *R v A Juror* (Woolwich Crown Court, Anwyl J, 9 November 1999).

17 *Juries Act 1974* (UK) s 1.

18 *Equality Act 2010* (UK) s 20.

19 *Juries Order 1996* (NI); See *Criminal Justice Act 1995* (Scot); *Criminal Procedure Act 1995* (Scot).

20 *Juries Act 1974* (UK) ss 2, 3(1).

- make support arrangements.²¹
- 13 The Courts and Tribunals Service is responsible for proactively providing a range of accommodations to jurors with disability, on the basis of individual requirements.²² The types of accommodations arranged may include hearing enhancements such as hearing loops, speech to text services, Braille material, accommodations for guide dogs, vision aids such as magnifiers, dedicated court ushers and the provision of additional breaks during the court process.²³ Pre-court visits are often arranged to help potential jurors to ascertain whether they can serve in light of their disability and to assess any issues or the need for particular adjustments.²⁴
- 14 The Commission understands that there are few reasonable adjustment requests that are refused. The Courts and Tribunals Service adopts a flexible, case-by-case approach in this regard.²⁵
- 15 Ultimately, the decision to exclude a juror with disability from service is the sole responsibility of the judge.
- 16 The *Juries Act 1974* provides that where it appears to an appropriate officer that there is doubt as to a juror's capacity due to a physical disability, that person may be brought before a judge.²⁶ A senior court official first makes an assessment about capacity to serve and considers whether the juror will be able to be supported without assistance in the jury room.²⁷ The court official then explains to the juror that they may apply to be excused. If the juror does not wish to be excused and doubt about their capacity to serve remains, arrangements are made for them to go before a judge for a determination. This will occur in the court where they have been summoned, prior to the beginning of jury service.²⁸
- 17 Judges may also exercise discretion to exclude a juror selected by an initial ballot when the juror is not challenged by parties,²⁹ where 'the judge notices that a member of the panel is infirm or has difficulty in reading or hearing'.³⁰ The judge has 'fairly wide discretion to excuse, defer or discharge jurors'.³¹ However, the Crown Court Compendium states that this discretion should be 'exercised with caution' as it 'can only be exercised to prevent an individual juror who is not competent from serving'.³² In *Ford* it was held that judges must not use their discretionary powers to reject jurors from particular sections of the community or attempt to influence the overall composition of the jury.³³ In the words of Lord Lane, 'the whole essence of the jury system is random selection'.³⁴
- 18 Judges have non-statutory³⁵ obligations to make adjustments for disability when hearing a case that are outlined in the Equal Treatment Bench Book (ETBB).³⁶ The ETBB provides guidance around accommodating court users with disabilities. The ETBB recognises the 13th person rule as an obstacle that may require legislation to overcome, but notes that 'no evidence has ever been presented that a deaf juror is less able to assess the demeanour of a witness'.³⁷

21 Information provided from Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 17 August 2020.

22 Ibid.

23 Ibid.

24 Ibid.

25 Ibid.

26 *Juries Act 1974* (UK) s 9(b).

27 'Making Jury Service More Accessible for Jurors', *Scottish Courts and Tribunals Service* (Web Page) <<https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2019/11/28/making-jury-service-more-accessible-for-jurors>>.

28 Information provided from Her Majesty's Courts and Tribunals Service to Victorian Law Reform Commission, 17 August 2020.

29 CPR PD 26C.3 (UK) R 26C.3.

30 Crown Prosecution Service (UK), *Jury Vetting* (Guidelines, 10 July 2018) <<https://www.cps.gov.uk/legal-guidance/jury-vetting>>.

31 Attorney-General (UK), *Jury Vetting: Right of Stand By Guidelines* (Report, 30 November 2012) [4] <<https://www.gov.uk/guidance/jury-vetting-right-of-stand-by-guidelines--2>>.

32 Judicial College UK, *The Crown Court Compendium Part 1* (Report, December 2018) [26D.2] <<https://www.judiciary.uk/wp-content/uploads/2016/06/crown-court-compedium-part1-jury-and-trial-management-and-summing-up-dec2018.pdf>>.

33 *R v Ford* [1989] QB 868.

34 Ibid 871.

35 The *Equality Act 2010* (UK) exempts judges acting in their 'judicial function'.

36 Cases where Courts have been encouraged to utilise the ETBB in their decision making: *Galo v Bombardier Aerospace UK* [2016] NICA 25 [53]; *R v Isleworth Crown Court* [2001] EWCA Admin 22 [38].

37 Judicial College UK, *Equal Treatment Bench Book* (Judicial College UK, 2018) [73].

- 19 Parties may challenge jurors in criminal proceedings but the scope for those challenges is fairly limited, and must occur on established grounds. In 1988 peremptory challenges (no reason challenges) were abolished entirely in England and Wales, and in Scotland in 1995.³⁸ Northern Ireland retained peremptory challenges until 2007.³⁹

