Victorian Law Reform Commission

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

This submission responds to the Victorian Law Reform Commission’s *Inclusive Juries* consultation paper.

**Summary**

In summary, a more inclusive jury system is a foundation of justice and legitimacy. It is directly consistent with the Victorian Charter of Rights & Responsibilities and, importantly, gives effect to Victoria’s commitment to respect the dignity of all people rather than privilege administrative convenience, a privileging that in practice has served to objectify many people as ‘citizens minus’. Anxieties about administrative costs or inconvenience are overstated. It is unlikely that insupportable numbers of people who are deaf, hard of hearing, blind or have low vision will seek to participate in juries under the Victorian justice system, but it is important that they are not arbitrarily denied the right to participate fully in public life if they wish to. The costs associated with their inclusion are appropriate costs. They are consistent with public/private sector investment to foster individual and collective flourishing by removing barriers to participation in public life or self-fulfilment, and are comparable with financial obligations imposed by law on private sector actors to protect participation by people with disability in the areas of employment, education, and other aspects of life.

**Basis**

The following pages reflect our research and teaching regarding health, human rights and other law at the University of Canberra and Bond University. That activity is evident in a range of peer reviewed publications and in submissions to law reform commissions and parliamentary inquiries, with for example citation in the Australian Law Reform Commission’s *Equality, Capacity and Disability in Commonwealth Laws* report. It includes scrutiny of the Australian Capital Territory and Queensland court systems and the Australian Capital Territory Civil & Administrative Tribunal.

The submission does not represent what would be reasonably construed as a conflict of interest.

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

***Reasons to make juries more inclusive***

**Q2 The Commission has identified some of the key reasons underpinning the need for reform. Are there any other reasons you would like to bring to our attention?**

The salient reason is enhancement of justice through participation of people in the jury system and by extension through community recognition that those people are individuals rather than objects, ie they are more than a disadvantage.

An under-recognised reason is that people who are deaf, hard of hearing, blind or have low vision have something to contribute to juries and the broader justice system because they bring to juries their lived experience. They have typically not lived in isolation. They are aware of the diversity of experience and may be especially acute. It is further important to recognise that not everyone is born blind, hard of hearing, deaf or with low vision, nor to diminish the experience of those who were. Jury participants may have experienced long-term disadvantage or may have only recently been affected by that disadvantage after many years as a successful practitioner, tradesperson or homemaker; conversely they may have unique insights born from life long experience of disability.

Also important is recognition that legal disputes involve people with disabilities – as victims, as offenders, and as litigants. Alienation of people with disability as a collective from significant response mechanisms designed to address legal disputes results in a distortion of the legal process which is not defensible on the basis of cost or administrative inconvenience.

***Provision of reasonable supports***

**Q3 Should the *Juries Act 2000* (Vic) be amended to specifically require the courts to consider the provision of reasonable supports for people who are deaf, hard of hearing, blind or with low vision?**

The Act should be specifically amended to both require consideration of reasonable supports and – importantly – directly encourage the provision of reasonable supports. We refer to direct encouragement, in essence a default position in favour of inclusion, given that the history of discrimination law in Australia and elsewhere regrettably indicates that ‘consideration’ is often merely formalistic.

**Q4 Is the ACT approach appropriate for Victoria?**

The ACT is a significantly smaller jurisdiction than Victoria and no problems have so far arisen with its emphasis on inclusion. Our assessment is that the ACT approach at the level of statute reform and administration is relevant to the Victorian justice system. That approach should be emulated by Victoria. As we discuss later in this submission, we consider that greater inclusion is consistent with and required to give effect to the *Charter of Rights and Responsibilities Act 2006* (Vic). Inclusion requires positive action rather than mere protection. It will in our view not involve inordinate and inappropriate expenditure or result in disruption to judicial processes, eg substantially delay trials.

**Q5 What would be the best way to notify Juries Victoria and the courts that a prospective juror is deaf, hard of hearing, blind or has low vision and of the supports they would need to serve?**

That the letter notifying people that they are due for jury service should both

* articulate Victoria’s commitment to inclusion in the jury system (thereby signalling to *all* Victorians, irrespective of disadvantage) and
* provide disadvantaged prospective jurors with a one-stop state-wide contact point that allows those people to identify and discuss what supports might be needed.

