

Inquiry into access to services and information in Auslan

Submission to the ACT Legislative Assembly's Education
and Community Inclusion Committee

28 JULY 2022

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the ACT Legislative Assembly Education and Community Inclusion Committee's ('the Committee') Inquiry into access to services and information in Auslan.
2. This submission will focus on safe, appropriate and equal access to justice for d/Deaf people,² including through Auslan. The first part of this submission will unpack the terms 'access to justice' and 'access to the justice system', namely what they mean for d/Deaf individuals in practice. The second part of this submission addresses the international, national and local human rights obligations underpinning the necessity to ensure that d/Deaf individuals can access legal processes equally. The final section of this submission offers some practical suggestions to ensure safe, appropriate and equal accessibility for d/Deaf people.
3. The ALA broadly welcomes recent reforms in this space in the ACT, including amendments to the *Juries Act 1967* whereby judges *must* now consider – and, where satisfied, *must* make a direction to provide the support (such as, an Auslan interpreter) – if the provision of that support would enable a person to discharge the duties of a juror and thus sit on a jury.³
4. The ALA also welcomes the aspirations contained within the ACT Government's *Disability Justice Strategy 2019-2029*, which includes a vision for the ACT to have “a disability responsive justice system”, a system where “people with disability have access to legal services and supports”.⁴
5. Attached to the ALA's submission is an article entitled 'Sign of the times: Communication courtesy for d/Deaf equality before the law' by Aneita McGregor and Asphyxia. This article first appeared in the July/August 2022 edition of *Precedent*, the ALA's bi-monthly journal, and is shared with permission from both authors and from *Precedent's* editorial team.
6. The ALA acknowledges the experiences of d/Deaf individuals that have been shared in McGregor and Asphyxia's article in relation to accessing the justice system, and strongly

² The ALA uses that the term 'd/Deaf' in order to include both those who identify culturally as being Deaf with Auslan as their first or primary language *and* those who are deaf (people who have a hearing impairment) but may not identify as part of the Deaf community.

³ *Juries Act 1967* (ACT) s 16 (2)(a) and (b).

⁴ Community Services, ACT Government, *Disability Justice Strategy 2019–2029* (Report, 9 August 2019) 8 <https://www.communityservices.act.gov.au/__data/assets/pdf_file/0008/1397924/Disability-Justice-Strategy_v2.pdf>.

endorses the authors' recommendations for improving access to services, including judicial processes, for d/Deaf people.

What 'access to justice' and 'access to the justice system' mean

7. The ALA contends that 'access to justice' and 'access to the justice system' are terms which are sometimes used interchangeably, and are certainly broader in what and whom they include than the terms themselves might imply prima facie. These are, therefore, important concepts to define when determining how to best facilitate equal access to justice and to the justice system, including for d/Deaf individuals.
8. The Access to Justice and Legal Needs Project has detailed various aspects of 'access to justice', including being able to:
 - obtain legal assistance, including from legal professionals (examples include private lawyers and Legal Aid ACT) in person, over the phone and online;
 - participate effectively in legal processes through access to courts, tribunals and alternative dispute resolution mechanisms;
 - obtain assistance from non-legal sources who provide advocacy and support, including social workers;
 - engage with and receive advice or assistance regarding legal rights from certain government authorities and representatives, such as ACT Policing, the Australian Federal Police, and Members of Parliament; and
 - participate effectively in law reform processes, including through law reform commission inquiries and parliamentary committees.⁵
9. In January 2020, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability identified the following individuals and criminal justice agencies that play a role

⁵ Louis Schetzer, Joanna Mullins and Roberto Buonamano, 'Access to Justice & Legal Needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW' (Background paper, Law & Justice Foundation of New South Wales, August 2002) 8–13
<[http://www.lawfoundation.net.au/ljf/site/articleIDs/012E910236879BAECA257060007D13E0/\\$file/bkgr1.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/012E910236879BAECA257060007D13E0/$file/bkgr1.pdf)>.

in 'access to justice' and 'the justice system' for people with a disability, including d/Deaf people:

- Police officers;
- Prosecutors and defence lawyers (including Legal Aid ACT);
- Victim support groups, including counsellors and advocates;
- Courts, including judicial officers and jurors;
- Corrections officers and community corrections officers.⁶

10. In practice, access to justice and the justice system for d/Deaf people can also include navigating online legal resources, which are by and large not available in Auslan, and may not be available in any other format accessible to d/Deaf individuals.

11. Further, access to justice can also include the consistent availability other communication accessibility services, such as live captioning. Live captioning can be an important in legal proceedings in addition to access to Auslan interpreters, as reflected in Asphyxia's experience:

In a court proceeding, my lawyer advised that, as live captions were not available, I would have to rely on Auslan interpreters only. Live captioning is important as it provides an immediate and literal record of what is being said. For example, the judge in her matter used either 'equal' or 'equitable', two words for which there is only one Auslan sign. In a legal context there is an important difference in meaning that affects decision-making. This meant that I was unable to adequately instruct my lawyer on how to proceed.⁷

12. As McGregor and Asphyxia articulate further in their article with the support of related case studies,⁸ access to justice and the justice system also includes ensuring that everyone with whom d/Deaf people may have contact – examples include government employees, officers of the court, registry staff, and legal professionals – have had training in appropriate, respectful communication and are fully aware of what services are available to best support d/Deaf people through judicial processes.

