**County Court of Victoria**

**Response to Inclusive Juries Consultation Paper**

The Court is committed to accessibility to justice. This includes all members of the community. The Court supports the consideration of people who are hard of hearing, hearing impaired, blind or vision impaired being able to partake in jury service.

The value of the jury system is well established and benefits from the inclusion of a cross-section of the community. Community participation through the jury system is a vital and important part of our justice system and promotes public confidence in the rule of law and the administration of justice.

The trial process offers the opportunity to educate the community and for those who sit on juries to, in turn, educate others. This opportunity should not be restricted to people without disabilities.

Not only is the jury system vital to the criminal justice process, it is a fundamental aspect of democratic rights. The jury has been referred to as a ‘little parliament’ serving to ensure a measure of democratic participation, and therefore, democratic legitimacy, to the of administration of justice. Criminal trials involve questions of fact and value judgment, which are questions and judgments suited to the wider community.

With reasonable accommodations, whilst balancing the rights of the accused and other jurors, and the appropriate funding and resourcing, there may be scope for persons in the subject group to be able to competently discharge their duties as jurors.

The Court responds to the questions raised by the Victorian Law Reform Commission below.

# Provision of reasonable supports

## To what extent will the courts and Juries Victoria need to work together to arrange/deliver supports?

The provision of reasonable supports would require extensive cooperation between Juries Victoria and the courts.

The Court envisages there will be significant reliance on Juries Victoria to undertake preliminary work to ensure trials are not delayed and can proceed as efficiently as possible. The Court foresees a process similar to the following:

* A juror who receives a summons from Juries Victoria is requested to, as soon as practicable, identify if they need supports and which supports they will require.
* Separately, as part of the case management process in the County Court, a judge or judicial registrar designates an upcoming trial as accessible to those who may require supports. This will mitigate the risk of delay on empanelment day. Identifying a trial as an accessible jury trial may be determined at the final directions hearing after discussion with the parties, including whether there are any issues in dispute that would require full hearing or sight, for

example, visual or voice identification. This information can be provided by the Court to Juries Victoria so that jurors who require supports are not allocated to a trial that is not suitable.

* The Juries Commissioner engage any prospective powers to ensure persons in the subject group are not allocated to a panel for a trial that is not suitable. The small pool of people in the Juries Commissioner’s Office, with the appropriate training and guidelines, could make those assessments instead of judges.

The work undertaken in the period prior to the trial will not only ensure the efficient commencement of a trial, it ensures all jurors are appropriately supported from the outset.

The extent of the relationship between the Court and Juries Victoria will be informed by the responses to later questions.

## How could arrangements be made to ensure that a deaf juror has a clear field of sight to the judge, parties, lawyers and Auslan interpreters?

The current courtroom configurations would create a challenge to the facilitation of clear lines of sight in positioning interpreters at the bar table. Many courtrooms do not facilitate this, particularly those remodelled for COVID-safe jury trials.

There are two ways to overcome this challenge. First, to position the juror separately so they may see all speaking parties and the Auslan interpreter in one field of sight. Second, position a greater number of Auslan interpreters in the courtroom so that a juror is able to view the speaker and interpreter in the same field of sight. Both methods give rise to further challenges.

Additional interpreters may overcome the field of sight challenge by positioning interpreters near the bar table and another interpreter near the witness box. This

may be a method that requires consideration in the balance of what is deemed to be a reasonable adjustment, discussed below in response to Question 7. There would be an increased cost and, subject to further advice, a possible risk of greater distraction to other jurors.

A juror would often need to be sitting in a unique position by themselves in the courtroom in order to see the judge, interpreters, advocates, witnesses and accused in one field of sight. Positioning a juror separately will segregate the juror from their peers and position them in a place where they may see or hear things the remainder of the jury would not. All members of the jury should be in the same position to view witnesses and receive evidence equally.

The Court is open to adjusting lighting to an appropriate level to assist with lipreading, while remaining comfortable for all court users.

Most importantly, the Court would require expert advice about courtroom configuration, lines of sight and lighting. The Court alone is not in a position to deem what would be appropriate configurations and lighting for jurors from the subject group.

## Do you envisage any problems with having an additional person (supporter or interpreter) or an assistance animal in the jury deliberation room?