The contact point must be accessible to people with a hearing or other advantage, so that it does not function as a tacit barrier to inclusion.

We have referred to ‘discussion’ because it is important to recognise that individual circumstances (and thus appropriate supports) will vary. It is fundamental that the inclusion strategy should not objectify jurors as ‘normal’ and ‘other’/deficit people, a social sorting that perpetuates discrimination.

***Assessment of reasonable supports***

**Q6 Should the trial Judge make the final decision about whether or not a person who is deaf, hard of hearing, blind or with low vision can discharge their duties in the circumstances of the particular case?**

Yes, that decision-making on an instance by instance basis (reflecting individual circumstances) is appropriate, founded on judicial recognition – consistent with express policy statements and amendment of current legislation – that there is a commitment to include people who need reasonable supports.

**Q7 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?**

We endorse that approach, subject to the default position being that reasonable supports will be provided, that the final decision will be made by the trial judge and that the sheriff/staff have received appropriate training. We discuss that training below.

We suggest that the process be underpinned by timely mandatory reporting, as discussed in our response to Question 42 below. We consider that reporting is a fundamental aspect of inclusion.

**Q8 At what stage of the jury selection process should this assessment occur?**

Assessment should take place at an early stage, based on the circumstances of the disadvantaged individual and the characteristics of the trial/s for which the potential juror is considered. It will often be clear, for example, that a particular trial will involve significant use of aural or visual evidence, requiring particular supports and fostering channelling of a juror to a trial in which there is less need for the particular support.

**Q9 What role should the Juries Commissioner or Juries Victoria play in the assessment process? Should anyone else be involved?**

We consider that the Commissioner and Juries Victoria should have a facilitative and oversight role, fostering the training discussed elsewhere in this submission and ensuring that there is qualitative and quantitative reporting regarding implementation of the inclusion strategy.

**Q10 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 in legislation?**

We consider that the ACT approach is appropriate.

**Q11 Should prospective jurors be questioned in open court, or in a private hearing?**

Questioning in open court is appropriate, consistent with Victoria’s broader commitment to Open Justice principles. That questioning reflects recognition of the dignity of all jurors – as noted above jurors are more than their disadvantage – and should be guided by training of judges and legal counsel, referred to below, so that it does not perpetuate exclusion.

In the event that open court questioning is the adopted model, it becomes even more important to ensure that potential jurors with a disability retain the right to elect to serve as jurors, rather than are compelled to do so. Questioning in open court necessarily exposes them to public disclosure of details of their disability that some, but not all, jurors may not be comfortable with. The possibility of being questioned about their disability in open court must necessarily be communicated to potential jurors early in the selection process, to avoid situations where confidentiality of jurors medical information pertaining to their disability is violated in ways that are inconsistent with treatment of jurors without a disability.

**Q12 Does the Juries Commissioner need any further powers to allow Juries Victoria to better channel a prospective juror into a more suitable jury pool?**

We suggest amendment of the suite of legislation regarding juries as per comments throughout this submission.

**Q13 Should the Act give a judge a specific power to exclude a prospective juror if it appears that notwithstanding supports, that person could not perform their duty in the circumstances of the particular trial for which the person has been summoned?**

Yes. Consistent with disability discrimination law, adjustments must be reasonable. If judges form the view that a prospective juror’s disability would compromise the ability of the accused to receive a fair trial, for example, then they should have the power under the Act to excuse the jurors. Amendment of the Act to provide a specific power is appropriate. It should be accompanied by a timely reporting requirement.

**Q14 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? Is this likely to occur often?**

Our sense is that such situations will be rare and that overall the Victorian justice system should be administered in ways that minimise exclusion.

**Q15 If a juror is excluded from a particular trial should they be returned to the jury pool to serve on a different trial?**

Yes. Exclusion should be on the basis of the particular circumstances of the individual and the specific trial rather than absolute.

