

***Inclusive juries – access for people who are deaf, hard of hearing, blind or have low vision***

1. The Supreme Court provides the following response to the Victorian Law Reform Commission’s consultation paper for the above inquiry.
2. There are three central principles which inform this submission from a Court perspective:
   1. The importance of representative juries.
      * Drawn from the adult community through random selection, the jury represents the community with disqualifications or exclusions limited to those directed to providing a fair trial and ensuring community confidence in the jury system.
   2. The need to ensure a fair trial.
      * Jurors must be able to assess the evidence and arguments before them, follow the directions they are given, and be able to communicate effectively with fellow jurors. As a matter of principle, in some cases it may not be appropriate for a person in the subject groups1 to serve as a juror.
   3. The efficient and effective operation of the justice system.
      * Trials should proceed in a timely way subject to the requirements of fairness. Supporting people in the subject groups to serve as jurors would present a number of practical or operational issues. These issues are not insurmountable. This submission merely notes the issues for the Commission’s consideration, and suggests options for addressing them.
3. More broadly the principle of equality before the law and equal access to the Court is foundational to the Court’s operations. Provision of access to the Court for those in the subject groups is facilitated through various means including website accessibility measures, wayfinding systems, hearing loops, portable headphones, and communication assistance in accessing registry services. Large display screens in courtrooms may be able to be used to assist vision-impaired people, however they have not previously been employed for that purpose.
4. In-court communication assistance has historically been the responsibility of parties to arrange. For example, in criminal matters the prosecution would arrange an Auslan interpreter for a witness who required one and in civil proceedings the party calling the witness would make such arrangements. Another example is tablets in criminal trials for State offences, which the Office of Public Prosecutions

1 Consistently with the Commission’s consultation paper, being in the subject groups refers to being deaf, hard of hearing, blind or having low vision.

provides for parties, counsel, the judge and jurors.2 As a general proposition, responsibility for the more intensive supports providing access for those with a disability has largely rested with those external to the Court. The Court therefore does not have processes or arrangements in place for organising such supports.

1. As noted in the paper, historically those with vision and hearing impairment were excluded from jury service, and it remains the case that without legislative amendment interpreters are excluded from the jury room. The Court therefore has not had systems in place to provide those supports in the jury context. The Court would of course adapt its processes with changes to the law.

# Representative juries

1. As noted in the Commission’s consultation paper, representative juries:
   1. contribute to the legitimacy of jury decisions by enabling the community to participate in the administration of justice; and
   2. increase impartiality by bringing a diverse range of views to the case.3
2. In *Brownlee v R*, Kirby J included diversity and a cross-section of community opinion as essential characteristics of a jury:

What, then, are the functional considerations that permit a distinction to be drawn between

a trial that answers to the description of “trial …by jury” and one that does not? The following considerations inform the answer to that question:

…

1. there must be a sufficient number of jurors to ensure that the common sense attributed to a lay jury can be given effect, so that a cross-section of community opinion will be expressed and shared among the jurors;
2. because an important purpose of trial by jury is to guard individuals from the danger of oppression by the government or by the judiciary, the jury rendering a verdict in a criminal trial must be, and remain of, a sufficient number to reflect, in a general way, the variety of opinions that exist in the community concerning society, the law and public authority;

…

(5) the number must also be sufficient to reflect, in a general way, those members of, or acquainted with, minorities within the community so that the dangers of prejudice against an accused, who may be a member of one or more of such minorities, are eliminated or at least reduced.4

1. The Court considers that supporting people in the subject groups to serve as jurors, where consistent with the accused’s right to a fair trial, would advance the representativeness of juries and the community’s confidence in the jury system.

2 The Court is not aware of whether programs or applications to assist people in the subject groups could be made available on these tablets. They are specially set up to run a program without providing access to standard tablet applications like web browsers.

3 Victorian Law Reform Commission, *Inclusive Juries – Access for People Who are Deaf, Hard of Hearing, Blind or*

*Have Low Vision,* Consultation Paper (December 2020), [5.3].

4 (2001) 207 CLR 278, 329-330.