Processes in Scotland

- 20 A 2018 report by the Scottish Courts and Tribunals Service, *Enabling Jury Service*, recommended reforms to improve participation of 'persons with physical disabilities, hearing and sight impairments'.⁴⁰
- 21 In response, Scottish courts have introduced additional services and accommodations such as magnifiers, hearing loops and information sheets in accessible formats, including a video with British Sign Language and subtitles.⁴¹ Trained Jury Liaison Officers facilitate the provision of accommodations to jurors.⁴²
- 22 Where accommodations are required, prospective Scottish jurors are asked to contact the relevant court via their summons document.⁴³ The Jury Liaison Officer for that court then contacts the juror, can arrange for a visit to the court, and discusses the needs of the juror. The final decision as to eligibility rests with the judge. Jurors with disability also have the option of being excused as of right.⁴⁴
- 23 In addition, the *Enabling Jury Service* report made recommendations that have not yet been implemented, including:

that consideration be given to amending current legislation to enable the presence of additional approved persons to be present in the jury room during the jury deliberations; furthermore that consideration be given to prescribing a specific form of additional oath for this purpose.⁴⁵

that further detailed consideration be given to ensuring the availability of suitably equipped, and secure, electronic devices for each court where jury business is to be conducted, with a view to enabling participation by those jurors who feel able to do so through this medium.⁴⁶

The experience of jurors in the UK

- 24 In July 2019, Chloe Norton, a deaf woman, wrote about her own experience with the UK system. On receiving a summons for jury duty in 2017: (this is a reduced version):

...I filled out the necessary forms and sent them back.

One of the sections asked if I needed any additional requirements and I stated that I would need a sign language interpreter.

A few weeks later I received another important looking letter. Expecting to see a court date, I was shocked to read that I had been rejected because I requested an interpreter for the proceedings!

38 *Criminal Justice Act 1995* (Scot); *Criminal Justice Act 1988* (UK) s 118(1).

39 *Justice and Security (Northern Ireland) Act 2007* (NI) s 13.

40 Scottish Courts and Tribunals Service, *Enabling Jury Service* (Report, February 2018) <<https://www.scotcourts.gov.uk/about-the-scottish-court-service/reports-data/enabling-jury-service/>>.

41 'Making Jury Service More Accessible for Jurors', *Scottish Courts and Tribunals Service* (Web Page) <<https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2019/11/28/making-jury-service-more-accessible-for-jurors>>.

42 Ibid.

43 Ibid.

44 Ibid.

45 Scottish Courts and Tribunals Service, *Enabling Jury Service* (Report, February 2018) 13 <<https://www.scotcourts.gov.uk/about-the-scottish-court-service/reports-data/enabling-jury-service/>>; Scottish legislation explicitly protects the 'Seclusion of jury to consider verdict' and prohibits anyone from visiting the jury and communicating with them: *Criminal Procedure Act 1995* (Scot) s 99.

46 Scottish Courts and Tribunals Service, *Enabling Jury Service* (Report, February 2018) 10 <<https://www.scotcourts.gov.uk/about-the-scottish-court-service/reports-data/enabling-jury-service/>>.

I found the letter quite rude and demeaning as it outlined that I did not have 'capacity' to serve as a juror... and they hadn't even met me!

They had assumed that because I need an interpreter that I would be unable to follow the court proceedings and make critical decisions.

I was extremely offended by this, and for the first time in a really long time, I actually felt ashamed to be deaf...

- 25 Ms Norton was aware that deaf people had served on juries in Australia and the United States. She contacted the Jury Central Summoning Bureau to argue that interpreters should be permitted in court:

From the start of their training, they are reminded time and time again that confidentiality is integral to their role. Therefore, interpreters will not enter the jury room with the intention to interfere with the discussion and to leave the courtroom and tell others about the case.

Interpreters are 'viewed' as a piece of equipment, equal to a pair of glasses, or a wheelchair (if you know what I mean!). There is no difference between an interpreter and a walking stick, except for a beating heart.

In situations such as courtroom proceedings, a Level 6 interpreter is used, which ensures the deaf person gains full understanding of the words spoken and emotions displayed by the person speaking, not the interpreter themselves.

Therefore, if a deaf person is excluded from jury duty because of their inability to carry out jury duty without an interpreter, surely persons who require any sort of aid to carry out their duty would also be excluded. This would include anyone who uses hearing aids, glasses, walking sticks, wheelchairs, pacemakers, the list goes on. But obviously this is not the case.

... I never got a response.

- 26 After following the matter up, some time later Ms Norton received a response from the Jury Central Summoning Bureau:

The team informed me that I should have been given the opportunity to argue my case against a Judge – which is the official procedure. It turns out that I was rejected before I was able to do this. The team put me in contact with Basildon Crown Court and a meeting was set up for me to attend the court and to discuss my need for an interpreter with the Jury Officer and a Judge.

I arrived at the court with my mother, fully expecting to be sat in a small room with an interpreter, the Judge, and the Jury Officer. The Jury Officer explained we were going to view the courtroom and as we took our places in the courtroom, the interpreter signed 'Please stand for the Judge'.

Needless to say I was confused and terrified! It turns out that the whole situation was being treated in the highest respect and that I had brought a case before the court! The Judge turned out to be the Resident Judge, Judge John Lodge, who is the point of contact for Basildon Crown Court.

After the initial shock of realising the seriousness of the case, I was able to argue my case against the rejection. Judge John Lodge was very professional and also very kind.

We worked together and placed the interpreter in various places in the courtroom to show that I could view the interpreter from where I was sat. We also discussed the use of a speech-to-text converter and it was agreed that it is a good alternative to having an interpreter in the jury deliberating room.

The law states that only 12 people (the jurors) are allowed in the jury deliberating room, which is why interpreters are not allowed in the room. However having the speech-to-text converter would be a really good replacement in the meantime, until the law is changed (hopefully!!!).