***Limiting the 13th person rule***

**Q16 Should the common law prohibition on supporters or interpreters assisting in the jury room be modified by legislation?**

Modification is essential for clarity, consistency and increased awareness in the broader community through publicity when the statute is debated and introduced.

**Q17 Should the supporters or interpreters be required to swear an oath/s or affirmation/s to accurately interpret/support proceedings, maintain the confidentiality and secrecy of deliberations and not disclose any information learnt in the jury room?**

Yes, it is axiomatic that these requirements be enshrined in legislation and clearly communicated through training of supporters and interpreters.

**Q18 Do new offences need to be created to deter or punish supporters or interpreters from revealing information about jury deliberations or to stop others from soliciting information from supporters?**

Consistent with Q17 above this should be addressed through amendment of the legislation and through training.

**Q19 Should supporters or interpreters be required to complete additional training to assist in jury deliberations and trial proceedings? What should that be?**

Yes, such training is appropriate.

***Eligibility***

**Q20 Does Schedule 2 of the *Juries Act 2000* (Vic) need to be amended to accommodate people who use Auslan? What form should this amendment take?**

Amendment is necessary, as per comments elsewhere in this submission.

***Excuse***

**Q21 If legislation provides for the consideration of reasonable supports, should a person who is deaf, hard of hearing, blind or with low vision still have the option of being excused from service because of their hearing or vision loss?**

Given the preceding comments regarding inclusion and dignity we do not endorse *automatic* exclusion on the basis of disadvantage. Participation in the justice system through service on a jury is a key aspect of the dignity of citizens in Australia as a liberal democratic state. It is a responsibility that is important and should be embraced, even though service may be inconvenient. We note with concern studies indicating that juries in Australia are strongly weighted towards particular demographics and that service is something to be evaded.

Please note the comments above in Q11 and the need to protect the autonomy of jurors with disability in decisions regarding the confidentiality of medical information pertaining to their disability.

***Peremptory challenges and stand asides***

**Q22 What can be done to reduce the likelihood of a peremptory challenge being used solely on the basis of the prospective juror being deaf, hard of hearing, blind or with low vision?**

We have emphasised the need to recognise individual circumstances and different needs in a specific trial. We consider that amendment of the legislation, accompanied by practice guidelines and training, is necessary to clearly indicate that inclusion is the default position. In essence, given the assessment referred to above, courts should be very wary of unsubstantive ‘social sorting’ through peremptory challenges.

**Q23 Should there be guidelines for the Victorian Bar outlining that challenges should not be used on discriminatory grounds including on the basis of disability?**

Such guidelines are essential and should reflect statute.

**Q24 Should the judge make a statement discouraging the use of challenges on discriminatory grounds?**

Such a statement is essential, should be reflected in practice guidelines and underpinned by the training highlighted elsewhere in this submission.

**Q25 Should the guidelines for stand asides expressly state that disability is not a ground for the exercise of a stand aside?**

Yes.

***Possible supports to enable inclusive juries***

**Q26 What technologies/supports would assist people who are deaf, hard of hearing, blind or who have low vision to serve as jurors?**

The supports – human and/or technological – potentially available for jurors are the same as those found elsewhere in Australian public administration, business and education. Use of Auslan for example is not revolutionary and has been a feature of many appearances by ministers/officials during COVID-19. Hearing loops to assist people who have hearing and/or visual problems are common in museums, retail malls, universities, theatres and other locations. Devices that magnify printed text or schematics are common (and may well be appreciated by people who do not identify as having low vision).

**Q27 What role could a support person play in assisting people who are blind or who have low vision in court and the jury room? Who is likely to perform this role?**

We see two roles. The first, under-recognised, is assisting the individual (and on occasion companion animal) to navigate the court precinct and trial rooms. The second is to assist the person to access information in the course of the trial. The support person might be a trained member of court staff or a contractor from a panel, someone with expertise regarding support and who – as indicated above – has been training in roles/responsibilities regarding support in a trial.

