

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B 16 of 2016

BETWEEN:

GAYE PRUDENCE LYONS
Appellant



AND:

STATE OF QUEENSLAND
Respondent

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APPELLANT'S SUBMISSIONS IN REPLY

PART I: CERTIFICATION FOR INTERNET PUBLICATION

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

PART II: ARGUMENT

Notice of Contention

2. The Respondent's application for leave to file the Notice of Contention should be refused for the following reasons.
3. First, the Notice of Contention and the Respondent's submissions in support of it, contradict the Respondent's position in the Application for Special Leave. In an unequivocal answer to this Honourable Court, the Respondent conceded that there was no question of fact that the Appellant would have been able to perform the functions of a juror with the aid of an Auslan interpreter and that, with the aid of such an interpreter, the Appellant is capable of discharging the functions of a juror within the meaning of the *Jury Act 1995 (Qld)* (*Jury Act*).¹
4. Second, findings of fact were made by the Queensland Civil and Administrative Tribunal (QCAT) against which the Respondent did not file a cross-appeal in the QCAT appeal proceedings,² nor in the Queensland Court of Appeal, being that:

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¹ *Lyons v State of Queensland* [2016] HCATrans 060 at 435 to 455. Further, the Respondent's written submissions in the Special Leave Application made no reference to the arguments advanced in support of the Notice of Contention.

² However, the Respondent did include submissions as to these matters in their written submissions to the QCAT Appeal Tribunal. Consideration of those submissions was opposed by the Appellant and were not dealt with in the QCAT Appeal Tribunal decision.

Filed on behalf of the Appellant by
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- (a) absent demonstrated misinterpretation, it is unlikely that courts would regard the process of an Auslan interpreter assisting a juror as in any way affecting the integrity of verdicts;³
- (b) there was no critical significance that deaf jurors would receive the evidence and addresses in a criminal trial interpreted for them by an Auslan interpreter;⁴
- (c) there was unqualified acceptance by QCAT of the evidence of Professor Jemina Napier including (but not limited to): “hearing people misunderstand court proceedings without being disadvantaged by hearing loss”; “there was no significant difference between levels of comprehension of the deaf and hearing jurors; deaf and hearing jurors similarly perceive the content of the judge’s summation to be complex and repetitive”; and “deaf jurors can effectively access courtroom proceedings via sign language interpreting.”⁵

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5. Third, the QCAT Appeal Tribunal held that there was no reason to depart from the decision of *Re: The Jury Act 1995 and an application by the Sheriff of Queensland*.⁶ In that decision Douglas J accepted that the use of Auslan interpreters would overcome the problem of a deaf juror hearing the evidence during the course of a trial. His Honour’s concerns were restricted to there being an additional person in the jury room who was not a juror.⁷ Contrary to the assertion in footnote 1 of the Respondent’s Submissions, the Notice of Contention filed in the Court of Appeal was concerned only with the implied repeal of the *Anti-Discrimination Act 1991 (Qld) (AD Act)* by the *Jury Act*.⁸ It did not address the matters the subject of this Notice of Contention⁹ and no such submissions were made to the Queensland Court of Appeal.

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6. Fifth, it is not appropriate to engage this Honourable Court in the factual inquiry the Respondent seeks to open about the accuracy of Auslan interpretation for a juror particularly when the Respondent has agreed (in these proceedings) that no part of the impugned decision by the Deputy Registrar was concerned with the faithful and correct interpretation of the evidence and it has acknowledged that no assessment was undertaken by the Respondent to determine whether or not Auslan interpretation would impair the Appellant’s ability to ‘hear’ evidence and deliberate as a juror.¹⁰ In

³ *Lyons v State of Queensland* (No 2) [2013] QCAT 731 at [73]

⁴ *Lyons v State of Queensland* (No 2) [2013] QCAT 731 at [74]

⁵ *Lyons v State of Queensland* (No 2) [2013] QCAT 731 at [75] and [76]

⁶ AB 711-725: [2014] QCATA 302

⁷ *ibid.* at [3]

⁸ AB 735.