⁶ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Criminal justice system* (Issues Paper, January 2020) 3 <<https://disability.royalcommission.gov.au/system/files/2022-03/Issues%20paper%20-%20Criminal%20justice%20system.pdf>>.

⁷ Aneita McGregor and Asphyxia, 'Sign of the times: Communication courtesy for d/Deaf equality before the law' (July/August 2022) *Precedent* 9.

⁸ *Ibid* 9–10.

A right to equal accessibility to the justice system

13. Equal access to justice, and to the processes and institutions involved therein, for d/Deaf individuals is a human right. As affirmed in *Australia's Disability Strategy 2021–2031*, ensuring this equal access for d/Deaf people helps to realise both Australia and the ACT's formal commitments to human rights promotion and protection.⁹
14. The ALA draws the Committee's attention to the following international, national and local instruments which guarantee and promote a right to equal access the justice system and related judicial processes for every individual, including for d/Deaf people:

United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)

15. Australia ratified the UNCRPD on 17 July 2008, one of the first countries to ratify this UN Convention.¹⁰
16. Article 13 of the Convention addresses equal access to justice:
 1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including 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.
 2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.
17. Access to justice through sign languages like Auslan and in other formats appropriate for d/Deaf people is also addressed in Article 21 of the UNCRPD:

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, as defined in article 2 of the present Convention, including by:

⁹ Department of Social Services, Commonwealth of Australia, *Australia's Disability Strategy 2021-2031* (Report, December 2021) 17 <<https://www.disabilitygateway.gov.au/sites/default/files/documents/2021-11/1786-australias-disability.pdf>>.

¹⁰ Australian Government Department of Social Services, *The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in AUSLAN (Australian Sign Language)* (Web Page, 6 April 2018) <[8](https://www.dss.gov.au/the-united-nations-convention-on-the-rights-of-persons-with-disabilities-uncrpd-in-auslan-australian-sign-language#:~:text=Australia%20was%20one%20of%20the,Disabilities%20on%2017%20July%202008.>>.</p></div><div data-bbox=)

- a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
- b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions; ...
- e) Recognizing and promoting the use of sign languages.

18. Further obligations for States Parties to the UNCRPD concerning promotion of and provision of access to services through sign language for people with a disability are detailed throughout the Convention.¹¹

International Covenant on Civil and Political Rights (ICCPR)

19. Australia ratified the ICCPR in 1980, Article 14 of which details every State Party's obligations to provide equal treatment before the law for all individuals, equal access to legal processes for all individuals, and the free provision of an interpreter:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

...

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; ...

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;¹²

¹¹ See: *United Nations Convention on the Rights of Persons with Disabilities*, art 9(2)(e), art 24(3)(b), art 24(4) and art 30(4).

¹² *International Covenant on Civil and Political Rights*, art 14

Human Rights Act 2004 (ACT)

20. The ACT's own legislative human rights instrument details the human rights all individuals can expect,¹³ and requires consideration of how compatible with those human rights each bill presented to the Legislative Assembly is.¹⁴

21. For this inquiry's purposes, the following sections of the ACT's *Human Rights Act* outline rights and obligations regarding access to justice, including for d/Deaf individuals:

8 Recognition and equality before the law

(2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.

(3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

Examples of discrimination

Discrimination because of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.

22 Rights in criminal proceedings

(2) Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else:

(a) to be told promptly and in detail, in a language that he or she understands, about the nature and reason for the charge; ...

(h) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court;

Discrimination Act 1992 (Cth) and Discrimination Act 1991 (ACT)

22. These Acts enshrine a shared legislative objective to eliminate discrimination against people living with a disability, including in the provision of systems and services.¹⁵

23. The ACT's *Discrimination Act 1991* also affirms a commitment to uphold all rights contained in the *Human Rights Act 2004*, including those provided above by way of examples in this submission.¹⁶

¹³ *Human Rights Act 2004 (ACT)* Preamble.

¹⁴ *Ibid* ss 37–39.

¹⁵ *Discrimination Act 1992 (Cth)* s 3(a); *Discrimination Act 1991 (ACT)* s 4(a).

¹⁶ *Discrimination Act 1991 (ACT)* s 4A.

Ensuring safe, appropriate and equal accessibility for d/Deaf people

24. The ALA urges the Committee to recommend that, where jurisdictionally appropriate and possible, the ACT Parliament amend legislative instruments and policies to require that government agencies, courts, tribunals and any other groups or individuals comprising the ACT's justice system (those listed in the first section of this submission and any in addition to those listed there):
- a. adhere to the aforementioned international, national and local instruments which enshrine equal access to justice for every individual, including via the use of sign languages like Auslan;
 - b. provide information in Auslan about all services and procedures, if that information is not already in a form which is accessible to d/Deaf individuals;
 - c. present clear information (including in Auslan) about accessing Auslan interpreter services; and
 - d. provide other communication accessibility services, such as live captioning, during any live legal proceedings.
25. The ALA strongly recommends that the ACT Government allocates sufficient funding to ensure that:
- a. resources relating to accessing the ACT justice system can be offered in Auslan, communicated through an Auslan interpreter and/or communicated through live captioning, as needed; and
 - b. staff in the relevant organisations, agencies, departments, courts and tribunals are offered professional development training in engaging respectfully, helpfully with d/Deaf people seeking to access the ACT's justice system.
26. The ALA acknowledges that there will be challenges that arise and extensive resources needed to implement the above recommendations.
27. The ALA firmly believes, however, that providing equal access to justice and making the justice system more accessible for d/Deaf people are essential pursuits which align with Australia's and the ACT's commitments to human rights preservation and promotion.