*13th person rule*

The Court does not view the 13th person rule as an impediment to jury deliberations in relation to an assistance person being present purely to assist a person who requires it. As the High Court re-affirmed the rule in 2016, legislative change similar to that undertaken in the Australian Capital Territory would be needed to enable a non-jury member to be present in the deliberation room.

*Assistance animals*

The Court does not consider the need for an assistance animal as a barrier to persons from the subject group participating in a jury.

Persons who require an assistance dog, for example, could be seated appropriately at the end of the jury box closest to the jury room door.

Assistance animals should be confined to certified assistance animals and for persons in the subject group, rather than other therapy animals (simply due to the focus of this consultation).

Animal allergies or phobias may create a challenge for other jury members. Juries Victoria may require legislative power to arrange a panel so that a person with an assistance animal and a person with allergies or phobias are not included in the same panel. The Juries Commissioner may not need a new power, so much as clarification of the existing power allowing a request for an assistance animal, or an indication if a prospective juror has an allergy or phobia to animals in the section 20 questionnaire.

## How could jurors be supported to serve where courtrooms are not evenly accessible or equipped with aids?

Future courtroom modifications may allow courtrooms to be more accessible.

In the meantime, the Court and Juries Victoria may need to work together to identify suitable trials for prospective jurors from the subject group. Further, the trial should be allocated to a courtroom with greater accessibility. It would be a significant challenge to swap trials, courtrooms, or jurors on jury panels on the day of the trial, particularly during the pandemic. Any arrangements for suitable trials and courtrooms would need to be done in advance of the trial commencement date.

## What other court processes and court room adjustments might need to be made and how might this affect the right to a fair trial?

Providing judicial instructions in writing may assist jurors who have a hearing impairment. The Court does not foresee any adverse impact of this adjustment and the Court is moving toward updating the Jury Guide for civil and criminal trials which contains many of the instructions and direction in writing. Written instructions may also assist other members of the jury who were not able to fully understand or remember the direction themselves.

Jurors from the subject group, or their support persons, may require a greater number breaks. Additional breaks would add to the length of the trial. This will also impact on other jurors and court resources. These impacts include the rights of the accused to a fair trial and the swift administration of justice due to additional breaks for a jury with a person who requires supports. Any pilot program conducted to advance inclusive juries may need to only include short trials to assess the impact of additional breaks on the length of trials.

In respect of vision impaired persons, the Court needs to be satisfied that the prospective juror has the means to access certain material before determining whether reasonable accommodations could be made. For example, if a person has complete vision impairment, the Court will need to be satisfied the person can read

braille.

The Court has worked hard to address feedback from juries and court users, particularly regarding the issues of delay. The Court is mindful that significant work would be required to facilitate inclusive juries, whilst ensuring an effective process is established to avoid similar issues of delay arising.

# Determining if reasonable supports can be provided/assessment

## We are particularly interested to hear your views about law and practice in other jurisdictions, for example, the ACT and in England and Wales. These jurisdictions provide for the provision and assessment of reasonable supports and are discussed in detail in the consultation paper in chapters 4 and 7 and the appendices. Could those approaches work in Victoria? How might they need to be modified to suit the Victorian context?

The most applicable jurisdiction for the Court to consider is the Australian Capital Territory (“ACT”) due to the similarities in court processes and Australian laws.

However, this approach still poses difficulties. The population of the ACT and the

quantity of jury trials are significantly different. The smaller case load in the ACT allows for a more structured case management approach in the lead up to a jury trial in the Supreme Court (noting the ACT has no intermediate court). Importantly, the Court understands a juror from the subject group has not yet participated in a jury and the provisions in the ACT are yet to be utilised.

In order to maintain the efficient commencement of a trial, the Court suggests a significant amount of work be completed well before the trial commencement date, as suggested in response to Question 1.

The Court foresees the following approaches employed in the ACT as suiting the Victorian context, namely:

* Legislative amendment to overcome the 13th person rule;
* Legislative guidance to assist the determination of whether supports can reasonably be accommodated.

‘Disability’ is not defined in the *Juries Act 2000*. Consideration may need to be given to amendments to cl 3(1) of sch 2 to allow for inclusive juries, as well as s 9(4)(b), which refers to disability as being a good reason for permanent excuse from serving as a juror.