**Q28 How could Auslan interpreters, court reporters and stenographers be booked or arranged in advance to ensure that a prospective juror could be supported to serve? How might a system respond to the unpredictability of the selection process? How might a system respond to the small number of interpreters working in a legal setting?**

We preface our comment by stating that it is unlikely there will be a vast number of people seeking support. The potential for support (and associated cost in training, administration, recruitment or contracted service provision) should not be used as an excuse for exclusion.

A broader response is that an inclusive justice system is a mechanism to build capacity across the economy by increasing the number of interpreters and other expert support personnel, whether within government or on a contracted basis. Building capacity will address issues with unpredictability and – importantly – provide a resource that can be drawn upon by educational institutions, business, nonprofits and other government agencies.

**Q29 How could supports be provided where courtrooms are not evenly accessible or equipped with aids?**

We suggest that there is a strategic dimension. There is general recognition that some court rooms (and associated locations such as jury rooms) are less accessible than others, for example for witnesses or defendants with a motor or visual disability. There is also recognition that some rooms date from last century or beyond and accordingly have adverse acoustics and sightlines. We have referred above to a strategy in the expectation that over time there will be a review and where necessary enhancement or replacement of facilities.

We also note that there is scope for ‘channelling’ of trials to rooms that are more accessible and/or equipped with support aids. That is a matter of ‘case management’, in other words the deft administration that is evident in much of the justice system and does not require immediate capital expenditure in every court room across the state.

***Court familiarisation***

**Q30 Should there be an option for a person who is deaf, hard of hearing, blind or with low vision to able to visit court before empanelment to familiarise themselves with the court and explore with court officials what particular supports they might need to serve?**

Visitation requires some planning but should be supported as consistent with both inclusion and the Victoria’s commitment to open justice, including measures to ‘demystify’ the court system (and more broadly law) through community ‘open days’, ‘school visits’ and online content.

Such measures necessarily have a cost but that cost is part of the administration of justice and will serve to reinforce the legitimacy of the court system in environments where justice is disrespected (for example by ‘sovereign citizens’) or simply misunderstood by many people.

***Guidelines for new laws***

**Q31 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?**

Clear, comprehensive and positive guidelines are essential. We suggest that they be readily accessible and that they be underpinned by a broader community education campaign. Specific recommendations are provided below.

***Court room layout and trial adjustments***

**Q32 How should court and jury rooms be organised to accommodate a person who is deaf, hard of hearing, blind or with low vision, using supports to serve?**

The adjustments will typically be those that are unremarkable in other locations, for example installation of hearing loops for people with hearing problems and minor restructuring of layouts in some court rooms to ensure a sight line for a jury using Auslan assistance. It is conceivable that on occasion someone who is blind might need a Braille version of a document or – more commonly – access to a device that converts text into audio. Our scrutiny of court rooms in locations in Melbourne, regional NSW, Sydney and the ACT suggests that many people *without* hearing/vision difficulties would welcome redesign to assist them in following what takes place in court and in jury rooms.

**Q33 What trial adjustments might be needed to accommodate a juror using supports to serve?**

See above.

**Q34 What is the best way of informing the court and parties about the use of supports in the trial process? When should this occur?**

Informing the court and parties should take place before the commencement of proceedings. It might be underpinned by an awareness video or interactive training module accessed by potential jury members pre-selection, eg available online when individuals are informed they are to serve on a jury.

**Q35 How should jurors be informed about how a fellow juror’s supports will work?**

Jurors could be effectively informed prior to the first hearing, with an introduction by the judge and an opportunity to ask questions. We specifically refer to the judge because that introduction signals the seriousness of jury participation as part of the justice system and that disrespect of a supported juror is abhorrent. Suh signalling serves to educate the broader community, ie engender awareness once jury service is finished.

**Q36 Does the use of supports raise any questions about the accuracy of a trial record for appellate court consideration?**

There is considerable scholarly research and some jurisprudence to the effect that a transcript or audio recording does not capture every aspect of what may have shaped a jury’s understanding. We consider that potential concerns regarding trial records in relation to appellate consideration can be practically addressed, without disruption of proceedings, through statements by the Bench and counsel when use of support might subsequently raise questions.