# Overriding duty to ensure a fair trial

*Existing powers*

1. Trial judges have an overriding duty to ensure a fair trial.5 This is reflected in powers relating to potential jurors that exist at a general level both as part of, and in addition to, those under the *Juries Act 2000* (the Act).
2. For example, a trial judge may, on their own motion, stand a potential juror aside. In *R v Searl*, Marks and McDonald JJ said:

a trial judge in exercise of the inherent power that he possesses to ensure that a fair and just trial is conducted may of his own motion stand aside a person whose name is called from the panel of jurors so as to prevent that person becoming a member of the jury to try an accused.

…

The power possessed by, and which may be exercised by, a trial judge to stand a juror aside who has not been challenged by the accused or stood aside by the prosecutor must be exercised judicially and then only upon proper material being before him whether by his own observations or otherwise.6

1. In *R v Bunting*, speaking in the context of the South Australian legislation, Martin J noted a power in exceptional circumstances to question potential jurors:

Apart from the power in s 16 to excuse a person summonsed from compliance with the summons, the Act does not specifically empower a trial judge to exclude members of a panel from sitting on a particular trial. However, the existence of an inherent power to do so is well recognised. As a matter of practice in this State, the power is regularly exercised at the commencement of a trial and before the names of individual jurors are drawn from the ballot box. It is a power that is exercised in the interests of the administration of justice with a view to ensuring that an accused receives a fair trial and that the verdict is based upon the evidence properly considered by an impartial jury. Judges regularly question jurors who seek to be excused concerning reasons advanced for being excused.

Bearing in mind the objects sought to be attained by the exercise of the inherent power, I am inclined to the view that it is not beyond the scope of that power to invite jurors to answer oral or written questions delivered by the Judge to each juror for the purposes of ascertaining information relevant to the exercise of the duties of jurors in a particular trial. Exceptional circumstances would be required to justify such a course. In practical terms, such questioning would not be far removed from the procedure of challenge for cause.7

1. It is noted that trial judges have a statutory power in s 32(3)(b) of the Act to excuse a potential juror if ‘satisfied that the person is unable to serve for any other reason’. However, it is unclear whether this power may be exercised on the Court’s own motion or whether it is only available once a potential juror has sought to be excused. The Commission may wish to consider this question.
2. There is also a power in s 12 of the Act allowing a court on its own motion or on application by the Juries Commissioner to order that a person not perform jury service if the court thinks it is just and reasonable to do so.
3. Once a jury has been sworn in, there is a limited statutory power to discharge a juror without discharging the entire jury. Section 43 of the Act provides:

5 See eg *Haddara v R* [2014] VSCA 100, [16]; *James v R* (2014) 253 CLR 475, [38].

6 [1993] 2 VR 367, 374-6.

7 [2003] SASC 257, [13]-[14] (citations omitted).

A judge may, during a trial, discharge a juror without discharging the whole jury if—

1. it appears to the judge that the juror is not impartial; or
2. the juror becomes incapable of continuing to act as a juror; or
3. the juror becomes ill; or
4. it appears to the judge that, for any other reason, the juror should not continue to act as a juror.
5. In relation to a juror in the subject groups, s 43(b) or (d) may become relevant during the course of trial if it turns out that the juror’s supports are not working adequately, or the evidence or issues in dispute evolve such that the juror is unable properly to assess the evidence. The operation of s 43 was explained in *Najibi v R*:

Unless the judge finds that some circumstance fitting within paras (a) to (d) is present, there is simply no occasion to discharge a juror under s 43.

It can next be said, in our opinion, that whether a circumstance fitting of any paras(a) to (d) is present in a particular case involves a value judgment, one in respect of which reasonable minds might differ; and which, for that reason would attract the application of *House v R* principles in the event of any appeal. Further, because what is in prospect is the dischargeof at least one juror, a judge should require considerable persuasion before concluding that any such circumstance is present. It is also a reason, we think, why para(d) should be narrowly construed, and why circumstances alleged to fit within that paragraph should be rigorously examined before a judge is satisfied that the circumstances relied upon do fall within the paragraph.

…

What is the function, then, of the the [sic] words ‘A judge may … discharge a juror without

discharging the whole jury.. .’? As we see it, there are two possibilities.