28. The ALA thus urges the Committee to consider the above recommendations, as well as those contained in McGregor and Asphyxia's article.

Conclusion

29. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the ACT Legislative Assembly's Inquiry into access to services and information in Auslan.

30. The ALA is available to provide further assistance to the Committee on the issues raised in this submission.



Hassan Ehsan

ACT President,

Australian Lawyers Alliance

SIGN OF THE TIMES

COMMUNICATION COURTESY FOR d/DEAF EQUALITY BEFORE THE LAW

By Aneita McGregor and Asphyxia

Interpreters using Australian Sign Language (known as Auslan)¹ are a familiar sight on television during crisis announcements and have become more so over the past couple of years at pandemic press conferences. However, more recently there has been a return to the absence of Auslan interpreters communicating important messaging to the Deaf community.² For example, there were no interpreters during coverage of the recent 2022 federal election – not for the tally room announcements, the concession speech of the outgoing Prime Minister, Scott Morrison, or the first address of the 31st Prime Minister, Anthony Albanese.

Our culture needs to shift toward routinely including our d/Deaf citizens in all aspects of society and at all times, not just during crises. This is critical for ensuring equality before the law, equal access to the legal system and protection of human rights. Culturally appropriate communication is the key to equity and fairness.

Whether you are a lawyer or advocate, have a legal support role, or work in a legal setting such as a court or tribunal, this article invites you to reflect on your cultural competence and confidence in communicating with d/Deaf clients. The authors hope this illustration of d/Deaf experience will demonstrate the importance of rethinking the role you play in communication, and adopting *communication courtesy*. This approach is effective and beneficial in enabling full participation in our legal system – so beneficial that it is paramount that it becomes the norm.

While courtesy hardly seems a revolutionary concept, experience has taught us that it is frequently lacking in terms of providing equal access. Our position is that it is necessary to challenge the status quo with reform that fosters an equitable and fair system where responsibility for communication is shared between those working in the law and their d/Deaf clients. The burden of solving communication issues currently sits squarely on the shoulders of those with a hearing loss and that, we say, is unacceptable in 2022 with all of the accessibility resources and measures available. For example, measures such as captioning for TV programs and having Auslan interpreters at press conferences are greatly underutilised.

There are three things to note about our approach to this article. First, we inclusively use the term 'd/Deaf' where the meanings of both the medical condition of hearing loss and membership of a community apply.³ Second, Asphyxia shares her lived experience to illustrate the critical importance of accessible communication for our whole community. Third, while we have written this article with the hearing legal fraternity as the primary target, we hope it may have broader application.

A NOT SO QUIET REVOLUTION

We bring disparate experiences to this article. Asphyxia is a Deaf performer, author and Deaf activist and Aneita a hearing lawyer with disability and administrative law experience. This article is the result of our personal collaboration in the NDIS and Administrative Appeals Tribunal (AAT) spaces, where there is a desperate need for increased d/Deaf accessibility. We have a shared vision that, for equality before the law, there must be a 'courtesy' revolution in thinking about communication with others.

We propose that communication courtesy be an essential aspect of engagement with others, and that this includes acknowledging the person you are communicating with may have diverse

communication approaches: communication involving hearing is only one such approach. It is notable that 1 in 6 Australians live with hearing loss, and that figure is set to become 1 in 4 by 2050, at which time a quarter of Australians will experience hearing loss. Currently approximately 30,000 of people with hearing loss use Auslan and identify as Deaf.⁴ Deafness affects different people in different ways, and no two d/Deaf people are the same. This difference can be influenced by the cause of hearing loss, the age when it occurred, whether or not their family could sign or use inclusive communication, the amount of information they have received to make up for a lack of overhearing (the casual absorption of knowledge that occurs by listening to others interact, the radio and TV), and their own cultural and personal values as a Deaf person. For many Deaf people, English is a second language; so their literacy skills may be limited as well.⁵ Additional disabilities, and membership of other minority groups, can create further barriers to communication. Further complicating the issue is the significant stigma associated with being d/Deaf, which may lead to d/Deaf or hard of hearing clients not mentioning their hearing loss.

