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RESEARCH ARTICLE

English language issues for jury service by New Zealanders from migrant and refugee backgrounds

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This paper describes an exploratory study carried out to identify the issues for jury service for people with low levels of English language ability. Questions were emailed to English language teachers and providers of support services to New Zealanders from migrant and refugee backgrounds. The experiences reported by respondents related to issues of understanding the New Zealand legal system, responses to jury summons, excusal from jury service, jury selection, and courtroom and jury room language. In addition, the levels of English language ability appropriate for jury service and approaches to assessing this were identified as concerns. Suggestions are made for improvements to the process and framework for jury service.

Keywords: English language; courtroom language; jury excusal; jury service; refugee and migrant

Introduction

In New Zealand all permanent residents and citizens on the electoral roll are eligible to be called for jury service (Electoral Commission 2014). Potential jurors are chosen at random and sent a summons to which they must respond indicating whether they are eligible and able to attend court for jury selection. In 2012, more than 216,000 people were summoned (Ministry of Justice 2014).

The proportion of the New Zealand population that is overseas-born has been increasing; it reached 25.2% in 2013, or just over a quarter of the population (Statistics New Zealand 2013, p. 15). The proportion of overseas-born from Asian countries has also been rising. Consequently, summons to jury service have increasingly included people from migrant and refugee backgrounds, some of whom have low levels of English language ability. It is estimated that nearly four in 10 juries of 12 people could include someone who cannot hold an

everyday conversation in English, based on the 96.1% of the population who have stated in the census that they can hold a conversation in English about everyday things (Statistics New Zealand 2013, p. 16), which means that 3.9% cannot. Without any filtering based on language, when drawing a jury of 12 people from the population, the chance that one of the jurors cannot hold an everyday conversation in English is therefore $[1-(1-0.039)^{12}] = 1-0.961^{12} = 37.9\%$ (where the superscript 12 denotes the 12th power), i.e. nearly four in 10. The Law Commission's 2004 review of the court's structure and operations acknowledges the challenges posed by the changing context in New Zealand (Law Commission 2004, p. 8): 'The court system does not appear to have responded fully to what it means to serve a diverse society.'

Juries are considered to play an important part in the New Zealand court system, as noted by the Law Commission (2004, p. 181):

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They help to ensure:

- lay participation in the hearing of criminal offences;
- contemporary community values are reflected in decisions of the court;
- a range of perspectives, experiences and knowledge are brought to bear in decision-making;
- the public is educated about court processes.

A series of reviews of the New Zealand system of jury trials was started in 1989 by the Law Commission and took a legal perspective on a wide range of issues, including language. A sociolinguistic perspective can shed further light on the language issues that were raised during the review. Therefore, this study examines jury service from the point of view of people working with New Zealanders from migrant and refugee backgrounds, focusing on the topic of jurors with low levels of English language ability (but does not discuss issues relating to the use of the other official languages [i.e. Māori or New Zealand Sign Language], which are of a different nature and scope). This has been raised as a concern by English language teachers who have been noticing that increasing numbers of their refugee and migrant students have been summoned for jury service. The 2011 Criminal Procedure Act changes to the types of trials for categories of offence (Ministry of Justice 2013) means that the proportion of jury trials to judge-only trials will be decreasing, and the number of jurors needed will decline. Nevertheless, the issue of English language ability will remain for those people from migrant or refugee backgrounds who are called for jury service.

The Law Commission notes that the ability to understand the trial is a legal requirement for jurors (Law Commission 2001, p. 78): 'Under common law, jurors or potential jurors were incompetent and therefore disqualified if they were unable to understand the language in which the trial was conducted.' The pamphlet that is currently sent with a jury summons has the following information about English ability (Ministry of Justice 2010):

Do you need to be able to speak English fluently?

All proceedings are in English. Understanding English is important. If you can understand and take part in a group conversation in English, you probably understand English well enough to be on a jury.

If you think you may have trouble understanding the trial, you should speak to a member of staff at the court.

