26 February 2021

Victorian Law Reform Commission Level 3, 333 Queen Street

Melbourne VIC 3001

**By email only to:** *juries@lawreform.vic.gov.au*

# Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or have Low Vision

Dear Commissioner,

The Law Institute of Victoria (‘**LIV**’) welcomes the opportunity to provide feedback to the Victorian Law Reform Commission’s (‘**VLRC**’) consultation on Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or have Low Vision (‘**the Consultation**’). This submission has been informed by the LIV Litigation Lawyers, Disability and Criminal Law Sections. The LIV accepts representativeness is linked to the notion of a ’trial by one’s peers’,1 and agrees that persons with a sensory disability should not be excluded from being able to serve on a Victorian jury. In so far as possible, the LIV supports promoting inclusiveness in juries to ensure justice is administered in line with the community’s standards. However, whilst there is a right to a fair trial, there is no inherent right to be a juror and it is the former that is the touchstone for which any change must be measured. The LIV have only responded to the Consultation Paper’s questions that relate directly to the practice and experience of lawyers; as such, not all questions are addressed in the LIV’s submission.

1 Victorian Law Reform Commission, Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or have Low Vision Consultation Paper, 5.6, 39 – citing Victorian Law Reform Commission, Jury Empanelment (Report No 27, May 2014) [3.83]

<https[://www](http://www.lawreform.vic.gov.au/).la[wreform.vic.gov.au](http://www.lawreform.vic.gov.au/)>

# Chapter 7 - A system to make juries more inclusive

1. **Provision of reasonable supports**

The LIV supports amending the *Juries Act 2000* (Vic) 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 LIV considers that before the final decision is made by the Judge, the Juries Commissioner should undertake the preliminary inquiry as to the extent of the impairment and assessment of reasonable supports that are required. This administrative process ought to precede the Judge’s consideration, however, the following options should be further considered:

* 1. Where the Juries Commissioner states that an individual cannot participate in a jury because adequate supports **could not be** provided, this decision can be brought before a Judge for final decision; or

The LIV considers that where a Juries Commissioner decides that an individual should be excluded,2 section 10 of the *Juries Act 2000* (Vic) (‘**the Act**’) provides the right to appeal for adjudication by a judge, significantly not “the” trial judge in the trial in which the person is a potential juror. This provides a mechanism for them to challenge the decision and to articulate the reasons why they can participate, leaving it up to a Judge to consider suitability vis a vis the specific type of trial.

* 1. Where the Juries Commissioner deems that an individual **can participate** with reasonable supports, the decision is brought before the trial judge to consider its appropriateness, given the circumstances of the particular case.

2 *Juries Act 2000* (Vic) s 8-9.

The Juries Commissioner currently excludes individuals from the pool for “good reason”,3 which can be for an extensive list of reasons under Schedule 1 and 2 of the Act, such as an intellectual disability or inability to communicate in or adequately understand English.

In making the initial decision, the LIV recommends that the Juries Commissioner should make the appropriate inquires as to a person’s sensory disability and inform the Judge of what reasonable supports would be required. The decision of the Juries Commissioner would be an administrative decision as to the potential juror’s eligibility and requirements to participate, after which the juror’s eligibility, regardless of the Juries Commissioner’s findings, should rest with the Judge who is best positioned to make an assessment and consider the submissions from parties on this matter. The Judge is best positioned to oversee a fair trial occurs, possessing wide powers to control the conduct of proceedings and is best placed to assess the specific circumstance of the trial against whether the individual is unable to discharge the duties of a juror. Different trials have different requirements, for example, if a matter turns on the identity of a defendant in CCTV footage, the ability for a vision impaired juror to make an informed decision is reasonably called into question and it would be the Judge who may assess their capacity based on the facts, evidence and arguments the trial will involve. If a juror is excluded from such a matter on the grounds of ensuring a fair trial, that juror should be returned to the jury pool given there are likely to be other trials that their sensory disability would not be an issue.

# Assessment of Reasonable Supports

Under the *Equal Opportunity Act 2010* (Vic), reasonable adjustments in any public setting places an obligation on an individual to state what adjustments are required for them to participate. Adequate disclosure from the individual to the Juries Commissioner would need to be made as to what adjustments are required for equal participation, which should be accepted on face value. The LIV notes that the current process of notifying Juries Victoria and the Courts of the supports required to serve on the jury is open and transparent. Where forms are sent out to potential jurors, they should be able to indicate their requirements and reasonable support needs. The LIV

3 Ibid s 8(3).

recommends that this request should follow the individual’s progress to the jury pool, so that they

would not need to make subsequent requests to the Judge and/or Court.

During the jury selection process, the trial judge explains what the trial will involve, including if the trial will be lengthy, the nature of the charges or whether it will be heavily document-based, so that the jury pool is adequately informed and can request to be excused. The Judge can excuse a juror if they advise they cannot be impartial due to the charges or are unable to serve for any other reason.4 A juror with a sensory disability should be able to make such a request to self-exclude on the basis of their condition impeding their capacity to fairly participate. Where a juror is excused under such circumstances, they should be returned to the jury pool to serve on a different trial.