***Costs***

**Q37 What are the likely cost implications associated with reforming the law?**

We are not aware of a comprehensive study of costs associated with establishment and maintenance of an inclusive regime. Given preceding comments we forecast that maintenance costs are not likely to be large, eg that there will not be a need for ongoing capital expenditure or contracted facilitation services.

We respectfully suggest that a strong focus on the costs associated with reforming the law is inappropriate. Expenditure to facilitate inclusion and to broaden community understanding is a legitimate investment, in the same way that there were costs associated with the reform of law to address gender and other discrimination. Inclusion is a matter of justice, the foundation of the state’s court system. It is also an enabler of increased productivity across the state/national economy.

**Q38 Do the cost considerations differ in regional areas?**

We consider that the default position should be for inclusion irrespective of location, ie in Victoria’s metropolitan and regional settings. Enhancement of infrastructure can be programmed over several years. Assistance staff can be provided on a needs basis from metropolitan centres through case management, as highlighted above and part of Justice Victoria’s commitment to ongoing process improvement.

**Q39 How could supports be provided in the most cost-effective way?**

As discussed above, there is no single one-size-fits-all support and we suggest that the most effective solution will often be a matter of flexibility, communication and courtesy rather than a capital-intensive technology solution.

***Creating cultural change for inclusive juries***

**Q40 Would Disability Awareness Training for court and Juries Victoria staff be useful to ensure reform is effective?**

We consider that such awareness-building is axiomatic: it is both necessary and readily achievable.

Establishment of such training should not be regarded as an imposition or indeed exceptional. Many institutions already mandate disability awareness training for new employees and contractors, typically as part of broader inclusiveness programs. That training is bespoke (ie institution-specific) or off-the-shelf (eg a suite of awareness videos and online assessment from the SBS).

The training will serve two functions. It will firstly signal that courts, tribunals and Justice Victoria staff have a substantive commitment to inclusiveness. Secondly, it will allay potential anxieties or misunderstandings among staff, something that will translate into their lives outside justice administration settings. An understanding of the challenges many people face and an affirmation of their capacity in addressing those challenges should assist staff in dealings with peers on the tram, at the beach, at the supermarket or at the kids’ school rather than merely in their professional lives.

**Q41 Do you have any suggestions about how to overcome misconceptions about the ability of people who are deaf, hard of hearing, blind or with low vision to serve?**

We suggest both the reporting noted above and a public education campaign. Ultimately the best advocates for inclusion are people who have demonstrated through their participation that they are different but equal, rather than objectified as deficient and inadequate. The active participation by women in all areas of the workforce is the salient, persuasive and incontrovertible demonstration that female does not equal half a man.

**Q42 Is there anything further that you would like to tell us about what you think would enhance access for people who are deaf, hard of hearing blind or who have low vision who wish to serve on juries in Victoria?**

We suggest five further measures.

* The first is that the Government encourage the state’s universities to ensure that the inclusion is featured in the law curriculum, consistent with the commitment by those institutions to fostering fairness and inclusion as aspects of justice.
* The second the inclusion is directly featured in formal ongoing training of current legal practitioners as part of Continuing Professional Development requirements.
* The third is that the Attorney-General and the Justice Department report to Parliament and the community at large on an annual basis using comprehensive statistics on the inclusion in juries of people who are deaf, hard of hearing, blind or with low vision
* The fourth is that the Government, through the Council of Attorneys-General, should encourage a coherent forward-looking national regime. Victoria’s achievement in building inclusiveness and justice must be emulated in the other jurisdictions.
* We also recommend that the Government resist calls likely to come from some sectors of the legal profession citing the difficulty of accommodating jurors with disability. Other sectors of the community accommodate people with disability on a daily basis. Indeed, participation in higher education provides just one salient example of a sector which has responded to the challenges of presenting content in an array of formats in order to enhance accessibility. Claims that it is ‘different’ or ‘difficult’ should not be used to justify not taking steps towards fuller participation in public life by people with disability.