The critical message here is that the smallest of changes can have a revolutionary effect on communication, and that change simply requires a shift in thinking, to proactively asking, *how can I ensure that we best communicate with each other?*

ACCESS FOR EVERYONE

'When I needed a lawyer at short notice, I called several through the National Relay Service (NRS),⁶ introducing myself and explaining that I was Deaf. I was unable to get an appointment. It was only after I instructed a hearing friend to call on my behalf and avoid mentioning my Deafness that I was able to secure an appointment with two potential lawyers.'⁷

This is typical of the kind of stigma associated with d/Deafness and demonstrates why d/Deaf clients may not reveal their hearing difficulties. You may already have several clients with hearing loss who struggle silently with lipreading and adapt themselves to hearing-centric communication modes without protest.

We propose that the starting point should not be from an ableist, 'everyone can hear' perspective. The demographics of the Australian community should illustrate clearly the need to develop inclusive communication practices. Ask yourself: *What do I need to do or share to ensure smooth and clear access with all my clients, including those with hearing loss, whether I know they have hearing loss or not?*

An important aspect of developing systems of access is the need to have one system for everyone. When you have a special system for a specific group, the system is more vulnerable to failure.

For example, in accessing captions at cinemas, rather than providing open captions (captions on the screen), cinemas use a portable device called Captiview (known as 'Craptiview' in the Deaf community), which provides captions on a device for the d/Deaf patron only. The Captiview system routinely fails as staff don't know how to use it properly – training is often overlooked, the need to charge the device is often forgotten, and hearing people tend not to check that the captions are correct (Asphyxia has watched commercial movies via Captiview with the caption 'penis' inserted randomly into the dialogue). It is preferable to have a single system in use for all clients that builds in access for those who cannot hear fully.

Communication courtesy also entails calling out discrimination, complaining about exclusion in relation to attitudes and practices, and being solution-focused when there are gaps or breakdowns in communication. As you will see in this article, even organisations that should be leaders in this area get it wrong despite being well-intentioned. We can learn from the mistakes of others.

THE NEED FOR DEAF AWARENESS

A crucial aspect of developing communication courtesy is acquiring a basic level of d/Deaf awareness so that typical assumptions about d/Deafness can be avoided.

Deaf people who belong to the Deaf community live with a rich culture with its own customs and ways of relating that vary considerably from the way hearing people relate to one another. Deaf people need to make an enormous cultural shift when relating to the hearing world, reminding themselves to behave in ways that are considered appropriate and acceptable to hearing people, while hearing people remain oblivious to the fact that a culture gap exists at all. For example, in the Deaf community, communication is typically blunt and direct, to an extent that would be considered rude in the hearing world. Deaf people may struggle to identify topics that hearing people discuss with a careful, diplomatic choice of words, to decipher the meaning of the euphemism presented for taboo topics, and to themselves output similar euphemisms to the extent considered appropriate for the context. Hearing people may simply perceive them as naive or rude, without realising there is a cultural gap occurring.⁸

Avoid incorrect assumptions about d/Deafness

These are some myths that can lead to discrimination and disadvantage for d/Deaf people:

- **Technology solves a person's deafness.** In reality, hearing aids and cochlear implants improve hearing in some circumstances but do not turn a d/Deaf person into a hearing person.
- **Deafness means an absence of any sound.** Many d/Deaf people struggle with tinnitus (ringing in the ears), distorted sounds, flattening of sounds into an unpleasant white noise created by hearing aids, and the overwhelming noise of people shouting at them.
- **Deaf people can and should lipread.** Some d/Deaf people lipread well, while others do not. For all d/Deaf people, lipreading is exhausting, because, unlike words on the page, words on the lips are indistinct. For example, the words, 'bat,' 'mat,' and 'pat' all look the same when lipreading, while other sounds do not show on the mouth at all, so the lipreader needs to use other factors such as the context of the conversation, facial expression and body language to guess at the likely word used. Asphyxia estimates that when lipreading she catches only one word in five, and the rest is guesswork. This is an enormous cognitive load that is draining for d/Deaf people. Do not assume you can leave this load entirely on their shoulders while you conduct business as usual.
- **Auslan is a literal translation of English words.** Auslan is a language distinct from English, with its own grammar, idioms and styles of expression. Concepts may be drawn in the air rather than expressed through signs representing each word. Facial expression and the position of the shoulders convey much information.
- **Deaf people are the same as hearing people save that they cannot hear.** This is not the case: d/Deaf people experience many barriers to accessing an ableist, hearing-centric world. Being d/Deaf influences every aspect of the way they conduct themselves and their social lives, and hence their career options, their economic position, their participation within their own families, their level of social cohesion and isolation, and the amount of energy they have available for self-advocacy.
- **Deaf people know English.** Some d/Deaf people are fluent in English, but for many English is a second language, and their English skills may be poor. Hearing people may interpret this as lesser intelligence or intellectual capacity, when in fact the lack of skill may be due to factors such as inadequate education and exposure to the language. Hearing people can hear English all day every day, while d/Deaf people may only have exposure to the language when they are concentrating specifically on it. A Deaf person with poor English and little language access during childhood may have difficulty accessing information through technology, such as doing a Google search, because they cannot read and interpret the results easily; they might also struggle with subtitles on TV. Similarly there can be an issue with reading English and accessing written communication in legal, medical, work or social settings.