# The assessment process

## What sorts of matters should be considered in determining whether it is ‘reasonable’ to provide supports? Is the ACT approach appropriate or should additional factors be listed/removed in legislation?

The considerations set out in s 16(3) *Juries Act 1967* (ACT) are appropriate. The Court agrees the following factors ought to be considered:

* whether the support would impose a disproportionate or undue burden on court resources, facilities and time frames;
* 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;
* any other issue the judge considers relevant.

The Court deems it necessary to provide further emphasis on the consideration on the accused’s right to a fair trial and on the fairness of any delay or inconvenience to the other jurors.

## Is a similar process to the ACT appropriate where the Sheriff makes a preliminary decision and matters only need to go to a hearing if the recommendation is that support cannot be reasonably provided?

* 1. **At what stage of the jury selection process should this assessment occur?**
  2. **How should these decisions be made – for example, should judicial decisions be made in a private hearing?**
  3. **What role should the Juries Commissioner or Juries Victoria play in the assessment process? Should anyone else be involved, such as Counsel?**
  4. **If a juror is excluded from a particular trial should they be returned to the jury pool to serve on a different trial?**

The Court believes it will be essential for arrangements to be made to accommodate jurors from the subject group well prior to the trial commencement date. A possible process is suggested in response to Question 1.

Ideally, Juries Victoria would conduct the assessments and determinations.

The circumstances in which a juror is excluded from one trial and whether they would be suitable to be returned to the jury pool to serve on a different trial may need to be assessed on a case by case bases. If the juror is competent to discharge their duties as a juror, and they were excluded for reasons such as courtroom facilities, they may be suitable for consideration on another trial (this is excluding considerations in the context of the COVID-19 pandemic).

There is an existing review procedure under the *Juries Act 2000* which allows a person aggrieved by a decision of the Juries Commissioner relating to the deferral of jury service, excusal for good reason and permanent excusal. The aggrieved person may appeal the decision at any time before the person becomes a member of a panel. An appeal must be lodged with the Juries Commissioner and shall be determined in accordance with the rules of the Court.1

## In what type of situations might it not be appropriate for a person who is deaf, hard of hearing, blind or with low vision to serve even where supports can be provided? For example, in cases that turned upon visual or voice identification evidence. Is this likely to occur often? How early would this come to light?

Cases involving visual or voice identification arise frequently. The jury may be asked to consider CCTV footage in an armed robbery case, for example, to determine whether the person in the footage is the accused. A jury may also be asked to identify the accused’s voice in telephone interception recordings in drug importation matters, as an example. These are merely two examples.

Matters involving visual or voice identification cannot always be anticipated – they sometimes arise part way through a trial.

Again, the identification of prospective jurors who require supports and the identification of trials that will be accessible to such jurors, could be completed at an early stage, well before the trial commencement date. The process may be similar to the one outlined in response to Question 1.

## Since people who are blind or deaf have their own ways of assessing credibility, will reliance on demeanour evidence be a potential barrier to participation?

The research referred to on pages 47 to 50 of the consultation paper suggest the assessment of demeanour can competently be undertaken by jurors who have hearing or visual impairment. The consultation paper further refers to research that

1 *Juries Act 2000,* s 10.

was referred to in *Fox v Percy* (2003) 214 CLR 118 suggesting lay people are notoriously inaccurate when assessing witness credibility on the basis of demeanour.

Assessment of witness demeanour is important, however the Court acknowledges that judges provide a direction to jurors to the effect that witnesses behave and come across in different ways for a variety of reasons not everyone will comprehend – they come from all walks of life and there are too many variables to accurately assess the demeanour of a witness in the witness box.

The Court does not see the assessment of demeanour as a potential barrier to participation.

## Does the Juries Commissioner need any further powers to allow Juries Victoria to better channel a prospective juror into a more suitable jury pool? Will this interfere with the random balloting of jurors to trials? Is this problematic?

The Court believes it will be vital for the Juries Commissioner or Juries Victoria:

* to receive information from prospective jurors early, which identifies their specific required supports;
* have power for the Juries Commissioner to make assessments about what constitutes reasonable supports and whether the supports required for a prospective juror can be accommodated; and
* have power to remove a prospective juror from a panel if it is not accessible and move them to another.