The first possibility begins with the proposition that s 43 is concerned with a single question: should an individual juror be discharged? So understood, the section has nothing to do with discharge of a jury. If that be the situation, then the answer to the question whether the apparent discretion should be exercised will lie in the finding that a circumstance fitting one of paras (a) to (d) is present. That is because the quality of the disability revealed by the presence of such a circumstance will make it inconceivable in practice that the juror should not be discharged. This is equivalent to saying that ‘may’ where appearing in the opening

part of s 43, means ‘must’ — so that that there is no discretion at all.

…

In our opinion, the first possibility is the correct construction of s 43.8

1. It would be consistent with the trial judge’s overriding duty and inherent and statutory powers that they make a final decision about whether a person is capable of performing the role of juror in the circumstances of the particular trial including where they may have a hearing or visual impairment.
2. The conclusion that a potential juror in the subject groups cannot perform the role of juror may be reached for various reasons, including:
   1. Reasons pertaining to the trial.
      * As the consultation paper notes, a person in the subject groups may be unable to perform the role of juror in the particular trial (notwithstanding the provision of supports) if the jury will be called upon to assess voice or visual identification evidence. There may also

8 [2016] VSCA 177, [240]-[241], [247]-[248], [251].

be cases that do not turn upon voice or visual identification evidence but involve such a significant volume of audio-only or visual-only evidence that allowing someone in the subject groups to serve as a juror would create an unacceptable risk of prejudice to the accused. For example, a trial involving a high volume of recordings from surveillance devices and telephone intercepts where the jury is invited to draw conclusions based on tone or emphasis. Another possible example is a trial heavily reliant on visual observations, where a jury may be taken on a view of a crime scene as a critical part of the evidence.

* 1. Reasons pertaining to available supports.
     + For instance, the potential juror may require supports that cannot be arranged at short notice or are otherwise unavailable at the time of trial.
  2. Reasons pertaining to the Court.
     + Supports to enable the person to serve may be available, however the courtrooms capable of safely accommodating the juror and those supports may not be available. The Supreme Court operates in heritage listed buildings which have very limited capacity to be adapted to comply with modern accessibility standards in relation to the spaces occupied by jurors. For example, jurors must negotiate steep stairs in courtrooms used for criminal trials, which could present a significant safety risk for jurors who are blind or have low vision. There is limited space in the Court’s jury rooms, so it may not be possible to accommodate support persons or support animals in some of those rooms. In some circumstances the Court can arrange to hold trials in courtrooms in the County Court building which does not have these issues to the same degree, however this is generally arranged well in advance of trial so may not be able to be arranged at short notice.

*Potential Amendments*

1. The consultation paper asks whether legislative provisions similar to those in the ACT would be appropriate for Victoria. In summary, these provide that a judge must consider whether supports that would enable a person with a disability to perform the role of juror could reasonably be given. If the judge is satisfied that such supports could reasonably be given, the judge must direct that the support be given. When determining whether support can reasonably be given, the judge may consider:
   1. whether the support would impose a disproportionate or undue burden on court resources, facilities and time frames;
   2. if the support would require a non-juror being present during jury deliberations, whether the non-juror’s presence would inhibit or restrict discussion, or unduly pressure or influence any juror;
   3. any other issue the judge considers relevant.
2. If the trial judge is not satisfied that support could reasonably be given, the judge may discharge the person from service under their summons.9
3. The Court does not see any issues in principle with requiring courts to consider the provision of reasonable supports for people in the subject groups, or with giving a trial judge a more specific power to exclude a potential juror if it appears that notwithstanding supports, that person could not perform the role of juror in the circumstances of the particular trial.
4. The ACT approach of allowing consideration of reasonable adjustments and the impact on matters like the length of trial and other matters that may be relevant recognises that there are broader considerations and that the categories are not closed.
5. The Court notes that the ACT provisions require the court to consider if a non-juror being present would inhibit or restrict discussion or unduly pressure or influence any juror but that if the judge makes a direction ‘the common law rule against having a non-juror in the jury room is not a relevant consideration’. If the policy position is reached that support persons should be an exception to the common law prohibition then it would be preferable to have a clear legislative amendment to that effect. Further consideration would be needed about whether the court making an individual determination about inhibition of discussion or undue pressure is an appropriate course. Consideration would also need to be given to developing a standard direction before the jury commences deliberations, regarding the presence of non-jurors in the jury room.
6. Another area that may benefit from legislative clarification is the argument made by the State in *Lyons v Queensland* that:

a deaf juror who has the evidence mediated through the services of an Auslan interpreter is not able to give a true verdict based upon his or her assessment of the evidence.