Make booking systems accessible

For many d/Deaf clients, the first point of contact with legal services comes with booking an initial appointment. As phone calls can be difficult or impossible for many clients with hearing loss, a crucial aspect of providing access is offering alternative means of making bookings, such as the following:

- Including an email address on your website, promotional material, and any invitation to email for an appointment.
- Ensuring reception staff know to respond to email enquiries promptly in the same way as when they pick up the phone. It is typical for d/Deaf people to try emailing, and then, when no response is received, to find a way to phone for immediate communication. By ensuring that email is a form of immediate communication and letting clients know this, access is broadened.
- Ideally, providing a mobile number and inviting SMS contact. SMS is more immediate than email and the shorter, more relaxed form is less intimidating for d/Deaf people with poor English; email comes with the expectation of more text-heavy and hearing-centric communication. An SMS service also needs quick response times as it is replacing the call to reception.
- Inviting potential clients to declare their access needs on your website and in your promotional material. For example, include the statement: 'Let us know your access needs and if we should book an interpreter for your appointment.' This message is welcoming and shows you understand that not all clients will be fluent in English or able-bodied.

Client registration forms can also make communication more accessible for d/Deaf clients:

- Clients should be able to select how they would like to be contacted – by phone, SMS or email – and to enter any additional access needs.
- Clients should be able to request that phone communication be via SMS only. It is frustrating for d/Deaf people to provide their phone number and then receive voice calls they cannot answer. Requests for phone numbers to be SMS only should be clearly flagged within client management systems so that all staff are alerted when they look up the number.

When an appointment is booked that includes access needs, such as interpreting, closed captioning or a scribe, the responsible staff need to contact the client for details of their preferred interpreter or service. These services are rarely available at short notice and must be booked promptly, and confirmation then given to the client so they know that everything has been arranged. Since d/Deaf clients often experience failures with services being booked, this can cause anxiety about whether access needs will be met.

'I had the experience of the NDIA providing assurance of a scribe for an online review meeting, but failing to do so. More disappointingly, that fact was not revealed until after the meeting, when the notes were requested. Such conduct falls short of ensuring equal access and is unacceptable.

If the d/Deaf person could receive an email telling them what has been booked this would allay their anxiety, and also give an opportunity to point out when the wrong service or person has been booked, as well as offering time to solve the problem.'⁹

Unless the d/Deaf person suggests asking the person currently interpreting for them to do so again, you should wait until afterward to communicate about the arrangements confidentially. Never ask a d/Deaf person who the interpreter should be for the next booking in front of another interpreter, because they may not wish to offend that person by saying they would rather have someone else. A d/Deaf person may also prefer not to announce in front of a family member that they would prefer to have someone else interpret for them.

Communicate effectively between appointments

Respect the method of communication the client has requested – whether via email or SMS, or through a third person (such as a family member). Some d/Deaf clients may be comfortable communicating in writing, but keep in mind that many have poor English and may be more comfortable expressing themselves in Auslan. They may also have difficulty understanding the content of legal documentation sent to them, and may require an Auslan interpreter to translate the document. Check in with your d/Deaf client about their comfort with written English.

By way of a cautionary tale, even the most well intentioned can get it wrong:

‘Recently in communication with me a staff member of the Human Rights Commission signed off a letter with ‘phone me ...’ and provided a landline number for contact. Given that I have a signature block that sets out my communication requirements, and that my complaint to the Commission related to inaccessible communication, this was a significant misstep. There really is no excuse for such a default position, which creates disappointment and frustration and is neither inclusive nor reflective of communication courtesy.’¹⁰

Don’t dictate communication methods

It is not the place of an organisation to dictate how a d/Deaf person should be communicated with – for example, proposing that written communication should be used instead of a face to face discussion or that the NRS should be used.

‘The NDIA will often phone participants to discuss an internal review; however, it was proposed to me that I put everything in writing. Why? My preferred communication method was a discussion. It appeared to be because the NDIA did not want to conduct a review meeting with an interpreter in a Deaf-friendly format such as a video call. The written approach is not a substitute for a conversation in which ideas are shared contemporaneously, and lacks the interactivity and understanding provided by the other person’s facial expression, body language, tone of voice, and level of animation. I responded to the NDIA’s proposal by setting out the considerations described here, but it should not be necessary for d/Deaf people to have to provide education of this kind – it is draining for them to have to do so repeatedly.’¹¹

It is vital to ensure there is a d/Deaf-friendly way for clients to contact you or your organisation if needed. The NDIA provides a live webchat, which is excellent – a service that generates a transcript, as this one does, is extremely valuable, and not only for d/Deaf people. However, despite this service, following recent flooding in NSW, when people were displaced and there was limited access to internet and phones, the NDIA’s only real option for participants to engage with them was by a 1800 number; the webchat staff were unable to help.¹² Ensure that d/Deaf friendly communication services are operated by staff who are able to provide the same level of service as that obtained by hearing people over the phone.

It is common for government organisations to require d/Deaf people to contact them through the NRS, instead of via another d/Deaf-friendly means. It is often thought that the NRS meets the needs of all d/Deaf people. However, this service has limitations.