Sections 20 and 21 of the *Juries Act 2000* provides a process for receiving information. Section 25(4) allows the Juries Commissioner to make enquiries about whether a person included on the jury list is disqualified from, or ineligible for, jury service, or about whether the information contained in a jury list is correct. They may need to be amended to specifically apply that process to any need for supports, as well as allergies or phobias in relation to support animals.

The Court acknowledges that the frequency of a person in the subject group being summonsed may not be high, therefore the impact on the randomness of jury selection may be low.

## Do you envisage any problems with limiting the 13th person rule in the legislation?

* 1. **Should the supporter be required to swear an oath to maintain the confidentiality and secrecy of deliberations and not disclose any information learnt in the jury room?**
  2. **Should supporters be required to complete additional training to assist in jury deliberations?**

The Court considers an oath or affirmation, similar to those in Schedule 1 of the

*Juries Act 1967* (ACT) to be appropriate, that is:

## Interpreter's oath

I swear ( or the person taking the oath may promise ) by Almighty God ( or the person may name a god recognised by the person's religion ) that I will well and truly interpret the proceedings and the jury's deliberations and that I will not otherwise participate in the jury's deliberations or disclose anything about those deliberations, except as allowed or required by law.

## Interpreter's affirmation

I solemnly and sincerely declare and affirm that I will well and truly interpret the proceedings and the jury's deliberations and that I will not otherwise participate in the jury's deliberations or disclose anything about those deliberations, except as allowed or required by law.

The Court acknowledges jurors may begin discussing the matter from a very early stage. Therefore, the oath or affirmation ought to be administered at the outset by the judge. That is, when the jury are ready to be empanelled (whether that be when the jury is brought into the courtroom or by audio visual link). A further oath may be required before the jurors retire to consider their verdict. Oaths and affirmations would be required for any new support persons who are brought into the trial to assist.

The Court believes it is vital for support persons to receive additional training, particularly given the significance of allowing additional person/s into a jury room during deliberations.

# Providing information about the use of supports

## How should trial participants and jurors be informed about the use of supports and what to expect. Should the judge provide a brief summary to the Court before a trial commences. Should additional information be provided to jurors before deliberation commences?

Additional information could be provided to the parties and jury about the process and supports after empanelment.

Directions may need to be formulated in order to be provided to the jury at the commencement of the trial and before they retire to consider their verdict. The directions could encompass, for example, the person will be assisted, the role of the person who is assisting, and the prohibition on the supporter engaging with the remainder of the jury.

# Eligibility and excuse

## How should the law respond to the situation where a deaf person is fluent in sign language but cannot understand English (nor read or write English i.e. not bilingual)?

English is considered the language of the Court and there is often a great deal of documentary evidence and transcript for the jury to consider. Where the documents are written in a foreign language, they will generally be accompanied by a certified translation to English. The Court does not consider it desirable to consider expanding the subject group further at this stage.

## If legislation provides for the consideration of reasonable supports, should a person in the subject groups still have the option of being excused from service because of their hearing or vision loss?

* 1. **If there is a separate category of excusal should it operate to excuse people in the subject groups ‘as of right’?**

The Court considers it is important for prospective jurors in the subject group to be excused due to their hearing or vision loss, if they wish. This would be similar to the situation for jurors over a certain age or with primary carer responsibilities.

# Peremptory challenges and stand asides

## A number of possibilities were put forward in the consultation paper to reduce the likelihood of a peremptory challenge being used solely on the basis of disability. What are your views about those ideas?

* **guidelines for the Victorian Bar outlining that challenges should not be used on discriminatory grounds including on the basis of disability**
* **a statement by the judge discouraging the use of challenges on discriminatory grounds**
* **expanding the guidelines for stand asides to encompass disability**

The Court considers that, for as long as challenges and stand asides remain available, it is vital that there be no interference with the accused’s right to peremptorily challenge prospective jurors or the Crown’s right to stand aside jurors as part of the empanelment process.

