  

***Inclusive Juries: Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision***

*Submission to Victorian Law Reform Commission’s Consultation Paper*

**Prepared by**

Professor the Hon. Kevin H Bell AM QC

With assistance from:

Andrea Olivares Jones and Karin Frodé Castan Centre for Human Rights Law

**March 2021**

CONTENTS 2

1. [BACKGROUND 3](#_TOC_250008)
   1. [About the authors 3](#_TOC_250007)
   2. [Reasons for this submission 3](#_TOC_250006)
2. [INTERNATIONAL LAW 3](#_TOC_250005)
   1. [Committee on Rights of Persons with Disabilities 3](#_TOC_250004)
   2. [Concluding Observations to Australia 7](#_TOC_250003)
   3. [CRPD General Comment No 6 8](#_TOC_250002)
   4. [International Principles and Guidelines on Access to Justice for Persons with Disabilities 8](#_TOC_250001)
3. LESSONS FROM DOMESTIC HUMAN RIGHTS JURISPRUDENCE 9
4. [CONCLUSION AND RECOMMENDATIONS 11](#_TOC_250000)

# BACKGROUND

# About the authors

The Castan Centre for Human Rights Law (the Castan Centre) welcomes the Victorian Law Reform Commission’s decision to consider reforms in the area of inclusive juries and the opportunity to contribute to the consideration of reforms on such an important topic.

The Castan Centre, based in the Faculty of Law at Monash University in Australia is an academic centre which aims to use its human rights expertise to create a more just world where human rights are respected and protected, allowing people to pursue their lives in freedom and with dignity.

The Director of the Castan Centre, Prof the Honourable Kevin H Bell AM QC, served as Justice of the Supreme Court of Victoria for 15 years (during which he conducted scores of trials by jury in both civil and criminal jurisdictions) until March 2020 when he joined the Monash Law Faculty. Prof Bell also served as President of the Victorian Civil and Administrative Tribunal (VCAT) for two years during his time on the Supreme Court.

During Prof Bell’s time at the Victorian bench, he played a pivotal role in the implementation and operation of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘*the Charter*’), delivering leading judgments on issues affecting the human rights of Victorians. This included detailed consideration of the meaning and scope of the rights to equality and non-discrimination enshrined under section 8 of the Charter in the cases such as *Matsoukatidou v Yarra Ranges* Council (2017) 51 VR 624 and *Re Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869.

# Reasons for this submission

The issue of inclusive juries touches upon the fundamental values of equality, dignity and democratic participation which underpin the Victorian Charter, as well as the international human rights framework which it incorporates into Australian law. Access to justice includes participation as a juror, which is meant to comprise a group of people which reflect our society.

This submission considers the international and Victorian human rights frameworks relevant to the issue of jury participation and builds upon both Prof Bell’s own judicial experience, as well as upon decisions by the UN Committee on the Rights of Persons with Disabilities which have found Australia’s exclusion of persons with hearing impairments from jury duty to breach multiple human rights.

In light of the terms of reference, we limit consideration to the participation in jury duty for persons who are Deaf, Hard of Hearing, Blind or Have Low Vision.

# INTERNATIONAL LAW

# Committee on Rights of Persons with Disabilities

The Committee on the Rights of Persons with Disabilities (‘the CRPD Committee’) has considered the issue of inclusive juries on multiple occasions in response to communications to the treaty body by persons with hearing impairments unable to participate in jury service in Australia. Despite the finding of human violations, the participation of persons with disabilities on Australian juries remains an issue in need of reform as recognised by the VLRC.

We commend the VLRC for taking CRPD Committee decisions into consideration in its Consultation Paper on Inclusive Juries. Below we further scrutinise these decisions which provide strong illustrations of the changes necessary to facilitate the inclusion of persons who are deaf, hard of hearing, blind or have low vision wishing to serve as jurors as required under international human rights law.

*Beasley v Australia*

The author, a woman hard of hearing, was called upon to serve as a juror in the District or Supreme Courts of New South Wales in 2012.1 In order to participate in the process, she required Auslan interpreting service, real-time steno-captioning or other communication options.2

The State authorities justified the decision to deny the author the opportunity to serve as a juror on the basis that:

* + 1. her disability meant that she was unable to adequately comprehend courtroom deliberations;
    2. involving an Auslan interpreter would breach the confidentiality of jury deliberation (i.e., the common law ‘13th person rule’); and
    3. that the provision of an Auslan interpreter would ‘unreasonably impede the effective and efficient administration of justice’.3

The author was therefore considered by the State to have a disability that rendered her ‘unsuitable for, or incapable of effectively serving as a juror’.4

In its decision, the CRPD Committee clearly set out the extent of Australia’s obligations under the CRPD Committee with respect to jury duty which provides useful guidance for law form in this area across Australia.