We also went down to the jury deliberating room to see the size of it and to talk about where I would sit (at the head of the table) and whether I would be able to see all the jurors.

I was able to see and lip-read others from the head of the table so we agreed that it was possible for me to carry out my duty in that room.

After going back up to the courtroom, Judge John Lodge gave a final ruling which stated that I am allowed to carry out my role as a juror with an interpreter in the courtroom, and a speech-to-text converter in the jury deliberating room.

He said there was no evidence to show that I couldn't perform my duty, and that hopefully this ruling will be a step in the right direction for deaf people who want the opportunity to be jurors.

I felt proud that I had managed to get the outcome that I wanted, and that I was able to prove I am capable to perform my duty. Needless to say I stood there with a massive grin on my face!

I have yet to receive a court date for my jury duty, but hopefully it will be soon ...⁴⁷

Ireland

- 27 Historically the 13th person rule has prevented deaf people in Ireland from serving on juries under the common law, and deaf jurors were automatically ineligible for service under the *Juries Act 1976*.
- 28 In 2008 the *Juries Act* was amended, and now states that people are ineligible for service if they 'have an incapacity to read, or an enduring impairment such that it is not practicable for them to perform the duties of a juror'.⁴⁸ The term 'practicable' is a new addition, and the amendment also removed an explicit reference to deaf people as ineligible.⁴⁹
- 29 In 2010 a deaf man challenged his disqualification resulting from his need for a sign language interpreter in the jury room. The Irish High Court (Central Criminal Court) ruled that in light of the 2008 amendment, deaf jurors are not automatically excluded from jury service and could serve where it was 'practicable' to do so. The High Court accepted that with assistance in the form of an interpreter and technological supports, it was practicable for a deaf juror to serve.⁵⁰ In the judgment, Justice Carney commented that the 13th person rule could be:
- met by an appropriate oath being taken by the signer in which he would submit himself to the same obligations of confidentiality as the rest of the other jurors.⁵¹
- 30 However, Justice Carney also noted that a deaf juror may be objected to by way of a peremptory challenge by the parties. In Ireland, parties each have seven challenges without cause and unlimited challenges for cause shown.⁵²

47 Chloe Norton, 'How I Won the Right to Be Accepted for Jury Duty', *The Limping Chicken* (Web Page, 11 July 2019) <<https://limpingchicken.com/2019/07/11/chloe-norton-how-i-won-the-right-to-be-accepted-for-jury-duty/>>.

48 *Juries Act 1976* (Ireland) sch 1 pt 1.

49 Irish Law Reform Commission, *Jury Service* (Report No 107, April 2013) [4.04] <https://www.lawreform.ie/_fileupload/Reports/r107.pdf>.

50 Ibid [4.13–4.14] citing *DPP v O'Brien* [2010] IECCA 103.

51 Irish Law Reform Commission, *Jury Service* (Report No 107, April 2013) [4.13] <https://www.lawreform.ie/_fileupload/Reports/r107.pdf>.

52 *Juries Act 1976* (Ireland) ss 20, 21.

31 Subsequent to this judgment the Irish Law Reform Commission released a 2013 report scoping some potential reforms. Key relevant recommendations included the following:

- The Juries Act 1976 be amended to the effect that:
 - a person is eligible for jury service unless the person’s physical capacity, taking into account the provision of reasonably practicable supports and accommodations that are consistent with the right to a trial in due course of law, is such that he or she could not perform the duties of a juror.⁵³
- This provision should be supplemented by guidance which enables jurors with doubts about their capacity to serve to identify themselves, and that decisions about capacity should be made by the judge. Where there is conflict between accommodating a potential juror and the right to a fair trial, the latter should be given priority. Jurors with disability should also be granted an opportunity for excusal on the basis of ‘good cause’.⁵⁴
- Further research should be conducted into the potential that the presence of a 13th person in the jury room may have an impact on the fairness of the trial.⁵⁵
- In order to be eligible to serve ‘a juror should be able to read, write, speak and understand English to the extent that it is practicable for him or her to carry out the functions of a juror’. This should be assessed on a case by case basis.⁵⁶

32 These recommendations have not been implemented and the additional research has not been undertaken. However, since the Law Reform Commission Report, the Irish Court Service has developed processes to enable deaf jurors to serve, including by providing Irish Sign Language interpreters.⁵⁷

33 The Irish Court Service has a dedicated disability liaison officer and takes a flexible and individualised approach to providing reasonable accommodations for people with disabilities.⁵⁸ These policies align with positive obligations on the Irish public service to eliminate discrimination and promote equality of opportunity and treatment.⁵⁹ Section 3(1) of the *Irish Sign Language Act 2017* also recognises:

the right of Irish Sign Language users to use Irish Sign Language as their native language and the corresponding duty on all public bodies to provide Irish Sign Language users with free interpretation when availing of or seeking to access statutory entitlements and services.

34 In December 2017, Kevin Dudley Junior became the first deaf person empanelled for jury service, in what the judge referred to as a ‘historic’ day for the rights of deaf people in Ireland.⁶⁰ In that case the defendant pleaded guilty and Kevin Dudley Junior did not deliberate.