The NRS is not practical for everyone to use. It lacks the immediacy of a conversation between two people. If you are a hearing person, you are required to speak, wait for the message to be typed, and then wait for a reply. Callers to the NRS are frequently put on hold for lengthy periods while waiting to have their call connected, or may experience the disappointment and frustration of being cut off in the middle of a call. In addition, the hearing person being called often becomes impatient with the process

and may communicate in a strange or stilted way.¹³ The biggest problem with using the NRS is the time lag between rounds of communication:

'I type what I need to say to a person, and then I have to wait for their reply and for the relay officer to type it out. The wait can be quite lengthy. There are also significant waits if I am on hold. If I sit there and stare at the screen while waiting, I go insane with boredom. Therefore, I need to do something else while I wait. That means my eyes go elsewhere. Unfortunately, I may become distracted if I am on the phone for an extended period while I engage in another activity. There is no auditory sound to remind me to check the NRS window for activity. It is not uncommon for me to start calls, get put on hold, forget I am on the phone, do something else for too long, then suddenly remember about the NRS call and realise it's far too late – the person answered and then hung up because I didn't respond! Hearing people don't have this problem because they hear music while on hold and when the music stops it catches their attention, or a person speaks and they hear it.'¹⁴

There are options other than the NRS available provided by private and government services and it should not be the hearing person who determines the mode of communication. Exercise courtesy and simply ask.

GOOD BUSINESS PRACTICE

Develop professional competence

Ongoing professional development is a fundamental requirement for anyone working in the legal profession, and in the authors' view improving interpersonal skills should be a feature of that growth. Learning new skills to better understand clients is valuable. Here are some tips for adding to your professional competence through a commitment to communication courtesy.

When communicating with d/Deaf clients:

- Don't assume that a person who cannot hear is less capable or competent than someone who can hear.
- If it is not already clear, ask your client about the best way for communicating in the given situation. Lipreading is tiring and so some clients may prefer to lipread for short discussions only. They may need you to moderate the speed of your speech or to speak more clearly. If a client signs to you or writes on paper or an iPad, respond in kind, perhaps typing on your phone or writing on paper, or using basic Auslan combined with mime if you are able to.
- Keep in mind that it is inappropriate and unwelcome to suggest medical interventions to a d/Deaf person, such as recommending that they get a cochlear implant.
- Avoid unnecessary focus on d/Deafness or sign language unless it is relevant to the conversation. Don't mention your relative who is Deaf, or tell them that you learnt to fingerspell at school, or demonstrate the ABC in sign language, or comment on how amazing it is to watch sign language. Instead, focus on the issues at hand.
- Use the same language your client uses to refer to their d/Deafness or disability. For example, if a client refers to themselves as 'hard of hearing,' be sure to use the same language yourself. Do not use euphemisms such as saying, 'your condition' and do not use different terminology such as describing them as 'deaf.'
- Build your disability competence generally. This might include professional development such as studying Auslan Certificate I or having your organisation undertake Deaf Awareness Training, which is offered by numerous organisations. Expression Australia¹⁵ can be a good starting point for researching options here. This can help build awareness around respectful communication and Deaf culture, and increase understanding about everyday barriers for people who are d/Deaf. Even basic Auslan at the level of Certificate I or II can make a huge

difference to your ability to welcome d/Deaf clients and help them feel comfortable, respected and accepted, in terms of both language and cultural understanding.

- Don't assume that a person with disabilities is a participant in the NDIS, and, if they are, don't assume that they are sufficiently funded for necessary supports in legal circumstances.

Include communication and access in agendas

Adopting communication courtesy as the everyday approach to work means that an organisation will meet client needs in the same way that their professional needs are met. A simple step is to include communication and access as a standing agenda item. This offers an opportunity to talk regularly about systems that are in place, identify improvements required, and continually add to competence and awareness.

Access should be a standing budget matter too. This budget allocation might be for upskilling staff, modifying computer systems, covering interpreter costs or meeting other costs. Considering and then meeting the needs of d/Deaf clients and staff is not only the right thing to do, but ultimately makes business sense as well.

Understand how to work with interpreters

Interpreters, whether professional or family members, play a critical role in communication between Deaf and hearing members of the community. Reliance on family members is a matter of individual preference, but is not permitted in some legal settings. A critical skill for practitioners is comfort with working with Auslan interpreters, and understanding their role and the etiquette involved. An essential resource for practitioners is the publication *Recommended National Standards for Working with Interpreters in Courts and Tribunals*.¹⁶

Choose conversation partners wisely

Working with interpreters, compared to having a direct conversation in their own language, is draining for Deaf people. If your organisation has staff who are fluent in Auslan, always make use of those staff for appointments with Deaf clients, unless the Deaf client requests otherwise.

Some organisations discourage this practice because the Deaf client may know the staff member personally. However, the Deaf community is a relatively small one, and consequently the same person may have multiple roles. For example, in the medical setting there are few GPs who are fluent in Auslan, so it is likely that such a person will be both a member of a community and also a GP to members of that community. Similarly, interpreters work closely with Deaf people daily, and it is therefore likely they will share friendship or family relationships with clients.