There is no further information provided and it is not clear what happens in practice. The current study is an initial exploration of the experiences of people who have low levels of English language ability when they are summoned for jury service. The article begins with an explanation of the methodology of the study, before describing the issues raised by English language teachers and people in support services for people from migrant and refugee backgrounds. This is followed by some suggestions for the future development of the jury service system.

The current study

This exploratory study was initiated by Teachers of English Aotearoa New Zealand (TESOLANZ) to find out:

- (a) whether New Zealanders with low levels of English have had any particular issues with jury service, and
- (b) the appropriateness and effectiveness of the language and terminology on the jury service website and related materials.

An email asking for feedback on the two topics was sent to members of TESOLANZ, English Language Partners, the Office of Ethnic Affairs, New Zealand Settlement Support Coordinators and Refugee Services Coordinators.

Replies were received from eight people with information collated on behalf of groups of colleagues or students/clients, and from 14 people with their own individual responses. As this was not a statistically representative sample of those working with New Zealanders from migrant or refugee backgrounds, the findings were examined using a thematic analysis and grouped according to the key

issues that came up in the responses. Excerpts from the responses are provided as illustration where relevant, with all identifying information removed.

Findings and discussion

The responses included issues directly relating to English language, as well as more general issues about the legal system that particularly affect people from migrant or refugee backgrounds with low levels of English. (Although some issues also apply to other people from migrant or refugee backgrounds, a wider examination was beyond the scope of this study.) Each of these issues will now be discussed.

Website and information materials

The Ministry of Justice uses the WriteMark quality assurance process (see <http://www.writemark.co.nz/>) to ensure that jury information materials are written in plain English. Respondents to this study agreed that the language used for the Jury Service website's written and video resources is clear and straightforward. However, some respondents noted that people who are at beginner levels of English will still struggle, and it would be useful to have the material translated into other languages, as well as further information specifically relating to issues around English language.

Responses to jury summons

Only one respondent indicated that there had been no students or clients who had disclosed anything about jury service. Most stated that they had had 'a few' who had reported being summoned.

Some respondents described positive responses to the summons by people with migrant or refugee backgrounds, noting that jury service can be a good experience of learning about democratic participation in New Zealand society:

We have had 2 learners receive letters asking them to do jury service. Both were in the first few months of their arrival in New Zealand and had very limited written and spoken English. I think they were impressed by the democratic nature of our justice system—they were from [...]—but with my bi-lingual

assistant's help we were able to ascertain that they felt totally inadequate to do this.

[My experience was with a] migrant whose English was not perfect, but who highly valued engagement with the community and could use it well in such forums. He told me he had been on a jury, and I mentioned that he could have excused himself and he said that he knew that but he had highly valued the opportunity to be included and did not think that his level of English had impeded his contribution. For him, it was a definite marker of belonging and I have every confidence that his was a valuable voice in the group.

Other respondents reported negative reactions, particularly about the fear of making a wrong judgement through a lack of understanding of the trial:

[I have written letters...] for elementary and low to mid/pre-intermediate students. Once translations were made, they were horrified at the idea that they could possibly be sending someone to jail when they could barely understand basic everyday stuff.

[...] was excused from jury service after writing a letter himself about his level of English. He has a degree in law, and felt it was unfair to have a jury member who may easily misunderstand a detail, thus clouding their judgement. This happened several years ago. He had lived in New Zealand for about 7 years at that stage, and his English is at an advanced level.

The summons information in New Zealand is all written in English, except the sentence 'If you think you may have trouble understanding the trial you should speak to a member of staff at the court', which is translated into Māori and 12 other languages (Arabic, Chinese Simplified, Chinese Traditional, Hindi, Korean, Cook Islands Māori, Fijian, Niuean, Sāmoan, Tokelauan, Tongan and Tuvaluan). Some respondents mentioned situations where the recipients could not understand the summons:

I have had to write a letter to excuse a [...] learner who felt she didn't have the level of English required for jury service. She couldn't even read the summons and had asked her children to translate it.