35 In October 2020 Patricia Heffernan became the first deaf person to deliberate on an Irish jury.⁶¹ She was assisted in the deliberation by two Irish Sign Language interpreters. On two previous occasions she had been excused from jury service due to her disability.⁶²

53 Irish Law Reform Commission, *Jury Service* (Report No 107, April 2013) [4.41] <https://www.lawreform.ie/_fileupload/Reports/r107.pdf>.

54 Ibid [4.42].

55 Ibid [4.44].

56 Ibid [4.88].

57 Mary Carolan, ‘Jury Service: Many with Disability “Would like to Do Their Civic Duty”’, *The Irish Times* (online, 4 February 2019) <<https://www.irishtimes.com/news/crime-and-law/jury-service-many-with-disability-would-like-to-do-their-civic-duty-1.3780755>>.

58 Ibid.

59 *Human Rights and Equality Act 2014* (Ireland) s 42.

60 Mary Carolan, ‘Jury Service: Many with Disability “Would like to Do Their Civic Duty”’, *The Irish Times* (online, 4 February 2019) <<https://www.irishtimes.com/news/crime-and-law/jury-service-many-with-disability-would-like-to-do-their-civic-duty-1.3780755>>.

61 Conor Gallagher, ‘Galway Woman Makes History as First Deaf Person to Deliberate on Irish Jury’, *The Irish Times* (online, 5 October 2020) <<https://www.irishtimes.com/news/crime-and-law/galway-woman-makes-history-as-first-deaf-person-to-deliberate-on-irish-jury-1.4370644>>.

62 Ibid.

United States

36 While jury processes vary between federal, state and local jurisdictions, the United States legislative framework prevents the automatic exclusion of jurors with disability, including people who are deaf or blind. The *Americans with Disability Act (ADA)*⁶³ states that:

No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.⁶⁴

37 Courts are public entities for the purposes of the ADA.⁶⁵ Federal Courts are covered by the *Rehabilitation Act* which has the same substantive requirements.⁶⁶ Juries have been found to fall within the remit of court obligations under these statutes.⁶⁷

38 The ADA lists examples of aids that should be provided to ensure effective communication with people with disabilities:

Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

Acquisition or modification of equipment or devices; and

Other similar services and actions.⁶⁸

39 The Justice Department's Technical Manual on the ADA elaborates that the public entity 'must provide an opportunity for individuals with disabilities to request the auxiliary aids and services of their choice and must give primary consideration to the choice expressed by the individual'⁶⁹ as determined through consultation with the individual.

40 In *Galloway v Superior Court* and *People v Caldwell* it was established that people could not be denied jury service solely based on their disability, and that blind jurors could perform the essential functions of a juror when provided with reasonable accommodations, in most cases.⁷⁰ In *Commonwealth v Heywood* the Massachusetts Appeals Court held that it is within a judge's discretion to determine whether a blind juror is competent to participate in the jury process.⁷¹

63 See also Kristi Bleyer, Kathryn Shane McCarty and Erica Wood, 'Access to Jury Service for Persons with Disabilities' (1995) 19(2) *Mental and Physical Disability Law Reporter* 249, 250.

64 *Americans with Disabilities Act*, 42 USC Ch 126 §12132 (1990).

65 *Galloway v Superior Court of the District of Columbia*, 816 F Supp 12 (DDC, 1993), [19].

66 *Rehabilitation Act*, 29 USC § 794(a) (1994) ss 501, 504.

67 *Galloway v Superior Court of the District of Columbia*, 816 F Supp 12 (DDC, 1993), [18–19].

68 *Americans with Disabilities Act*, 42 USC Ch 126 §35.104 (1990); see also United States Justice Department, *Title II Technical Assistance Manual* [II-7.1000] <<https://www.ada.gov/taman2.html>>.

69 United States Justice Department, *Title II Technical Assistance Manual* (Report) [II-7.1100] <<https://www.ada.gov/taman2.html>>.

70 *People v Caldwell*, 661 NYS2d (1997) 714; *Galloway v Superior Court of the District of Columbia*, 816 F Supp 12 (DDC, 1993), 18–19.

71 *Commonwealth v Heywood*, 484 Mass 43 (2020).

41 In *Caldwell* the inability of blind jurors to see witnesses' faces and body language was found not to be disqualifying because blind people have to assess situations in their daily lives without visual cues, and could do the same in the courtroom.⁷² The courts in *Galloway* and *Caldwell* listed the kinds of accommodations that may enable a blind person to serve, including moving a juror's seat closer to the witness box, having documentary evidence read into the record, providing large print transcripts,⁷³ providing descriptions of documentary or physical evidence or using audio describers.⁷⁴

42 Recently, the Massachusetts Supreme Judicial Court held that a blind juror was able to assess evidence of grievous bodily harm in a particular case that included photographic evidence, but did not hinge upon identification or visual evidence. According to the judgment:

As the injuries suffered by the victim were not visible at the time of trial, the ability to see the victim's face during his testimony was not essential to reaching a verdict. Similarly, because of the internal nature of the injuries and subsequent surgery, photographs of the victim's face taken close in time to the assault would not have assisted the jury in determining whether the victim suffered serious bodily injury. On the other hand, the juror had appropriate access to the testimony of the victim and the medical records, which were directly relevant to the question whether the victim suffered serious bodily injury. Here, the medical records, rather than the photographs, provided the critical evidence upon which the jury could find serious bodily injury. Because in this instance the photographic evidence would not have materially assisted the jury in determining serious bodily injury, seating juror no. 6 was well within the judge's discretion.⁷⁵