⁹ Whilst the Notice of Contention filed in the Court of Appeal proceedings relied on an implied repeal of the *AD Act*, it was not grounded, as it is in this Notice of Contention, on the matters set out in Grounds 1 and 2 of this Notice of Contention, being the alleged incapacity of a deaf person to perform the functions of a juror.

¹⁰ See Appellant’s Submissions at paragraph 19(c) and (d) and the Respondent’s agreement to those matters at paragraph 4 of the Respondent’s Submissions.

essence, the Notice of Contention seeks to recast the Respondent's approach¹¹ at this final stage of the appellate process.

7. Further, to the extent that the Respondent's Submissions infer that a deaf juror is unable to "sense" oral evidence or to apply any "personal" appreciation of oral evidence,¹² that submission is without foundation. It is similarly offensive to infer that because of their inability to hear, the attendance of a deaf juror during oral evidence and submissions would be rendered unnecessary by the provision to them of a transcript of the proceedings.¹³

8. The previous legislative stipulation in the *Jury Act, 1929 (Qld)* preventing persons who were "blind, deaf or dumb" from being jurors was not repeated when the Queensland Parliament enacted the *Jury Act*. Instead s. 4(3)(l) of the *Jury Act* provides a functional test to ensure that persons with a disability, including deafness, are not automatically excluded from jury service simply on the basis of their status as a person who is deaf or hearing impaired.

The Deputy Registrar's Belief

9. Causation is to be determined objectively by identifying the "real reason" for the putative discriminator's conduct. Any benign motive of the discriminator does not excuse discriminatory treatment.¹⁴ It is not necessary for a discriminator to have the intention or a motive to discriminate.¹⁵ Indeed, s. 10(3) of the *AD Act* stipulates that a person's motive for discriminating is irrelevant.

10. The Deputy Registrar's belief that she was applying the *Jury Act*¹⁶ to the Appellant was inextricably bound to the fact that the Appellant was (and is) deaf and required an Auslan interpreter to participate as a juror. Deafness (as an attribute under the *AD Act*) and/or the need for an Auslan interpreter therefore had to be the real reason (or a substantial reason¹⁷) for rejecting the Appellant as a potential juror.

***Purvis* and the treatment of "special services or facilities"**

11. The Respondent has misapprehended the decision in *Purvis*¹⁸ at [217] and [222]. The effect of those paragraphs is that special services, equipment etc.,¹⁹ is not to be taken into account when considering whether or not a complainant and the comparator are in

¹¹ This being no more apparent than at paragraph 9 of the Respondent's Submissions filed 9 May 2016.

¹² See paragraphs 15 to 16 of the Respondent's Submissions filed 9 May 2016.

¹³ *ibid.* at paragraphs 15 to 17

¹⁴ *Purvis v New South Wales* (2003) 217 CLR 92 (*Purvis*) at [166] per Gummow, Hayne and Heydon JJ.

¹⁵ *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359

¹⁶ See paragraphs 43, 44, 45 and 48 of the Respondent's Submissions filed 9 May 2016.

¹⁷ See section 10(4) of the *AD Act*.

¹⁸ *Purvis v New South Wales* (2003) 217 CLR 92

¹⁹ See, for example, s. 9 of the *Disability Discrimination Act 1992 (Cth)*

the same or not materially different circumstances. However, it is permissible to take into account other objective circumstances connected with the person's disability. In *Purvis*, those circumstances included the student's violent behaviour toward teachers and other students.²⁰ This Honourable Court held that it was appropriate to inform the comparator with this characteristic but not the fact that the student required special services or accommodation.

12. Given that the Appellant would have been able to perform the functions of a juror but for the need for an Auslan interpreter,²¹ there is no distinguishing feature between the Appellant and the notional comparator except for her deafness. Subsection 10(5) of the AD Act is a statutory protection (as is s. 5(2) of the *Disability Discrimination Act 1992* (Cth)) to prevent discrimination on the basis of a person's need for special services for their impairment.²²