A lady said when she was summonsed she found it very difficult understanding the recorded message on the [...] court's telephone and had to play it for at least 9 times to understand it. She said they talked too quickly and too softly.

Others felt that English ability could be an excuse for recipients to use when they did not want to do jury service for other reasons.

A further comment was that because many refugees and migrants are in low-paid occupations the low fee for jury service could cause financial hardship, especially if employers do not make up the difference between the jury service fee and lost wages. The levels of payment for jurors have also been noted by the Law Commission (2001) as a significant problem across the jury service system.

Excusal from jury service

There were a number of replies from teachers who reported having written letters for students to be excused, using level of English as grounds. Some of these letters had resulted in excusal:

[Two learners received letters.] We helped them write letters asking for deferral until their English [had improved]. One received a letter saying he would be deferred for 4 years but got a letter the following week to serve! We had to photocopy the letter they had sent previously and again ask for him to be excused. His English was too poor to either understand or write a reply—but failure to could have caused him to be in trouble with the law.

Others reported that the letters had not been successful:

This year an elderly [...] couple whose English is very low received a letter. Though their daughter wrote a letter explaining their incapability of English language, they were not excused. As a result, the couple went to the court for selection, waited for a long time, and finally didn't get chosen for the duty.

There is a need for clarification of the process when English language is to be used as grounds for being excused from jury service. Although the information telling potential jurors who are concerned about their level of English to 'speak to a member of staff at the court' is translated on the current form into Māori and 12 other languages, there are no further instructions. For example, it is not made clear which member of staff should be approached, whether the discussion can take

place in advance of the jury selection process, or whether support people can attend with the potential juror.

Jury selection

Some respondents noted that the jury selection process may be particularly alienating for those who have low levels of English ability:

The last time I was on jury duty one [...] lady turned up and didn't really even have enough English to explain that she didn't have enough English! She was excused but not a nice position to be in.

Two [...] people turned up to attend jury service but felt very intimidated by the officious officials and overwhelmed by the proceedings. Both were challenged before getting on the jury and felt it was possibly 'anti Asian'. I explained to them that it isn't personal and although I am not Asian, it has happened to me too! I explained the process of selecting a jury and several were surprised at it.

The jury service website explains that the selection of 12 jurors takes place through a ballot of all potential jurors who are assembled at the court. Lawyers can obtain information about potential jurors in advance and can influence the potential composition of the jury by saying 'challenge' as the person walks to the jury box without giving any reason, for up to six people from each side. The Law Commission report on juries (Law Commission 2001, p. 88) notes that, in some cases, judges in New Zealand explain this 'peremptory challenge' process during the selection, emphasising that it should not be taken personally. However, there is scope for clearer explanation of these processes, and the reasons for them, in information available to potential jurors.

Understandings of the New Zealand legal system

Some respondents noted that it is important for people of refugee and migrant backgrounds to understand that New Zealand laws are different from the laws in their own country. This may be an important factor for people from countries with legal systems based on religious law (such as Sharia) or socialist law (such as in communist or

formerly communist countries). The ‘eurocentric culture’ of the courts has been acknowledged by the Law Commission (2004, pp. 6–7), which notes that ‘the mode of operation is almost exclusively mono-cultural and alienating to those whose cultures are not derived directly and relatively recently from the United Kingdom’. A further difference for those from European as opposed to English backgrounds is the adversarial (or two-sided) rather than inquisitorial (or investigative) approach. When there are difficulties in comprehension through low levels of English language ability, language issues may become confounded with cultural issues.

It was also pointed out by respondents in this study that the nature of the issues before the courts could make it difficult for people from some cultures to make objective decisions about the evidence before them. Previous research has found examples of differences between cultural practices and New Zealand law in the areas of child discipline, relationships between husbands and wives, relationships with the police, and the presumption of innocence (Chile 2007, p. 82). It is particularly important for jury members to be fully informed about their role in cases where this could be a factor.