43 In *People v Guzman* it was held that the defendant's right to a fair trial was not violated when a deaf person was not removed for cause, and that a juror cannot be challenged for cause solely on the basis of their deafness.⁷⁶ In addition, deaf people constituted a 'cognizable group' which should be included on juries to ensure they represented a cross-section of the community.⁷⁷ The court stated that 'there is no reason that a deaf person, with the aid of a qualified, court-appointed sign language interpreter cannot do as fine a job or better than hearing jurors'.⁷⁸

44 Courts have also addressed the treatment of the 13th person rule. In *Guzman* it was held that the rule pertains to officers of the court such as bailiffs, judges, or counsel, and 'the presence of the signer is a different matter entirely'.⁷⁹ This is because 'the role of the signer is not that of a participant or an authorized official of the court but is that of a communications facilitator'.⁸⁰ In *United States v Dempsey* the court addressed the main concerns associated with the 13th person rule. As to whether an interpreter would compromise the secrecy of the jury room, the court found it no more likely that an interpreter would reveal confidences than the jurors themselves.⁸¹ The court found that a 13th person was unlikely to have a 'chilling effect' on deliberations as they formed 'part of the background' rather than being 'independent participants'.⁸² Concerns as to any unlawful participation by the interpreter could be addressed through an oath and by the judge inquiring prior to the verdict whether the interpreter abided by their oath.⁸³

72 Nancy Lawler Dickhute, 'Jury Duty for the Blind in the Time of Reasonable Accommodations: The ADA's Interface with a Litigant's Right to a Fair Trial' (1999) 32 *Creighton Law Review* 849, 856; *People v Caldwell*, 661 NYS2d (1997) 715.

73 *People v Caldwell*, 661 NYS2d (1997) 714.

74 *Galloway v Superior Court of the District of Columbia*, 816 F Supp 12 (DC, 1993), 17–18.

75 *Commonwealth v Heywood*, 484 Mass 43 (2020) 6.

76 *People v Guzman*, 478 NYS 2d (1984) 455, 474.

77 *Ibid* 467.

78 *Ibid* 462.

79 *Ibid* 473.

80 *Ibid*.

81 *United States v Dempsey*, 724 F Supp 573 (ND Ill 1989) 24.

82 *Ibid* [17].

83 *Ibid* [22–25].

- 45 As a result of ADA obligations and case law, the inclusion of deaf people on juries in the United States is relatively routine.⁸⁴ Numerous states have affirmatively codified the right of individuals with disability to serve on juries, explicitly including deaf people, and requiring the provision of accommodations, including court-appointed and funded sign language interpreters,⁸⁵ and/or have developed policies and guidelines to this effect. For example, Federal Court policy requires that where a deaf or hearing impaired person is otherwise qualified to serve, the court must provide 'a sign language interpreter or other appropriate auxiliary aid or service'.⁸⁶
- 46 Additionally, many state and local courts have entered into formal and informal 'settlement agreements' to provide accommodations and supports for people with disabilities, in order to comply with the ADA.⁸⁷ Examples include accessible court facilities, auxiliary aids and court-appointed sign-language interpreters. Some states also commit to providing staff training on disability.⁸⁸
- 47 The New South Wales Law Reform Commission has observed, with reference to the United States, that 'what are sometimes claimed to be insurmountable obstacles here, seem to have caused little impediment to reform there, and with no evident ill-effect'.⁸⁹ Lord Justice Auld noted in his influential review of the UK court system that:
- The experience of the American Courts where deaf people have sat on juries is that they have not been a hindrance. On the contrary, the need for juries to work at their pace, although lengthening the deliberations somewhat, has tended to make them more structured, with the advantage, if nothing else, of only one person talking at a time.⁹⁰
- 48 Beyond its disability legislation, the United States has key differences in its approach to jury selection and the deliberation process, compared to Australian and other common law jurisdictions.⁹¹ One point of distinction concerns confidentiality rules. In the United States, jurors may be permitted to speak about the case after a verdict has been reached.⁹² Another particularly significant differentiation is the 'voir dire' selection process.
- 49 Jury selection processes vary amongst United States jurisdictions. Broadly, prospective jurors are randomly selected from electoral rolls or other public sources such as motor vehicle registration lists.⁹³ During the selection process, they take an oath where they swear to tell the truth when responding to questions about their qualifications as a juror.⁹⁴ Jurors first form part of a larger jury pool before being placed in a smaller jury panel and sent to a court room for the voir dire.⁹⁵
- 50 Voir dire is a 'questioning process used in some jurisdictions of the United States and elsewhere to assess the values and sympathies of prospective jurors'.⁹⁶ Voir dire involves counsel gaining information about prospective jurors, including views and potential biases associated with the case, by submitting questions to jurors.⁹⁷ Counsel converse with There

84 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 38 <<https://www.lawreform.justice.nsw.gov.au/>>.

85 See, eg, Cal Civ Pro § 224; Tex Government Code § 62.1041.

86 'Communication Access in Federal Courts', *National Association of the Deaf* (Web Page) <<https://www.nad.org/resources/justice/courts/communication-access-in-federal-courts>>.

87 National Center for State Courts, *Enforcement Activities under the Americans with Disabilities Act Title II: Programs, Services and Activities of State and Local Courts 1994-2004* (Report, June 2004).