Firstly, the Committee found that the State had, by providing *no adjustments* to enable the author’s participation as a juror, failed to provide ‘reasonable accommodation’ as mandated under arts 5(1) and

1. of the CRPD.5 In particular, the Committee observed that the State had accommodation options available to it, given for example that Auslan interpretation is a common accommodation often used by persons who are deaf in Australia and the State had not provided sufficient evidence that the provision of this accommodation would have amounted to a ‘disproportionate or undue burden’ on the State.6 Notably, the Committee did acknowledge the importance of jury confidentiality, but found that the State had provided insufficient reason as to why certain adjustments, such as requiring Auslan interpreters to take a special oath, could not have helped ensure confidentiality whilst still respecting the rights of persons with a disability. 7

1 United Nations (‘UN’) Committee on the Rights of Persons with Disabilities (‘CRPD Committee’), *Views Adopted by the Committee Under Article 5 of the Optional Protocol, Concerning Communication No. 11/2013,* UN Doc CRPD/C/15/D/11/2013 (25 May 2016) (‘*Beasley v Australia’*).

2 Ibid [2.2].

3 Ibid [2.4].

4 Ibid; See also *Jury Act 1977* (NSW) s 14(4).

5 *Beasley v Australia* (n 1) [8.4].

6 Ibid.

7 Ibid.

The Committee further affirmed that ‘the performance of jury duty is an important aspect of civic life’, within the meaning of art 9(1).8 It recalled its *General Comment No. 2* (2014) on accessibility, in which the Committee emphasised that the obligation on States to implement accessibility is ‘*unconditional’*, meaning that where an entity is obliged to provide accessibility, they cannot refer to the ‘burden of providing access for persons with disabilities’ as an excuse for omission of this responsibility.9 Therefore the State, by failing to take appropriate measures to enable the authors participation in jury duty, prevented her participation in a clear ‘aspect of life’ and thereby violated art 9(1) of the CRPD.10

The Committee also emphasised that the refusal by the State to provide the author with a format of communication necessary for her participation in jury duty amounted to a denial of the opportunity to express herself in an official interaction, and therefore violated her freedom of expression under art 21(b).11

Finally, the Committee expressed that States have an obligation under art 13 to ensure effective access to justice for persons with disabilities ‘in all phases of legal proceedings’, including jury service.12 The Committee further made clear that the ‘performance of jury duty is an integral part of the Australian judicial system’, and concluded that participation in jury duty is in essence participation in public affairs within the meaning of art 29.13 They concluded therefore that the State had violated the rights to access to justice and participation in public affairs.14

As the VLRC has acknowledged, recommendations from the Committee included: providing Auslan interpretation services to enable persons with disabilities to participate in jury service; carrying out a ‘thorough, objective and comprehensive assessment of requests for reasonable adjustments15; changing laws, regulations, policies and programs to reflect the rights and needs of persons with disabilities16 ; and ensuring appropriate and regular training to local authorities.17

*Lockrey v Australia*

Shortly before the decision in *Beasley*, the CRPD Committee had found similar violations in *Lockrey v Australia* (‘*Lockrey*’) which also concerned the exclusion of a person who was deaf from participation in jury service in New South Wales.18 Despite indicating willingness to participate, the author had been summoned for jury duty three times, in response to which he repeatedly stated the need for real time steno-captioning in order to do so.19

The relevant State authority justified the decision to deny the author’s participation in jury duty on the grounds that he was deaf since participation through real time steno-captioning jeopardised

8 Ibid [8.6].

9 Ibid; CRPD Committee, *General Comment No 2 (2014) – Article 9: Accessibility,* 11th sess, UN Doc CRPD/C/GC/2 (22 May 2014) (‘*General Comment No 2’*).

10 *Beasley v Australia* (n 1) [8.6].

11 Ibid [8.8].

12 Ibid [8.9].

13 Ibid.

14 Ibid.

15 Ibid [9].

16 Ibid.

17 Ibid.

18 CRPD Committee, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 13/2013*, UN Doc CRPD/C/15/D/13/2013 (25 April 2016) (‘*Lockrey v Australia*’).