'During my interaction with the NDIA I was able to secure a meeting via Teams with a Deaf staff member. This made the meeting more direct and conversational for me. However, I have been informed that the NDIA has a policy that their staff should not know the participants they meet with. A staff member who had worked in the Deaf community for many years as an interpreter was not permitted to work with Deaf clients due to the anonymity requirement. That presented a catch-22 situation, because a high level of Deaf cultural competence should always be provided, but this can only be achieved through connection with the Deaf community.'¹⁷

The small community does raise considerations around confidentiality and anonymity. In relation to the NDIA context, this is a human rights consideration. Asphyxia notes:

'It is wrong that a decision is made for us that prioritises anonymity over our cultural needs. I should be able to exercise a choice about which is more important to me – culturally

appropriate communication, or anonymity. It is insulting at best to say that this is the choice of the NDIA – that I must be assisted by someone who has no understanding of my culture. The reality is that the only people who will have the high level of knowledge about Deafness will be those who have taken an interest in it and gained competence through engagement. It is ridiculous that they are then off limits.¹⁸

Understand how Auslan interpreters work

Auslan interpreters are required to interpret *every single thing* regardless of whether it is considered important or not, and they are trained to bridge cultural gaps, such as the one described above where Deaf people may present as rude by using very blunt language. An Auslan interpreter knows to adapt the language to the context and use appropriate terminology so that the Deaf person doesn't come across as rude. Auslan interpreters also understand that they are there for the benefit of *both* the hearing and Deaf clients, and will interpret everything the Deaf client says to the hearing person too. They also know not to intervene in a conversation, even if they don't agree with what is being said.

Note the following important practices when working with an interpreter:

- When an interpreter is working, it is not acceptable to speak directly to them and bring them into the conversation. Their role is to be a conduit of information between the Deaf and hearing parties and not a participant in the conversation. If they respond to you, they will not be interpreting at the same time.
- Due to differences in grammar, it is not generally practical to sign and speak at the same time – when people do this, Deaf clients receive reduced-quality information.
- Interpreters need breaks every 20 minutes to prevent development of repetitive strain injury and fatigue. Depending on the circumstances, two interpreters may be needed who will alternate, swapping every twenty minutes.

Family members as interpreters

In general, it is not appropriate for a family member to interpret in a legal setting, though there are limited circumstances where this may be acceptable. Family members should not interpret because even if they are fluent in Auslan they may not have received the ethical training that Auslan interpreters receive and they may not be able to interpret legal meaning. Family members could possibly, despite good intentions, modify the message inappropriately, or they may not actually be fluent in Auslan and so provide low quality or misleading information to the Deaf person.

In some circumstances it *is* appropriate for a family member to interpret. Some Deaf people use a significant number of 'home signs' – signs that are used in their household but are not known by others – and some may have cognitive or language limitations which mean that they cannot understand most interpreters.

In summary, regard should always be had to the preference of the Deaf person for who is best placed to interpret, while at the same time considering the requirements of the legal context. In a legal circumstance where a family member is not permitted to interpret, but the Deaf person cannot understand conventional interpreters, flexibility with the rules may be required in order to facilitate access – perhaps a qualified interpreter can be provided to oversee the family member. As emphasised in the discussion above, the critical factor is openness and communication courtesy when making the necessary arrangements.

Ensure access in court and tribunals

*The United Nations Declaration on the Rights of Disabled Persons*¹⁹ has established an obligation to meet the access needs of all parties:

'3. Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow-citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible.

5. Disabled persons are entitled to the measures designed to enable them to become as self-reliant as possible.

8. Disabled persons are entitled to have their special needs taken into consideration at all stages of economic and social planning.'²⁰

Yet it can be difficult to arrange access through the court and tribunal systems, as registry staff and legal professionals at times lack knowledge about the access options available and how they should be organised. Here Asphyxia reflects on some of her experiences with the AAT and Commonwealth court system, and the barriers and challenges she has experienced:

'In a court proceeding, my lawyer advised that, as live captions were not available, I would have to rely on Auslan interpreters only. Live captioning is important as it provides an immediate and literal record of what is being said. For example, the judge in her matter used either 'equal' or 'equitable', two words for which there is only one Auslan sign. In a legal context there is an important difference in meaning that affects decision-making. This meant that I was unable to adequately instruct my lawyer on how to proceed. It is unknown why the request for live captioning was refused – whether it was the decision of registry or the result of an assumption by the lawyer – but live captioning to ensure my full participation was not an unreasonable request.'²¹

It seems a reasonable expectation that the AAT, which has been responsible for appeals in the NDIS Division since the NDIA started, would be well equipped to assist d/Deaf applicants, but unfortunately that has not been Asphyxia's experience. Asphyxia notes:

'Prior to an AAT directions hearing, where I was a self-represented applicant, I requested a transcript for disability access. I was advised by the registry that I would have to pay for it or complete a financial hardship application, even though the basis for my request was my disability. I am, unsurprisingly, unable to simultaneously sign myself, watch the interpreter interpreting for the AAT member and NDIA lawyer, and take notes for myself which I would need later for a lawyer or advocate.