88 Ibid.

89 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 44 <<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-114.pdf>>.

90 Lord Justice Robin Auld, Ministry of Justice (UK), *Review of the Criminal Courts of England and Wales* (Report, September 2001) ch 5 [47] <<https://ials.sas.ac.uk/eagle-ii/review-criminal-courts-england-and-wales-right-honourable-lord-justice-auld-september-2001>>.

91 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 37 <<https://www.lawreform.justice.nsw.gov.au/>>.

92 Administrative Office of the US Courts, *Handbook for Jurors Serving in the United States District Courts* (HB100, 2013) 14 <<https://www.uscourts.gov/sites/default/files/trial-handbook.pdf>>; Law Reform Commission of Western Australia, *Selection Eligibility and Selection of Jurors* (Discussion Paper No 99, September 2009) 68 <https://www.lrc.justice.wa.gov.au/_files/P99-DP.pdf>.

93 American Juror, *How Juries Are Selected* (Web Page) <<http://www.americanjuror.org/selected.htm>>; 'Handbook for Jurors Serving in the United States District Courts', *US Courts* (Web Page) <<https://www.uscourts.gov/sites/default/files/trial-handbook.pdf>>.

94 Ibid.

95 American Juror, *How Juries Are Selected* (Web Page) <<http://www.americanjuror.org/selected.htm>>.

96 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) Glossary <<https://www.lawreform.vic.gov.au>>.

97 Jacqui Horan and Jane Goodman-Delahunty, 'Challenging the Peremptory Challenge System in Australia' (2010) 34(3) *Criminal Law Journal* 167, 179.

is scope for a broad range of questions, including about:

marital status, extent of education and area of study, crime victim status, law enforcement affiliation, prior involvement with the law or the courts, occupation, family members and their employment or occupation, and hobbies and interests.⁹⁸

- 51 Counsel subsequently challenge jurors on the basis of their answers and the impression they develop of a prospective juror. This process is also an opportunity for counsel to 'build a favourable impression of their clients, or educate jurors about the issues in advance of the trial'.⁹⁹ Rules vary amongst US jurisdictions regarding the scope of questioning, the length of the process and whether the questioning itself is conducted by counsel or the trial judge.¹⁰⁰ The final selected jury will be made up of the first 6–12 jurors that are not challenged by the parties during this process.¹⁰¹ Due to the voir dire, the jury selection process in the United States diverges widely from the approach taken in Australia. Horan has observed that it 'directly undermines [the Australian] ideal of offering a jury randomly selected from the community'.¹⁰²
- 52 Parties in the United States may challenge for cause, or make peremptory challenges, as discussed in Chapter 5.
- 53 Despite key points of difference between the United States and Australian systems, the United States experience is instructive due to the regular and long-term inclusion of people with hearing and vision disabilities on juries, apparently without negative implications for the broader trial process.

The experience of jurors in the US

- 54 The National Federation of the Blind's newsletter, *Braille Monitor*, contains personal stories from people with disabilities and their experiences of the jury process in the United States.
- 55 Jim Moynihan described his experience serving on a jury in Missouri in 2002. This is a reduced version of his story:

I have often wondered what it would be like to serve on a jury, and I finally got my chance on August 5 and 6, 2002. After receiving my summons to serve, I reported at the courthouse in downtown Kansas City, Missouri, at 8:00 a.m. on Monday, August 5, 2002. When I reached the desk, the clerk told me that I was excused. When I asked why, she said, 'because you are blind.'

I informed her that I did not wish to be excused on the grounds of blindness and would serve if selected. The incredulous clerk directed me to the room where the panelists sat waiting to be culled for jury duty. The lucky twelve would be selected for the jury, and the rest would be sent home.

I assumed that I did not have much to worry about since I would not be selected. I completed the form telling the judge and attorneys for the prosecution and defense that I was a civil rights investigator working for the U.S. Department of Education, Office for Civil Rights. Knowledgeable coworkers had told me that I would automatically be rejected for jury selection because attorneys did not want people on the jury who could separate fact from fiction. Attorneys want dummies who might be persuaded in favor of their client.

98 Phylis Bamberger, 'Jury Voir Dire in Criminal Cases' [2006] *American Bar Association Journal* 24, 26.

99 Jacqui Horan and Jane Goodman-Delahunty, 'Challenging the Peremptory Challenge System in Australia' (2010) 34(3) *Criminal Law Journal* 167, 179.

100 Ibid.

101 American Juror, *How Juries Are Selected* (Web Page) <<http://www.americanjuror.org/selected.htm>>.

102 Jacqueline Horan, *Juries in the 21st Century* (Federation Press, 2013) 41.

.... Then about fifty of us were sent to the room where the jury selection process began. We were told that this case concerned the XO club. A woman had fallen and had then filed a personal injury lawsuit.

... The attorneys for the plaintiff and the defense questioned the panelists to make the jury selection. We were asked whether we knew any of the doctors who had treated the plaintiff for her injuries. I was surprised to find and acknowledge that I knew the orthopedist...

One of the attorneys for the plaintiff referred to my occupation as a civil rights investigator and asked me if I thought too many lawsuits were being filed. I agreed that there were too many lawsuits, but I had learned that in my job my opinion did not matter. In fact, a supervisor once told me she did not give a damn about my opinion. My training required me to keep digging until I was satisfied I understood the facts of a case so thoroughly that I could explain it to team leaders and attorneys. After that response I thought to myself, you're a goner.