19 Ibid [2.1]-[2.4].

confidentiality as it ‘would introduce a non-jury person who is not summoned and selected through the random ballot process into the jury deliberation room’.20

In a domestic discrimination complaint brought by the author, the relevant State authority had noted that the rights of persons with disabilities have to be considered against the right to a fair trial on part of accused persons.21 Further, it also noted that the use of real time steno-captioning in particular would require legislative reform without which such accommodation was not possible.22

As in the subsequent decision of *Beasley*, the CRPD Committee for similar reasons found Australia in violation of the author’s rights under art 5(1) and (3)23; art 9(1) (‘read alone or in conjunction with arts 2, 4, 5(1) and (3)’)24; art 21(b) (‘read alone or in conjunction with arts 2, 4, 5(1) and (3)’)25; and art 13(1) (‘read alone or in conjunction with articles 3, 5(1), and 29(b)’).26

To remedy the violations, the Committee called on Australia to, inter alia, prevent similar future violations by ensuring a ‘thorough, objective and comprehensive assessment’ of requests for reasonable accommodation and that ‘all reasonable accommodations are duly provided’ to ensure participation in line with the CRPD.27 Further, the Committee called for relevant reforms of laws and policies as needed in consultation with persons with disabilities, as well as regular training of relevant State officers in the court system.28

*JH v Australia*

Despite the two decisions in *Beasley* and *Lockrey* calling for the non-repetition of similar violations in the future, we call the VLRC’s attention to the CRPD decision *JH v Australia* (‘*JH’)*.29 *JH* was decided in 2018 and involved similar issues as the two previous decisions.

The author was summoned as a juror to appear in the Western Australia District Court.30 The author requested that the Court provide an Auslan interpreter to facilitate her participation, but was excused from her summons to serve as a juror on the basis that there was necessity to afford a fair trial to the accused, including through the preservation of jury deliberation confidentiality.31 State authorities emphasised that the decision was made with the intention to ‘provide a system that was fair to the accused and complied with applicable legislation’.32

The State argued that it ‘did not take a blanket approach’ in excusing the author from jury duty, but had considered her circumstances and assistance requirements and determined that she was ‘not

20 Ibid [2.4].

21 Ibid [2.5].

22 Ibid.

23 Ibid [8.2].

24 Ibid [8.6].

25 Ibid [8.8].

26 Ibid [8.9].

27 Ibid [9].

28 Ibid.

29 CRPD Committee, *Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 35/2016,* UN Doc CRPD/C/20/D/35/2016 (20 December 2018) (‘*JH v Australia’*).

30 Ibid [2.1].

31 Ibid [2.1]-[2.4].

32 Ibid [2.6].

capable of serving effectively as a juror’ under domestic law.33 The State also argued that the provision of an interpreter may not be feasible where cases involve non-verbal audio evidence, that interpreters added complexity and cost to trials.34 They therefore concluded that the provision of an Auslan interpreter was ‘not an appropriate measure given the overriding necessity to ensure a fair trial’.35

As with *Beasley* and *Lockrey,* the Committee was not convinced by the State’s arguments that the provision of an Auslan interpreter would amount to a disproportionate or undue burden, and concluded that the State had violated the author’s rights under arts 5(2) and (3) of the CRPD.36 In particular the Committee reiterated that the State had not justified the provision on no adjustment on the basis of concerns around jury deliberation confidentiality, as these could be addressed by way requiring interpreters to take a special oath before the court to preserve the secrecy of jury deliberations.37 The Committee also again found that the denial of an Auslan interpreter resulted in a violation of the author’s right to freedom of expression under arts 21(b) and (e) of the CRPD.38

*Lessons for CRPD Committee Decisions*

Careful consideration of the Committee’s determinations in *Beasley, Lockrey* and *JH* are essential to guide reform in this area. Firstly, these cases illustrate that the state of Victoria has *obligations* under international human rights law to enable the meaningful inclusion and participation of persons who are deaf and hard of hearing.

Secondly, these cases provide tangible examples of what needs to change in order to comply with international human rights law, namely:

* 1. *Laws* that prohibit practical and reasonable adjustments ought to be updated and amended (i.e., through requiring a special oath from interpreters to protect confidential and ensure non-interference with deliberations);
  2. *Practices* by court authorities ought to change, for example through providing training for authorities, requiring careful and considered assessments of what reasonable accommodations can be made, and providing effective adjustments such as the support of an Auslan interpreter; and
  3. *Persons with disabilities* ought to be consulted in order to guide reform to reflect their needs.

# Concluding Observations to Australia

The issue of inclusive juries has also been raised since the above cases were decided. Notably, the CRPD Committee’s most recent Concluding Observations on Australia (2019) saw the Committee expressed concern about Australia’s compliance with the right to access to justice for persons with disabilities in light of the fact that:

33 *JH v Australia* (n 23) [4.3].