One person [...] said to me that her young daughter was on jury duty this year and was the youngest to be selected. She said it was the [older] men on jury service that put her at ease, especially as it was a case about rape.

Some respondents stressed that many people from migrant and refugee backgrounds have a fear of legal and court systems. Their experiences of unsafe legal systems in their countries of origin make them nervous about participating in jury service in New Zealand.

There is one person I know who has received at least two such letters asking her to be on the jury selection panel. She and her partner have been here for at least 30 years, and each time she has been asked to participate in this process, her husband writes a letter saying that her English is inadequate. She has had all those years to brush up on her written English, and I have offered help, but she has refused to engage saying that it was too late for her to improve. Her

oral English is fairly good, but it’s more her fear of the justice system that has actually put her off.

Fear of legal systems as a result of previous experiences has also been a finding in other research with migrant and refugee communities in New Zealand (e.g. Law Commission 2002; Chile 2007).

A lack of understanding of courtroom proceedings has been identified as a general problem for jurors (Young et al. 1999, p. 13). Explanatory material currently available on the system of jury trials in New Zealand (e.g. Young et al. 2003) is not designed as information to jurors and is too complex for use with people with low levels of English. However, it could be the basis for the development of materials in simple English.

Courtroom language

The complicated nature of language used in courtrooms was stressed by several respondents:

Last time I was on jury duty [...] the trial I was on had an incredible amount of reading and long hours of listening to statistical data and recorded conversations—very high-level academic language too.

The particular difficulties of courtroom language noted in responses included:

- the speed of spoken language;
- the complexity of sentence structure;
- the density of idiomatic language;
- the use of legal jargon;
- the volume of information;
- the length of time that close attention is required;
- the wide range of vocabulary needed.

Respondents noted that these difficulties may be exacerbated by issues of body language:

In court many people look down when they speak—either at their papers or at the floor. This makes it hard for foreign language speakers to catch what they are saying.

Some responses identified the need for English language teaching materials focusing on courtroom language, even for those with high levels of

abilities in general English (the International English Language Testing System [IELTS] uses a scale from 1 ‘non user’ to 9 ‘expert user’, see <http://www.ielts.org/>):

I [...] teach on a course in liaison interpreting where the entry level is IELTS 6 General or equivalent. The graduates of this course often go on to work with the Police and sometimes in the courts, but find they need to do a lot of preparation around vocabulary in particular.

A further issue was a lack of information about whether any translation or interpreting support is available for jurors. The first case of an interpreter in a New Zealand jury room was for a deaf juror in 2005 (Napier et al. 2007, p. 3). However, interpreters do not appear to be provided for jurors with low levels of English language ability.

Academic analyses of courtroom language have identified the specific aspects in which the discourse differs from everyday language (e.g. Coulthard & Johnson 2007; Eades 2010). In New Zealand, Lane (1992) has analysed the particular functions of questions to witnesses, and Innes (2001, p. 37) notes that unlike everyday two-way conversation, the goal of a trial is to provide information to the jurors, who take part only as listeners. Heffer (2010) has developed a model of the jury trial, with a linear sequence of linguistic genres forming a hierarchical ‘forensic narrative’, which progresses from the ‘higher’ goal of decision-making to the ‘lower’ goal of fact-making and back again.

The jury makes its decisions after receiving instructions from the judge, and there is a substantial international literature on the language of instructions for juries (Heffer 2008). Jurisdictions in the United States and Australia have legislated the standard language of jury instructions (see Tiersma 2013; Victoria Department of Justice 2013). In New Zealand, the approach has moved towards ‘question trails’, also called ‘fact-based directions’ and ‘route to verdict’, which are tailored to each case, and for which the judge identifies the issues to be decided in logical order by the jury (Glazebrook 2012; Clough 2013). It would be interesting to compare the two approaches from the perspective of the English language support they provide to jurors.

Jury room language

Some respondents noted that the discussions in the jury room were a further potential cause of difficulty, particularly as there is no requirement for a stenographer to capture the proceedings in writing, which would enable later analysis for any juror who wished to revise the discussions. The confidential nature of jury room discussions means that there is a lack of research on this aspect of the decision-making process.