In light of the cases, particularly *Theodoropoulos v The Queen* [2015] VSCA

364 (‘*Theodoropoulos’*) and the subsequent decision of the Court of Appeal in *Cook v The Queen* [2016] VSCA 231, any interference with the accused’s right to peremptory challenges may be deemed a fundamental irregularity in the jury empanelment process.

As part of the information provided to the parties and the panel at the outset of the trial, mentioned in response to Question 13, judges could provide the parties and panel with information about the adjustments that may be made during the trial to ensure a person with vision or hearing loss can participate equally. This may have a duplicative effect by not only informing the court and panel of any modifications to the way the matter will proceed, but also perform an educative role for the lawyers to quash any preconceived ideas or prejudices held toward jurors with vision or hearing loss.

# Cost considerations

## What are the likely cost implications associated with reforming the law from the Court’s perspective?

The Court anticipates there will be significant costs associated with inclusive juries reform, some of which include:

* Recruiting supporters
* Training supporters
* Training of court staff
* Expert reports for modifications and adjustments
* Assessing and approving prospective supporters
* Technology and equipment
* Court resources in cases of delay
* Changes to administrative forms
* Time for the incorporation of further considerations in final directions hearings
* Potential reviews to a judicial registrar or judge
* Potential increased renumeration for staff if inclusive juries leads to additional duties
* Court room modifications

The Court foresees that a pool of trained support people will be needed who can be called upon to support a juror from the subject group when necessary, similar to the process involving intermediaries. There would need to be different pools of people who provide different types of assistance.

## How well equipped are the courts at the moment to implement reform in this area? Are existing supports for people with disabilities who are parties or witnesses comparable/transferable?

Hearing loops are an existing support. They are installed in the courtrooms to assist court users with hearing aids. There are also headphones available for those hard of hearing, who do not wear hearing aids.

## Do the cost considerations differ in regional areas?

The Court anticipates the costs in regional areas to be greater than in Melbourne. Regional courts are often configured differently, which may impact on field of sight considerations for persons who require Auslan interpreters.

Trials in regional courts will likely require trained supporters from a pool of people to travel daily, or be accommodated, in the regional areas.

The Court suggests that if a pilot is undertaken, the most appropriate place for the pilot would be Melbourne.

## How could supports be provided in the most cost-effective way?

The Court anticipates the need for significant funding for modifications and running costs. The Court is not able to make all necessary accommodations and does not

possess the required equipment. Support people will need to be employed, trained, and assessed. Juries Victoria, judicial registrars and court lawyers would need to be supported to allow for assessments and identification of matters suitable or not suitable as accessible trials. There may be other educative costs associated with the training of other court users.

A cost-effective way to achieve this may be to pool resources between the two trial courts.

# Guidelines

## Should guidelines about the operation of new laws be developed by the Court and Juries Victoria to accompany reforms to ensure that they operate effectively?

The Court considers guidelines about the operation of the prospective new laws to be important. Guidelines prepared by the Court and Juries Victoria would aim to provide the reform the greatest opportunity for success possible. Guidelines are also important to provide consistency and transparency in any approach, whilst maintaining the ability for the court to exercise its discretion.

# Creating cultural change

## Would Disability Awareness Training for Court and Juries Victoria staff be useful to ensure reform is effective? What would be the best means of delivering this training?

The Court considers training to be essential for judicial officers, court staff and Juries Victoria staff. Training would mitigate the risk of well-meaning questions being asked or comments being made in relation to a person with a disability that are unintentionally offensive or discriminatory. Such questions or comments may result in embarrassment or other feelings of alienation for the prospective juror.

Contractors with specialised expertise in disability awareness may be considered suitable to provide such training.

## Do you have any other ideas about promoting attitudinal change in the legal profession and amongst lay jurors to address misconceptions about the ability of people with disabilities to serve?

Training could be promoted to the legal profession. The Judicial College may consider providing a public page on their website containing training materials, as they have done for Vulnerable Witnesses.

Additions could be made to the jury induction provided by the Juries Commissioner to prospective jurors. The induction could incorporate information about the support fellow jurors may receive and how the law approaches it.

The Court promotes equality before the law and the Court may review its policy documents to ensure the Court is supporting people with a disability as part of the court process, just as the court ensures there is no racism, sexism, cultural insensitivity.