Then at the start of the directions hearing I requested that the member make available a transcript, or in the alternative that the NDIA request it. I was informed by the member that I was 'the same as all other participants' and could purchase the transcript or apply for financial hardship. The NDIA did not obtain the transcript either, so I ultimately purchased it myself for around \$500. This was an ableist and discriminatory approach, which inappropriately conflated disability with financial hardship.

Fortunately, since then my application has been allocated to another member and steps have been taken to improve accessibility through the live captions being provided and a captions transcript being available afterward. Although the captions transcript is not a substitute for a full transcript, the current arrangement is a significant improvement.

Delay by AAT registry staff with booking interpreter and captioner services caused me significant burden and stress with my application. I have been required to make multiple

enquiries as to whether interpreters have been booked, with mixed results. On one occasion, the bookings were not made and 2 days before a directions hearing the hearing was relisted to suit the availability of a captioner.¹²²

The overarching message is that everyone involved in a proceeding needs to be vigilant in their communication, and proactive, consistent and efficient, and courteous, to ensure equal access before the law and to avoid causing disadvantage and discrimination.

CONCLUSION

Inclusion requires more than the occasional appearance of an Auslan interpreter on TV during a crisis. We need a new way of thinking, to bring about dramatic change and facilitate equal access in the community for d/Deaf people. We have shared examples from the legal setting to illustrate the importance of meeting individual communication needs. We invite you to approach this with curiosity and openness – to think about others and their needs, while also thinking about your own communication (your needs, skills and strengths, and gaps). The more we learn to communicate comfortably in d/Deaf-friendly ways, the closer we come to creating equality for everyone before the law. While this article has focused on d/Deafness, the concepts explored apply equally in terms of considering people with a range of disabilities.

It is not suggested here that the responsibility for communication and access sits with one or other side of an interaction. Deaf clients tend to already be engaged in intensive efforts to arrange their own access, and they have a good idea of what access solutions will work best for the circumstances. Communication courtesy is a step towards sharing the load. We have tried to highlight that, with a change in systems and through upskilling, mutual respect and understanding, and a focus on communication courtesy, equal access before the law can be more fully achieved.

Aneita McGregor and **Asphyxia** have written this article in collaboration. **Aneita** is a hearing woman with a background in law and disability advocacy, and **Asphyxia** (www.asphyxia.com.au) is an acclaimed Deaf author, performer and activist. The authors have been collaborating for nearly a year, and communicate with each other by text, email, Zoom with a combination of signing and chat, and through an Auslan interpreter.

¹ See Auslan Signbank <<https://auslan.org.au/>>.

² Note that the term 'd/Deaf' is used to represent both those who identify culturally as being Deaf with Auslan as their first or primary language and those who are deaf – who have a hearing impairment (people who have a medical condition, but who may not be part of the Deaf community).

³ See Auslan Signbank, above note 1.

⁴ Australian Network on Disability, *Disability statistics* <<https://www.and.org.au/resources/disability-statistics/>>.

⁵ J Napier and M R Kidd, 'English literacy as a barrier to health care information for deaf people who use Auslan', *AFP: Australian Family Physician*, Vol. 42, No. 12, 2013 <<https://www.racgp.org.au/afp/2013/december/auslan-english-literacy/>>.

⁶ See National Relay Service <<https://www.infrastructure.gov.au/media-communications-arts/phone/services-people-disability/accesshub/national-relay-service>>.

⁷ Asphyxia, email to Aneita McGregor.

⁸ This has been experienced by Asphyxia and recounted to her by others in the Deaf community.

⁹ Asphyxia, email to Aneita McGregor.

¹⁰ Asphyxia, email to Aneita McGregor.

¹¹ Asphyxia, email to Aneita McGregor.

¹² This is an account of Asphyxia's personal experience.

¹³ For examples of complaints about the service, see the social media group Humans of NRS <<https://www.facebook.com/groups/2617493991675385>>.

¹⁴ Asphyxia, 'Royal commission into violence, abuse, neglect and exploitation of people with disability' (Blog post), <<https://helloasphyxia.wordpress.com/2020/08/01/royal-commission-into-violence-abuse-neglect-and-exploitation-of-people-with-disability/>>.

¹⁵ See <<https://www.expression.com.au/>>.

¹⁶ Judicial Council on Cultural Diversity, Recommended National Standards for Working with Interpreters in Courts and Tribunals, April 2022 <<https://www.judicialcollege.vic.edu.au/news/recommended-national-standards-working-interpreters-courts-and-tribunals>>.

¹⁷ Asphyxia, email to Aneita McGregor.

¹⁸ Asphyxia, email to Aneita McGregor.

¹⁹ GA Res 3447 (XXX) (adopted 9 December 1975) <<https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-rights-disabled-persons>>.

²⁰ Ibid. See also United Nations Office of the High Commissioner, *International Covenant on Civil and Political Rights*, Article 14 – Australia has signed and ratified this Covenant; *Charter of Human Rights and Responsibilities Act 2006* (Vic), including ss8(2), 8(3) and 25(2)(i); *Human Rights Act 2004* (ACT); and various discrimination acts, including the *Disability Discrimination Act 1992* (Cth) and the *Discrimination Act 1991* (ACT).

²¹ Asphyxia, email to Aneita McGregor.

²² Asphyxia, email to Aneita McGregor.