Appropriate levels of English for jurors

Several responses noted that ‘conversational English’ as noted in the jury service pamphlet (Ministry of Justice 2013) is not adequate for the role of a juror:

We do have group conversations in English in our classes, but they take a long time to cover something as simple as describing what students had for dinner last weekend; that is nowhere near what is needed for jury service.

The Law Commission (2001, p. 78) also states that this may ‘mislead’ potential jurors about the level of language necessary for participation in a trial.

Given the complexity of English language used in a jury trial, there is a clear need for a deeper understanding of the components of English language ability required by a juror, e.g. skills in speaking, reading, writing, listening and vocabulary. The specialised uses of courtroom language may be particularly challenging. In a study of 48 jury trials, Young et al. (1999, p. 26) found high numbers of reported problems:

Eight jurors in seven different trials for whom English was a second language either said themselves that they had failed, or were reported by others to have failed, to comprehend the evidence fully because they did not understand some of what was being said. In some instances, this drastically reduced their ability to follow the evidence and participate effectively in deliberations.

As this included assessments by other jurors, it is not possible to determine the number of instances in which this actually occurred. However, the study has been referred to in subsequent Law Commission

discussions, where it is noted that the jurors had been requested to advise staff if they did not understand English (Law Commission 2001, p. 78). This shows the need for more awareness of the difficulties experienced by the potential jurors in negotiating the court system, and indicates a mismatch of perceptions between court officials and those outside the legal system.

Language issues have also been raised as problematic for all lay participants in New Zealand courtrooms. For example, the amount of oral information to be heard and recalled in jury trials was noted as a difficulty for all jurors in the Law Commission's research by Young et al. (1999). In contrast, in a study of language used in jury trials at the Auckland District Court, Innes (2001, p. 266) found that it is the power dynamics rather than the language per se that causes miscommunication, and notes that this finding is supported by international evidence. She concludes that although there is a widely held view that there is a great deal of misunderstanding in New Zealand courtrooms, her study found that 'there seems to be little miscommunication in the traditional sense of interethnic differences, nor when extending the notion to gender and the professional-lay axis' (Innes 2001, p. 269). It would be useful to explore whether similar differences between perception and reality also exist in relation to the English language ability of jurors from migrant and refugee backgrounds.

Assessment of jurors' English language ability

The issue of general literacy levels of all jurors has been analysed by law commissions in both New Zealand and Australia. In New Zealand, the commission has rejected an earlier recommendation that there be a literacy test, although it notes that this is available at the judge's discretion for whole juries 'where literacy is required to properly understand the evidence' (Law Commission 2001, p. 81). It is not clear what test would be used, especially since they state that more than a million New Zealand adults are below minimal levels of English literacy competence.

The commission in Western Australia concluded that although written aids such as transcripts, written directions, flowcharts, glossaries and chronologies are increasingly being used to assist juries, a requirement for literacy ability was not appropriate, and that 'a juror who can understand English but who cannot read or write is just as capable of assessing the evidence as a literate juror' (Law Reform Commission of Western Australia 2010, p. 94). It is pointed out that in order to avoid embarrassment with literacy difficulties, jurors in trials involving a significant amount of written evidence can write a note to the judge seeking to be excused. However, it is difficult to see how this would be appropriate, or even possible, for people with low levels of literacy skills. It points to a further difference in understandings between those inside the legal system and those who participate in it as lay people, such as jurors. Different approaches to determining the ability of English for second language speakers are used in jurisdictions with similar legal systems to New Zealand:

- The Western Australia review recommended that guidelines be developed for judicial officers for those who self-identify as not understanding English or being able to communicate in English, with standardised questions similar to those used to identify if a person requires an interpreter (Law Reform Commission of Western Australia 2010, p. 99).
- In the Republic of Ireland, the decision is made on a case-by-case basis by court officials, judges and practitioners 'using their knowledge and experience to discern indications of capacity or otherwise' and continuation of this practice was recommended in a 2013 review. Jurors would be reminded of the English language requirements for themselves and other jurors (Law Reform Commission of Ireland 2013, p. 68).
- Ontario has a two-step process with a questionnaire sent to determine whether someone is eligible for jury service before the summons is sent. The questionnaire includes a question

asking if the person speaks, reads and understands English or French, and the note explains that the person 'must be fluent in either language and understand it well enough to follow a trial where all evidence and legal instructions will be given in English or French, without the assistance of an interpreter' (Ontario Ministry of the Attorney General 2013, Section 3, Instruction 9).

In New Zealand, the Law Commission (2001, p. 78) suggests that the current system of self-assessment by jurors is inadequate, and recommends that further screening is required through jurors assessing each other's English language ability (Law Commission 2001, p. 80):

When the jury retires to choose a foreman, the judge should invite them to talk among themselves and ensure that each of them is able to speak and understand English, and advise the judge if any juror appears unable to do so. The proposed second informational video should also emphasise this issue. If the judge is satisfied that a juror cannot speak English sufficiently well, the juror should be discharged.

However, the sound assessment of English language ability is a specialised area. For example, examiners for the IELTS tests used by the New Zealand Immigration Service are required to have, as minimum qualifications, a relevant degree and English language teacher training with substantial adult teaching experience, as well as specific training in assessment and ongoing monitoring and recertification (IELTS 2014). It is not clear how court officials, other jurors, or judges untrained in English language assessment would be able to make appropriate assessments. A short discussion among the jury members while choosing their foreperson would not generally be sufficient to make a sound decision on the ability of one of them to understand the spoken language (including recordings) or written texts that might be presented as part of a trial, even if they were trained in language assessment. This limitation would also apply to the presiding judge.

It would be useful to set guidelines for levels of English necessary for jury service in New Zealand. This would best be with reference to international benchmarks such as the IELTS (IELTS 2013) or the

Common European Framework of Languages (CEFL) (Council of Europe 2001), along with appropriate expert input into the design of an appropriate process for the assessment of the English language ability of potential jurors.

Once clearer understandings of the appropriate levels of English language ability are identified, the assessment procedures could be strengthened in two ways: for potential jurors to assess their own levels of English language ability (such as a self-assessment test on the jury service website); and for specialist assessment of the English levels of potential jurors. In either case, it would be more efficient (and less stressful) for an assessment of a potential juror's English language ability to be made before rather than after the jury selection.

Conclusion

This paper has detailed concerns about jury service with regard to New Zealanders from migrant and refugee backgrounds with low levels of English language ability. The increasing number of New Zealanders who are overseas-born has significant implications for the system of jury service. The issues identified included the context of jury service in a different legal system from those in their home countries, as well as more specific issues concerning language used in a court for a jury trial.

The study suggests a number of immediate ways in which the jury system could be improved:

- preparing information about the role of the courts and juries within the New Zealand legal system, and the value of jury service;
- translating jury summons information into as wide a range of languages as possible;
- clarifying what interpreting (spoken) or translation (written) support is available for jurors;
- specifying minimum English language ability requirements for jury service;
- improving and clarifying the process for approaching court officials to discuss issues of jury service, and including this information with the jury summons.

The study found a mismatch between the perceptions of English language teachers and other support people, and those of the officials in the legal system as represented by Law Commission reports over a number of years. Research with potential jurors themselves would be useful, as well as better statistics on the current number of people with low levels of English who receive jury summons and details about how they respond. There is also a need to further examine courtroom language use in jury trials, by court officials, judges, lawyers, witnesses and jurors. This information could then be the basis for information (or teaching) materials for potential jurors with low levels of English ability.

Previous research on language use in New Zealand jury trials (Innes 2001, p. 266) has found that 'the professional participants in court in this country make every attempt to ensure that the court receives the best understanding possible of what is being heard'. The development of better processes around English language would build on these attempts to maximise the participation of all New Zealanders in jury trials.

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