Interpretation of the evidence to a juror is said to result in a trial that is no longer wholly

under the supervision of the judge. The trial at which the evidence of one or more witnesses

is interpreted is distinguished, in the State’s argument, on the basis that in such cases each

juror gives a true verdict according to the same evidence. Moreover, in such cases a party who is dissatisfied with the accuracy of the interpretation may challenge it. There is no way to challenge the accuracy of the interpretation of communications made in the jury room.10

1. The ‘same evidence’ argument is likely to be raised by counsel if the Court is required to determine whether a person who requires the assistance of an Auslan interpreter or a describer is able to serve as a juror. Legislative clarification would assist the Court to deal with such arguments.

# Excuses and peremptory challenges

*Excuses*

1. As noted in the consultation paper, even if reasonable supports are available, a person in the subject groups may wish to be excused on account of their hearing or vision impairment. Whether the person should have the option of being excused

9 See *Juries Act 1967* (ACT) s 16.

10 (2016) 259 CLR 518, [32]. It was not necessary for the High Court to address the argument.

despite the availability of supports that would enable them to serve, is a question of policy on which the Court does not offer a view.

1. In hearing excuses the Court considers the importance of a representative jury and the need to ensure a fair trial. Mere inconvenience to an individual is not sufficient reason to excuse. It is however appropriate to consider the extent to which the particular imposition on the individual would impact on their concentration and the discharge of their duty. Some weight must attach to an individual’s own assessment of their capabilities, whether that be in their assessment of their capacity to bring an open mind to the case because of a particular experience, or their capacity to engage in all aspects of the jury process with supports.
2. At whatever stage of the process an individual seeks to be excused there are options to maintain a level of privacy. If the person seeks to be excused on account of their disability but does not wish to reveal the reason in open court, they may write their excuse on a piece of paper after having sworn an oath or made an affirmation.

*Peremptory challenges*

1. The accused or their counsel will be able to use peremptory challenges against potential jurors in the subject groups. The reasons for exercising a peremptory challenge cannot be interrogated. Given the nature of peremptory challenges, it is not considered appropriate for a trial judge to give guidance on their exercise, other than to make general comments about juries being intended to be representative of the community.
2. Giving guidance aimed at dissuading the accused from using peremptory challenges in a discriminatory fashion toward people in the subject groups, would raise the question of why directions are not given in relation to any other form of discrimination.
3. Addressing issues in advance of trial about whether there are any inherent impediments to a person from the subject groups serving would however provide an opportunity for the Court to engage in discussion with the parties. The Court would in that context come to a final view about whether or not the nature of the trial means it is inappropriate for potential jurors in the subject groups to serve on the jury having full regard to the need to ensure a fair trial. Parties would need to engage in reasoned and informed argument which could in itself be an educative process.

# Practical considerations

1. The Court considers that it would be useful to separate into two stages the supports that a person in the subject groups would require.
2. First, the supports required to enable the person to participate in a jury pool and a panel (preliminary supports). Under COVID-Safe conditions those processes have been altered, and elements of those changes may be continued beyond COVID-19.
3. Second, the supports required to enable the person to participate in a trial as a juror (trial supports).11 These supports would need to be available throughout the trial.
4. What follows are practical or operational issues relevant to the various stages of the jury system. The Court does not put forward solutions to those issues. Rather, the Court suggests options for the Commission’s consideration and identifies potential drawbacks associated with those options where relevant. The Court considers that when developing reforms to allow people in the subject groups to serve as jurors, there will inevitably be tension between:
   1. dealing with matters as far in advance as possible to promote the efficient administration of justice; and
   2. allowing an individual’s circumstances, including the nature of their disability, to be taken into account.