The questioning continued until the judge finally pounced on one unlucky soul, observing that this man was the only panelist who had remained totally quiet during the selection process. The judge commented that nature abhors a vacuum. The judge asked this man if he thought there were too many lawsuits, and he agreed that there were. He then asked the man if he could keep an open mind if he were selected, and he said that he could, to a point. I was not surprised when this man was not selected.

... When I returned from lunch, I was surprised to learn that I was one of the twelve jurors selected. The judge admonished us not to discuss the case until it was time for the jury to deliberate. The trial would begin that afternoon and conclude on Tuesday, he hoped. It might continue on Wednesday with the jury handing in its verdict that day.

The trial was straightforward, and the facts were not in dispute...

The trial ended late Tuesday afternoon. I wanted to get started, but a number of my companions required a smoke break. We all agreed that the plaintiff should get something; the question was how much...

The jurors expressed their opinions strongly but remained good tempered throughout the deliberative process... We finally reached a consensus that the XO club and landlord were guilty. I believe that most of us were reasonably satisfied.

...We repaired to the courtroom, where the jury foreman handed in the verdict, which was read by the court clerk. The expressions on the faces of the attorneys for the defendants indicated that they were not happy. But I believe that one of the treasures of our democracy is the right to a jury trial. It bothered me that the clerk was willing to excuse me from serving on a jury based on blindness, and it shocked her that I wanted to serve if selected. Yet other citizens are expected to serve on juries unless they come up with a legitimate excuse. We all know that blind people are excused from working because others expect that society will take care of us.

I was impressed that the people on my jury took their task seriously. They grappled with the issues presented by the attorneys and tried to arrive at a fair and equitable solution. We came from all walks of life and had never met before. We were of different races and levels of education. We tried our best to hammer out a reasonable and fair settlement. We even accommodated the smokers; how about that?

The XO case will probably not be remembered as a monumental case in the annals of legal jurisprudence. Thousands of such cases may be heard across America every day by average people like me who serve on juries. Sure beats Communist China, Cuba, North Korea, Iraq, or Iran. I would do it again if called upon. You can turn me down for any of a number of reasons, but don't let my blindness be one of them.¹⁰³

- 56 The following are extracts from a news report on the experience of a deaf woman serving on a Detroit jury:

Tracy Straub's eyes shifted between witnesses on the stand, exhibits displayed on a TV screen and sign language interpreters as she sat in a Detroit courtroom.

The 45-year-old Trenton woman, who was born deaf, served as juror in an armed robbery case in Wayne County Circuit Court last month, welcoming the chance to be involved in the judicial system.

"I've got a lot of friends that are deaf and have never served jury duty before," Straub told the Free Press through an interpreter. "So I'm kind of the rock star in that way."

She watched as John Stuckless and Bethany James took turns signing the words of witnesses testifying in the trial of a person who was accused of robbing a man and being present when he was shot.

The interpreters stood at the front of the courtroom, near the court reporter, for about 15 to 20 minutes at a time. Then they switched to prevent fatigue during testimony.

...Straub said she learned more about how the legal system works during her experience. The panel of 12 started deliberating the case after two alternate jurors were chosen.

"I did have an interpreter there while we discussed and deliberated," Straub said. "The interpreter basically acts as my voice and my ears."

She said she didn't feel as if there was enough evidence to convict, and the jury returned its verdict: not guilty on all charges, including armed robbery, assault with intent to do great bodily harm, felonious assault and felony firearm.

Unlike many who receive a summons, Straub wanted to be involved in the process.

Straub hopes others will follow in her footsteps.

"If they can see that I can do it," she said. "Then they know that they can do it, too."¹⁰⁴

Canada

- 57 Federally the Canadian jury trial process is set out in the *Criminal Code*.¹⁰⁵ The Code specifies that a judge *may* permit a juror with a physical disability who is otherwise qualified to serve to be provided with technical, personal, imperative or other support services to enable them to serve.¹⁰⁶ The purpose of this 1998 provision is to promote the participation of jurors with physical disabilities.¹⁰⁷
- 58 The *Canadian Charter of Rights and Freedoms* captures the importance of a right to trial jury.¹⁰⁸ In *R v Kokopenance* the Canadian Supreme Court discussed the importance of representativeness as a crucial feature of the Canadian jury system.¹⁰⁹

103 James Moynihan, 'Blind Juror', *Braille Monitor* (online, July 2003) <<https://www.nfb.org/sites/www.nfb.org/files/images/nfb/publications/bm/bm03/bm0307/bm030703.htm>>.

104 Elisha Anderson, 'Deaf Juror Glad to Do Her Duty for Justice's Sake', *USA Today* (online, 5 November 2015) <<https://eu.usatoday.com/story/news/nation/2015/05/10/deaf-juror-glad-duty-justices-sake/27068733/>>.

105 *Criminal Code*, RSC 1985, c C-46.

106 *Ibid* s 627.

107 *R v Kossyrine* [2017] ONCA 388, [42].

108 *Canada Act 1982* (UK) c 11, sch B pt 1 ('*Canada Charter of Rights and Freedoms*') ss 11(d)(f), s 15.

109 *R v Kokopenance* [2015] SCC 28; [2015] SCR 398.