34 Ibid [4.7].

35 Ibid [4.8].

36 Ibid [7.5].

37 Ibid.

38 Ibid [7.7].

*‘only some states and territories have passed legislation to support the equal participation of persons with disabilities in the jury system, while the rest and the federal Government have not done so’.39*

The Committee has therefore recommended that the State ‘in close consultation with persons with disabilities, through their representative organisations’ ensure effective access to justice under art 13 of the CRPD, including through the development of legislation in all states on the ‘equal participation of persons with disabilities in the jury system’. 40

# CRPD General Comment No 6

In 2018, the CRPD Committee elaborated upon the meaning and scope of art 5 of the CRPD on equality and non-discrimination by adopting *General Comment No 6*.41 With regards to access to justice, the Committee clarifies the distinction between ‘procedural accommodations’ under art 13 and ‘reasonable accommodation’ under art 5.42 The former does not require such accommodations to be proportionate while the latter incorporates ‘reasonable’, meaning that that the accommodation should not impose an ‘undue burden’ on the provider of the accommodation.43 Further, procedural accommodations involve a ‘proactive, systemic duty’ whereas reasonable accommodation is reactive, responding to the specific needs of a person.44 The General Comment specifically lists ‘the recognition of diverse communication methods’ as an example of a procedural accommodation.45

As summarised above, the CRPD Committee found violations involving both arts 5 and 13 of the CPRD in the decisions involving Australian jury service where the system was not designed in a way that provided procedural accommodations (and the CRPD therefore called for law and policy reform) and in such system, there was also a failure to provide reasonable accommodation in the cases considered. Both access to justice through procedural accommodations and reasonable accommodation in individual cases should be guaranteed.

# International Principles and Guidelines on Access to Justice for Persons with Disabilities

The *International Principles and Guidelines on Access to Justice for Persons with Disabilities* (‘*Principles and Guidelines*’) were produced in 2020 as a result of the collaboration and consultation with UN experts, disability organisations and disability rights experts, States, academics and other key stakeholders.46

39 CRPD Committee, *Concluding observations on the combined second and third periodic reports of Australia,*

UN Doc CRPD/C/AUS//CO/2-3 (15 October 2019) [25].

40 Ibid [26].

41 CRPD Committee, *General comment No. 6 (2018) on equality and non-discrimination*, UN Doc CRPD/C/GC/6 (26 April 2018).

42 Ibid [23]-[25(d)].

43 Ibid.

44 Ibid.

45 Ibid [51].

46 *International Principles and Guidelines on access to justice for persons with disabilities* (August 2002) at [www.ohchr.org/Documents/Issues/Disability/SR\_Disability/GoodPractices/Access-to-Justice-EN.pdf.](http://www.ohchr.org/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-EN.pdf)

The *Principle and Guidelines* provide a framework and tools on issues including the participation and inclusion of persons with disabilities in the administration of justice, including as jurors.47 In doing so, the UN High Commissioner for Human Rights, Michelle Bachelet, notes in the foreword that the document amounts to ‘an indispensable contribution to achieving justice for all’.48

Principle 7 of the *Principles and Guidelines* concern the right of persons with disabilities to ‘participate in the administration of justice on an equal basis with others’, enshrined in law under the CRPD.49 This principle specifically points out that States have an obligation to ensure that persons with disabilities can participate as jurors.50 The guidelines accompanying this principle outline specific steps that the State and other authorities, such as ‘judicial councils and other judicial governing bodies’ may take in this regard, including:

* Removing all barriers, including legislation, that prevent persons with disabilities from serving as jurors;51
* Ensure that persons with disability can participate on an equal basis in the jury system by ensuring the provision of ‘all necessary support, reasonable accommodations and procedural accommodations’;52
* Strengthen reform strategies by collecting disaggregated data on persons with disabilities and participation in the justice system.53

# Charter of Human Rights and Responsibilities Act 2006 (Vic)

The *Juries Act 2000* (Vic) provides that a person is ineligible to serve as a juror if the person has ‘a physical disability that renders the person incapable of performing the duties of jury service’ (sch 2 cl (3) (f)).

The provision does not exclude all persons with physical disability. It only excludes persons whose physical disability renders them incapable of performing the duties of jury service.

Whether a person has a physical disability that has that effect will very often depend upon factors that are exogenous to the person, including the design of the court and the conduct of the hearing as regards jurors and the supports (if any) that are made available to the person.