*In the lead up to trial*

1. After an accused is committed to stand trial, there is a post-committal directions hearing before a judicial registrar. There will also be directions hearings conducted closer to trial at which various pre-trial issues are discussed and finalised. It may be appropriate for the issue of jurors in the subject groups to be raised at one of these directions hearings closer to trial, not to make any determinations but for counsel to turn their minds to the issue. Counsel could indicate to the Court their views on whether the case would be unsuitable for a person in the subject groups to serve as a juror. The Court could amend its practice note regarding these directions hearings accordingly. This consideration would necessarily be at a level of abstraction as regards the nature of disability and the supports available.

*If a person in the subject groups is selected for the jury roll and sent a questionnaire*

1. The Court considers that in order to facilitate a person in the subject groups participating in the jury system, it would be necessary to understand at an early stage the supports that the person requires. The questionnaire process could be used to identity what preliminary supports a person in the subject groups requires, and what trial supports they would require if empanelled as a juror.

*If a person in the subject groups is summonsed*

1. A jury summons will state when and where a person is required to attend for jury service.
2. If a person in the subject groups is summonsed, Juries Victoria could book any necessary preliminary supports for the times the person is required to attend for jury service. If those supports cannot be arranged, the Juries Commissioner could invite the person to ask for their service to be deferred under s 7 of the Act. The Court suggests that consideration be given to whether the Juries Commissioner should have an own motion power to defer a person’s service if the necessary supports cannot be arranged.
3. At the summons stage it may also be appropriate for Juries Victoria to confirm whether trial supports would be available if the person were selected as a panel

11 Trial supports may be broken down further, because the supports required for a one week trial may differ from the supports required for a four week trial.

member and then empanelled as a juror. If trial supports would not be available, the comments above would also apply.

1. The Court notes the ACT model also incorporates the capacity for the Sheriff to excuse a person from service where supports were available but provision of those supports was unreasonable. It would be hoped that resourcing arrangements would be such that the occasion for such a determination would be rare, but this option would be consistent with legal standards of reasonable accommodation in other contexts.

*If a person in the subject groups is selected from the pool to become a member of a panel*

1. When a trial judge requires a panel, a member of their staff usually contacts Juries Victoria and advises of the required panel size and expected duration of trial. One option would be for Juries Victoria to inform the staff member if there were any people in the subject groups attending for jury service that day. The staff member could discuss with the judge and then advise Juries Victoria whether the judge had any concerns about the suitability of service on the trial of persons in the subject groups. Consideration needs to be given to the level of information or abstraction on which the indication is given at this stage.
2. After a staff member requests a panel, Juries Victoria conducts a ballot to form a panel of the required size.
3. The Court raises for consideration the following options for navigating the tension between dealing with matters in advance and allowing individual circumstances to be taken into account:
   1. the trial judge could give a non-binding indication that the trial appears unsuitable for all or certain people in the subject groups to serve as a juror, and the staff member could advise Juries Victoria accordingly;
   2. Juries Victoria could ask people in the subject groups whether they are content for the Juries Commissioner to exclude them from the panel if they were balloted to a panel for a trial in which the judge has given an indication of unsuitability. If a person were content to be excluded, the Juries Commissioner could exclude them pursuant to a clear statutory power. The person could then only become a member of a panel if they were balloted to a panel for a trial in which the judge had not given an indication of unsuitability;
   3. if a person were not content to be excluded, they could form part of a panel for a trial in which the judge had given an indication of unsuitability, and the following processes could apply:
      * Juries Victoria could inform the trial judge’s chambers that the panel includes a person in the subject groups. Juries Victoria could advise the Court of the preliminary supports that have been booked for the empanelment day, and how the person has been using those supports. Juries Victoria could also advise of the trial supports required by the person;
      * the Court could push the empanelment back by approximately one or two hours in order for there to be an immediate hearing to determine

whether the person is capable of performing the role of juror in the particular trial. It is not unusual for the Court to delay arrival of the panel in order to deal with an issue that has arisen on the morning of empanelment;

* + - the person could attend the Court for the immediate hearing. It may be necessary to administer an oath or affirmation to an interpreter or other support person at this time;12
    - the Court could hear from the person and counsel before determining whether the person is capable of performing the role of juror in the particular trial;
    - if the Court determined that the person would not be capable, the Court could then decide whether the person should return to the jury pool or be discharged from service under their summons;
    - if the Court determined that the person would be capable of serving, the person could choose to wait at the Court until the rest of the panel arrives, or to return to the Jury Pool Room and then attend the Court with the rest of the panel.