The process could include the Judge’s Associate asking the Juries Commissioner for a panel and the Commissioner advising that there will be an individual with a disability on the panel. As noted by the VLRC, it is difficult to predict if a prospective juror will actually serve on a jury.5 To assist in parties’ challenging a potential juror, it would be in the interests of all parties that a statement be read by the Judge to the effect of identifying that the juror is able to participate in jury services with reasonable adjustments and to specify those adjustments. This would ensure that, where there are issues (if at all), these are ventilated between parties and with the Judge, before the jury pool enters the courtroom.

# Limiting 13th person rule

The LIV supports the common law prohibition on supporters/interpreters assisting in the jury room to be modified by legislation. The supporter/interpreter should be required to take an affirmation that they will accurately and objectively interpret/support proceedings, maintain the confidentiality and secrecy of deliberations and not disclose any information learnt in the jury room. The LIV considers that new offences should be introduced to deter supporters/interpreters from violating

4 *Juries Act 2000* (Vic) s 32(2).

5 Victorian Law Reform Commission,’ Inclusive Juries – Access for People Who are Deaf, Hard of Hearing,

Blind or Have Low Vision’ (Consultation Paper, December 2020) [3.8].

their affirmation, which should be of a similar nature to the court conduct based criminal offences of contempt of court or perjury.

# Eligibility

The LIV recommends that Schedule 2 of the *Juries Act 2000* (Vic) be amended to accommodate people who use AUSLAN interpreters, to include that the jurors should be excluded who cannot communicate in English **and/or** AUSLAN.

# Interpreter/supporter training

In many instances, LIV members have reported their experiences with interpreters in a range of professional settings are that they can stray beyond the confines of their role; venture into providing legal advice, not accurately convey what is being said or needlessly elaborate on statements. Whilst specific training may not be the best way to address this, the LIV recommends part of the affirmation require a pledge to honestly, objectively and accurately interpret to the best of their abilities. Additionally, a fact sheet should be provided to interpreters/supporters and the Judge should reinforce the importance of their role and adhering to their affirmation and the guidance of the fact sheet.

# Peremptory challenges and stand asides

The nature of peremptory challenges is that a defendant does not have to disclose their reasoning, which can often be instinct decisions based on very little information such as appearance, a potential juror’s behaviour during empanelment or their occupations. The LIV has previously described some of the unspoken reasoning behind peremptory challenges:

*[…] at times, prospective jury panel members react in ways that can seem inappropriate to the setting, or that may indicate that they may have difficulty being impartial in the trial. Members report that when serious charges are read out, it is not uncommon for prospective jury panel members to roll their eyes, or sometimes turn and glare at the accused. At other*

*times, panel members have burst into tears, hyperventilated during the arraignment, yet still did not seek to be excused. At other times, jury panel members are inattentive or distracted, or conversing with their peers.6*

Whilst the positive obligation provisions in the *Juries Act 1967* (ACT) are yet to be used since their introduction in 2018, this may be attributed to exclusions through peremptory challenges and self- exclusions. However, to remove the ability to peremptorily challenge on a confidential basis as to ascertain whether there is any underlying bias or discriminatory attitude towards a juror’s sensory disability, is to fundamentally change this process founded in affording a defendant a fair and impartial trial. The LIV therefore submits it is essential that this wide discretion remain without reasons being required,7 regardless of the perceived basis of the peremptory challenges.

# Chapter 9 - Creating cultural change for inclusive juries

1. **Disability Awareness Training**

The LIV considers that Disability Awareness Training for court and Juries Victoria staff would be useful to ensure the reform is effective. The LIV notes that the Supreme Court are currently running a project to increase the level of disability training within the courts of judicial officers, court staff and other people involved in the administration of justice. Training and education can go a long way in altering the broader culture in courtroom settings.

The LIV would support in addition to training, a recommendation for an audit to be undertaken of the courts throughout Victoria into making courts more accessible to individuals across the full spectrum of disabilities.8

6 Law Institute of Victoria, Submission to the Department of Justice & Regulation: Review of Equality & Fairness in Jury Selection (21 June 2016) 6 <https:[//w](http://www.liv.asn.au/getattachment/9d2a6718-3131-4568-)w[w.liv.asn.au/getattachment/9d2a6718-3131-4568-](http://www.liv.asn.au/getattachment/9d2a6718-3131-4568-) 8bf0-cdda303bbfa3/20160622\_DJR\_JurySelection\_FinalV03.pdf.aspx>

7 *Juries Act 2000* (Vic) s 39.

8 Members report that a priority would be for the Supreme Court to have wheelchair access for jurors, who are currently balloted to the County Court instead.

Yours sincerely,

Tania Wolff

# President