The *Juries Act* does not impose upon the Juries Commissioner an obligation to provide support to physically disabled jurors. But the Juries Commissioner, who is constituted as an employee under pt 3 of the *Public Administration Act 2004* (Vic) (see s 60(a) of the *Juries Act*) is a public authority within s

47 Ibid 2.

48 Ibid.

49 Ibid 22 principle 7.

50 Ibid principle 7.1.

51 Ibid principle 7.2(b).

52 Ibid principle 7.2(c).

53 Ibid principle 7.2(e).

4(1)(a) and (b) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Therefore, the Juries Commissioner is bound by s 38(1) of the Charter to act compatibly with human rights and to give proper consideration to human rights when making decisions. The right to equality before the law in s 8(3) of the Charter is directly relevant to the discharge of the functions of the Juries Commissioner in relation to physically disabled jurors. The qualification upon the obligations of the Juries Commissioner under s 38(1) which are to be found in s 38(2) of the Charter do not appear to be relevant.

A court is not a public authority under the Charter except when it is acting in an administrative capacity (s 4(1)(j)). But the Charter applies to courts ‘to the extent that they have functions’ under pt 2 and div 3 of pt 3 (s 6(2)(b)). The scope and meaning of these provisions is discussed in *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624. 632-638 [28]-[46]. Again, the right to equality before the law is directly relevant to the function of the court in proceedings in which there are jurors.

The right to equality before the law in s 8(3) of the Charter has a connection with the definition of ‘discrimination’ in the *Equal Opportunity Act 2010* (Vic) which is satisfied in relation to persons with physical disability.

The right to equality before the law in s 8(3) of the Charter has three elements, all of which appear to be salient in relation to how the Juries Commissioner and a court might act or make decisions in relation to potential jurors with a physical disability. The meaning of the right and the scope of these three elements is extensively discussed in *Matsoukatidou* (see especially 638-44 [47]-[61]). The second and third elements involve a positive obligation ‘to make reasonable adjustments and accommodations’ (643-4 [61]). This goes directly to the matters into which the Commission is inquiring.

On the basis of this analysis, it is submitted that the provisions of the Charter provide powerful support for the Commission to recommend that potential jurors with physical disabilities are supported through reasonable adjustments and accommodations so that they are capable of performing the duties of jury service. The Juries Commissioner and the courts already have clear legal obligations under the Charter to make such adjustments and accommodations so as to ensure that potential jurors with physical disabilities are equal before the law as explicated in *Matsoukatidou*. Failing to make reasonable adjustments and accommodations is incompatible with those obligations. However, existing law and practice does not specify what kind of adjustments and accommodations may be reasonable and appropriate, nor ensure that the Juries Commissioner and the courts are funded to make them available. The Commissions analysis of these issues and recommendations will be vitally important in filling this fundamental deficiency in Victorian law and practice. Conversely, the Commission should ensure that its analysis and recommendations are both consistent with the Charter and do not unintentionally detract for the human rights obligations that it specifies.

# CONCLUSION AND RECOMMENDATIONS

Australia ratified the CRPD on 17 July 2008.54 As its provisions make clear, ‘full and effective participation and inclusion in society’ is a key objective of the Convention.55 The issue of inclusive juries goes to the heart of what this instrument stands for, including the fundamental values of equality, dignity and liberty.

As recently as 2019, the CRPD Committee raised its concerns over the failure of some Australian jurisdictions to provide equal participation for persons with disabilities in the jury system, despite three earlier decisions in which the Committee found Australia to be in violation of multiple rights under the Convention.

Under the Charter of *Human Rights and Responsibilities Act 2006* (Vic), the Juries Commissioner and the court have clear legal obligations to ensure the human right to equality before the law by making reasonable adjustments and accommodations that enable potential jurors with disability to discharge the functions of jury service.

Based on our submission, we call on the VLRC to:

* **Recommendation 1(a):** Incorporate into its reform proposals the recommendations of the CRPD Committee in *Beasley*, *Lockrey* and *JH* which clearly set out Australia’s international obligations to ensure full and effective participation of persons with disabilities in jury service.
* **Recommendation 1(b):** In incorporating the recommendations from treaty body jurisprudence, the VLRC should also consider more recent expressions by international experts as to Australia’s obligations, notably the CRPD Committee’s 2019 *Concluding Observations* and the 2020 *International Principles and Guidelines* discussed in this submission.
* **Recommendation 2**: The Commission should draw upon the existing rights and obligations in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to make recommendations as to how existing law and practice should her changed to ensure that reasonable and appropriate adjustments and accommodations are made to enable potential jurors with disability to discharge the functions of jury service.

54 ‘View the ratification status by country or by treaty’, *United Nations Treaty Body Database* at [www.tbinternet.ohchr.org/\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&Lang=EN.](http://www.tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=9&amp;Lang=EN)

55 See, eg, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 3(c).