1. Another option would be for the indication referred to in paragraph [43a] to be a determination with legal effect, such that all or certain people in the subject groups would not be able to form part of the panel for that particular trial. The Court notes two potential issues with this option. First, judges may find it difficult to make a determination without regard to a specific juror and their specific needs. Second, it would be necessary for the Juries Commissioner to apply a determination to individuals in the jury pool. While the determination itself may not be amenable to challenge, an individual may seek to challenge the Juries Commissioner’s application of the determination to them, for instance arguing that they do not fall within the scope of the determination.
2. For trials where the judge has not identified any issues with people in the subject groups serving as jurors, the Court considers that it would be helpful for Juries Victoria to advise in advance when a panel includes a person in the subject groups and the supports they have been provided for empanelment. That way, before the panel arrives in the courtroom the trial judge could explain to counsel what will occur to facilitate participation by the panel member in the subject groups.
3. Once the panel is seated in the courtroom, the trial judge enters and gives the panel a briefing. Individual judges determine what to include in this briefing. It generally includes the estimated length of trial, hours required if selected as a juror, and the need to be able to sit in the jury seats. Modifications to hours or seating (in some courtrooms) may be possible to accommodate a person in the subject groups. The trial judge’s briefing could also include a statement that it is important to be able to understand and assess certain types of evidence in the particular trial. This statement could be given in all cases or in cases where the Court is aware that the panel includes a person in the subject groups.

12 The Court notes that if the person ultimately became a juror and their trial supports involved different support persons, those persons would need to take the oath or make the affirmation applicable to them before providing any assistance to the relevant juror.

1. The excuse process follows. A person in the subject groups may wish to be excused after learning of the matters in the trial judge’s briefing.
2. The Court notes that if it became necessary to excuse or stand aside a potential juror in the subject groups during the empanelment process, it would be important to ensure the excusing or standing aside is handled in a respectful and sensitive manner. The option of a separate hearing discussed in paragraph [43c] above may be desirable.
3. The Court would also suggest that potential jurors in the subject groups are made aware of particular elements of the process relevant to them and the conditions across the courts so that they are not taken by surprise. The paper raises the possibility of potential jurors attending at court in advance of their summons date to assess the environment.
4. Retaining the usual rule that a potential juror is required to return to the jury pool unless the Court orders otherwise would recognise that an individual unable to serve on a particular trial may be able to serve on a jury for another trial.

*If a person in the subject groups is empanelled as a juror*

1. After swearing in the jury, there may need to be a short adjournment to discuss with counsel seating arrangements during the trial, breaks for any support persons such as Auslan interpreters, and possibly the need to adjust how they speak.
2. The Court would also need to discuss with counsel whether the trial will take longer than estimated. Trials will almost certainly take longer if a juror requires the assistance of Auslan interpreters. If the additional time required is significant, the Court may need to confirm with jurors that there are no issues with the new estimate.
3. When the jury is brought back after the short adjournment, when first addressing the jury the trial judge could explain the following in addition to the usual matters:
   1. the supports that will be used during trial;
   2. seating arrangements;
   3. matters relating to Auslan interpreters if they are present; and
   4. that if jurors have any concerns about the supports, they can raise them with the Court.
4. A staff member meets with the jury each day and leads them in and out of the building, and to and from the courtroom and jury room. If a juror in the subject groups requires any assistance outside the courtroom, they may raise this with the staff member.

# Education and training

1. Professional development activities would be an important accompaniment to any legislative amendments in this field, both for the profession and the judiciary. This would include information about:
   1. the supports that are available to enable people in the subject groups to perform the role of juror;
   2. the level to which people in the subject groups will be able to understand complex concepts and evidence once supports are provided;
   3. how the supports work and the effect they will have on the running of a trial; and
   4. the continuing paramountcy of the accused’s right to a fair trial.
2. The Court notes that the introduction of intermediaries was accompanied by educational materials and programs. This assisted in overcoming concerns about the effect of intermediaries on a trial.
3. Depending on the nature of any legislative amendments it may also be appropriate to develop guidance material for parties and for members of the public. Guidance material could cover what to expect in the various stages of the jury selection process, as well as changes to the trial process.