- 59 The selection of jurors is a two-step process. First, a 'jury roll' is collated based on eligible candidates who are empanelled randomly via a ballot system. During the selection process, prospective jurors may be excused, challenged or stood aside. A challenge for cause can be exercised if there is a concern that a juror, even with reasonable supports, is unable to perform the duties of a juror.¹¹⁰ If a challenge for cause is made the judge will determine if the alleged ground is true or not. On the application of the parties, or on the judge's own motion, this matter can be determined without the presence of all jurors, sworn or unsworn, to maintain their impartiality.¹¹¹
- 60 Secondly, prospective jurors are subject to an in-court selection process, regulated by the *Criminal Code*.¹¹² At the beginning of all proceedings that involve a jury, a mandatory pre-hearing conference (similar to a voir dire process in the US) is held to discuss any matters and/or arrangements that would promote a fair and expeditious trial.¹¹³ For example, a support person may be required to enable a blind and/or deaf person to serve as a juror.
- 61 The eligibility criteria for jury service differs for each province and territory of Canada.
- 62 In a majority of jurisdictions, physical disability is a ground of ineligibility to participate in jury service if that person is unable to discharge the duties of a juror. However, legislation also provides for the consideration of reasonable accommodations.
- 63 For example, in Ontario, the *Juries Act* specifies that:
- A person is ineligible to serve as a juror if the person is physically or mentally unable to discharge the duties and cannot be reasonably accommodated to perform those duties.¹¹⁴
- 64 Similarly, in British Columbia, the *Jury Act* provides that a person is disqualified from service if they have a physical or mental infirmity that would not allow them to discharge their duties as a juror.
- Where a person cannot see or hear but will receive the assistance of a person or device that the court considers adequate to enable them to serve, the automatic disqualification will not apply.¹¹⁵
- 65 In Alberta and New Brunswick, the common law rule prohibiting a 13th person in the jury deliberation rule is expressly overridden by legislation.¹¹⁶ The support person must only assist the juror as the court directs and cannot contribute to the discussions in any way.¹¹⁷
- 66 An old reported case involving a deaf juror was *His Majesty the King v E.W Boak* (1925) heard by the Court of Appeal for British Columbia. This case was appealed on the basis that the inclusion of a deaf juror meant the jury was illegally constituted and the decision should be set aside. The case was dismissed because it could not be proven that a 'substantial wrong or miscarriage' had occurred.¹¹⁸
- 67 *R v Kossyrine* (2017) was appealed on the grounds that the judge erred in discharging a disabled juror without reasonable cause and in making this decision exercised 'disability-based discrimination'.¹¹⁹

110 *Criminal Code*, RSC 1985, c C-46 s 638(1)(e).
111 *Ibid* s 640(2).
112 *Criminal Code*, RSC 1985, c C-46.
113 *Ibid* s 625.1(2).
114 *Jury Act*, RSO 1990, c J-3 s 4(a).
115 *Jury Act*, RSBC 1996, c 242 s 3(1)(o).
116 *Jury Act* RSA 2000, c J-3, s 6(1); *Jury Act* RSNB 2017, c 103, s 6(2).
117 *Ibid*, s 6(3); *Ibid*, s 6(3).
118 *The King v Boak* [1926] SCR 256, 481.
119 *R v Kossyrine* [2017] ONCA 388, [41].

- 68 The trial judge discharged the juror for the following brief reasons:
- I find that [juror 11] has serious problems which impact on his ability to concentrate and understand the evidence. These include his broken back, his being in a body brace, and is taking medication to control his pain. He is using a walker. He also has a significant hearing impairment. In the end, I find there is reasonable cause to discharge [juror 11] and replace him with the alternate juror.¹²⁰
- 69 The Ontario Court of Appeal upheld the decision of the trial judge to discharge the juror, not because of their physical disabilities but because the judge was concerned that the juror would not be able to adequately perform their duties to an acceptable standard.¹²¹ It could not be proven that the trial judge had exercised their discretion unreasonably.¹²²
- 70 Most recently, a blind juror with a service dog was empanelled in a criminal case heard by the Toronto Superior Court, Ontario, in 2018. A press report suggests that the juror's ability to deal with photographic evidence was questioned by the judge during a pre-trial hearing after concerns were raised from defence counsel after the juror attended court with an assistance dog. The juror confirmed that if they were described to the juror, they would understand the images. It was found that the juror would approach the case with an open mind and decide the case based solely on the evidence and the judge's legal instruction. No issues arose during the trial or jury deliberations due to the involvement of the blind juror. The blind juror remarked: 'the whole idea of a jury is it's a bunch of different people ... pooling their different ways of assessing credibility and then voting as a group. Well, who's to say visual is the only way to do it.'¹²³
- 71 In response to the blind juror's involvement in the trial, a retired Crown Attorney, who is blind, commented: 'having a blind juror not only makes the legal system more representative of society, it makes lawyers more effective.'¹²⁴

120 Ibid [34].

121 Ibid [54].

122 Ibid [45].

123 Greg Thomson, 'Accessibility for Ontarians with Disabilities Act', *Blind Juror in Toronto Impaired Driving Case Was Almost Rejected* (Web Page, 31 December 2018) <<https://aoda.ca/blind-juror-in-toronto-impaired-driving-case-was-almost-rejected/>>.

124 Ibid.