No implied repeal of the AD Act

13. In *Minister for Immigration and Multicultural Affairs v Nystrom*, Gummow and Hayne JJ held that the threshold for irreconcilability required "*actual contrariety be clearly apparent and that the later of the two provisions be not capable of sensible operation if the earlier provision still stands*".²³ That is not the case here.
14. The two statutes are not irreconcilable. Indeed the very wording of s. 4(3)(l) prevents any blanket discriminatory decisions based on impairment alone. An assessment as to implied repeal in the context of two pieces of State legislation, includes the presumption that Parliament has not intended to impliedly repeal a former enactment.²⁴ The Appellant's Submissions (at paragraphs 48 to 53) illustrate the manner in which the harmonious operation of the legislation may be achieved. Such a conclusion has due regard to the "*practical ways in which the legislation operates together*" and indicates that an irreconcilable conflict of duties does not arise.²⁵

Australia's international obligations

19. In *Beasley v Australia*,²⁶ a Communication determined under the Optional Protocol to the *Convention on the Rights of Persons with Disabilities*, the Committee on the Rights of Persons with Disabilities observed that "*the performance of jury duty is an important aspect of civic life ... as it constitutes a manifestation of citizenship*." The Committee

²⁰ *Purvis* at 161 [225] per Gummow, Hayne and Heydon JJ.

²¹ Appellant's Submissions at paragraph 20 and Respondent's Submissions at paragraph 4.

²² *Purvis* at 134 [130] per McHugh and Kirby JJ.

²³ (2006) 226 CLR 566 at 585

²⁴ *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 276 (Fullagar J); *Saraswati v R* (1991) 172 CLR 1 at 17 (Gaudron J).

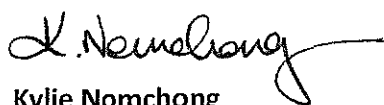
²⁵ *Royal Automobile Club of Australia v Sydney City Council* (1992) 27 NSWLR 282 at 294.

²⁶ Gemma Beasley, Communication No. 11 of 2013, UN Doc CRPD/C/15/11/2013 (1 April 2016)

found that the failure of the Sheriff of NSW to provide the petitioner, who is deaf, with Auslan interpretation to enable her to participate as a juror was a violation of her human rights to equality before the law (Article 5), to access to justice (Article 13), to freedom of expression and opinion (Article 21), and to participation in political and public life (Article 29),²⁷ each civil rights to which the Commonwealth of Australia²⁸ must give immediate effect.²⁹

20. It is a foundation principle of the common law of Australia that the legislature cannot override fundamental rights by general or ambiguous words. There must be a clear intention to do so manifested by unambiguous language which indicates that the legislature has directed its attention to the rights and freedoms in question and has consciously decided on abrogation or curtailment.³⁰ Those provisions of the *Jury Act* relied upon by the Respondent as prohibiting the participation in a jury of a deaf person assisted by an Auslan interpreter do not satisfy this test.
21. Wherever the language of a statute is susceptible of a construction that is consistent with the terms and obligations of an international instrument ratified by Australia that construction must prevail.³¹ The *Jury Act* is entirely capable of such a construction.
22. The Respondent seeks to rely upon an English common law rule, established in the nineteenth century,³² to the effect that there cannot be a “thirteenth person” in the jury room. Such a rule is not part of the common law of Australia. The development of the Australian common law must reflect contemporary notions of justice and human rights, especially equality before the law, which are the aspirations of the Australian legal system.³³

Dated: 20 May 2016



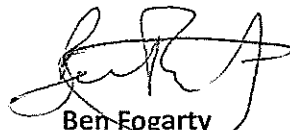
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²⁷ *ibid* at paras 8.1 to 8.9; see also Michael Lockrey, Communication No 13/2013, UN Doc CRPD/C/15/D/13/2013 esp at paras 8.1 to 8.9.

²⁸ *Convention on the Rights of Persons with Disabilities* [2008] ATS 12 Article 4(5); *Vienna Convention on the Law of Treaties* [ATS] 1974 No 2

²⁹ *Convention on the Rights of Persons with Disabilities* [2008] ATS 12 Article 4(1)

³⁰ *Al-Kateb v Godwin* (2204) 219 CLR 562 at 19.

³¹ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J.

³² *Vaise v Delaval* (1785) 99 ER 44; *Goby v Wetherill* [1915] KB 674

³³ *Mabo v Queensland (No. 2)* (1992) 175 (CLR) 1 at par 29 per Brennan J.