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| 26 February 2021The Hon Anthony North QC ChairVictorian Law Reform Commission Level 3, 333 Queen StreetMELBOURNE VIC 3000By email: juries@lawreform.vic.gov.au |  |

Dear Mr North

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

Victoria Legal Aid (**VLA**) welcomes the Victorian Law Reform Commission’s (**VLRC**) review into inclusive juries. We recognise the importance of designing laws and systems that create an inclusive society and support the independence of people with disabilities.

VLA supports reducing barriers to people with disabilities participating in all aspects of public life on equal terms with others. As identified in the VLRC Consultation Paper, people with lived experience of disability will contribute an important perspective as jurors and will also provide an opportunity for accused people with these impairments to be tried by jurors who may have a similar lived experience to them.

While VLA supports facilitating increased access to jury participation, inclusivity measures must also ensure an accused person’s right to a fair trial. Jurors have a critical and difficult role in assessing the evidence presented at trial, and they are asked to decide the facts on their understanding of the evidence. Our submission provides suggestions for the empanelment process, supports and trial adjustments. We also encourage a review of the reforms to assess the operation in practice, and encourage further Victorian research into the operation of juries.

We would be happy to discuss these matters with you further.

Yours sincerely

**Louise Glanville**

Chief Executive Officer Victoria Legal Aid

**Submission to the Victorian Law Reform Commission *Inclusive Juries Review***

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**Acknowledgement of country**

Victoria Legal Aid operates on Aboriginal country throughout Victoria. We acknowledge the traditional custodians of the land and respect their continuing connections to land, sea and community.

# About Victoria Legal Aid

Victoria Legal Aid (**VLA**) is an independent statutory agency responsible for providing information, advice and assistance in response to a broad range of legal problems. VLA assists people with legal problems such as family separation, child protection, family violence, discrimination, criminal matters, fines, social security, mental health and tenancy.

VLA is the largest criminal defence practice in Victoria and operates VLA Chambers, a specialist group of in-house advocates who are briefed to provide in-court representation for clients at all stages, mostly in serious indictable matters. VLA funds approximately 80 per cent of the criminal jury trials that take place in Victoria.1 In 2019-20, 22.7 per cent of grants of legal assistance for criminal matters were to VLA in-house lawyers.2

Our Chambers Public Defenders and Indictable Crime team lawyers have experience of the complexities of presenting evidence to audiences with different backgrounds, as well as the challenges of presenting evidence through the use of an interpreter. VLA is well placed to interrogate assumptions about the core skills and attributes required of jurors and whether those can be sufficiently facilitated with supports.

VLA’s Equality Law Program provides legal advice and representation to people with disabilities who experience discrimination and harassment in many areas of public life. This includes assisting clients with disabilities who are seeking adjustments in their employment, education or other areas of public life to accommodate their disabilities. Of the discrimination- related inquiries received, inquiries about disability discrimination are the most common and each year we provide hundreds of instances of legal advice and assistance about this issue. For example, over the past five financial years we gave 345 advices on disability discrimination in education and 1,803 advices on disability discrimination in employment.

VLA’s dedicated Mental Health and Disability Legal team assists clients who experience mental health or disability issues on a range of matters, including the NDIS and forensic disability system, and provides legal services for clients subject to compulsory treatment under the *Disability Act 2006* (Vic).

Overall, approximately one quarter of VLA clients across Victoria disclose having a disability or experiencing mental health issues.3 VLA does not record whether our clients have vision or hearing impairments.

1 Victoria Legal Aid, *Delivering High Quality Criminal Trials: Consultation and Options Paper*, January 2014, 4. For more information see <[https://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/delivering-](https://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/delivering-high-quality-criminal-trials) [high-quality-criminal-trials](https://www.legalaid.vic.gov.au/information-for-lawyers/doing-legal-aid-work/delivering-high-quality-criminal-trials)>

2 Victoria Legal Aid, *Annual Report* 2019-20, 40.

3 Ibid, 12.

## The importance of inclusive juries

The jury’s role in criminal trials is one of the most important features of our criminal justice system. VLA welcomes change to better enable people who are vision or hearing impaired to serve on juries, where appropriate supports can facilitate effective participation, and ensure that defendants receive a fair trial.

Through our work responding to disability discrimination, we see the impact on people when they are excluded from participating in community life because adjustments are not made to accommodate their disabilities. Not only does this discrimination have a significant impact on the health and wellbeing of people with disability, it can also impact on their ability to complete their education, maintain their employment and have access to services. Our wider community is also adversely impacted when people with disabilities are denied the ability to fully participate in public life and contribute their diversity of lived experiences to public decision-making processes, including in the justice system.

Juries serve an important role in the democratic process; if juries are to be representative of the community, diversity is necessary to ensure that legal decisions reflect the attitudes and values of the whole community.4 Including people who are deaf, hard of hearing, blind or have low vision to participate in juries (and all components of the legal system) will ensure juries represent the diversity found within the general community, and enable defendants with hearing or vision impairments to have a juror which shares some of their lived experience. It could also improve access to juror participation for Aboriginal and Torres Strait Islander people, who have a disproportionately high rate of vision and hearing impairments.

Enhanced facilities and technological supports and adjustments implemented to enable people with hearing and vision impairments to participate in jury service will have other benefits. It will enhance the participation of jurors who are currently not excluded, but nevertheless have challenges in hearing or seeing the evidence in court. It will improve the participation of people with these impairments in other roles, whether as judges, advocates, witnesses, parties or other stakeholders.

## Empanelment

We are not commenting on every aspect of jury pool selection or the Juries Commissioner’s powers, but highlight the characteristics that we see as critical to this reform.

Firstly, there should be a process for people to communicate their individual impairments and the supports that they will need to understand the information presented and communicate with the court and fellow jurors. We support maintaining the option of being excused from service for a person who is deaf, hard of hearing, blind or with low vision.

The Juries Commissioner should provide the detail of any impairments which will impact how a potential juror will receive evidence and any supports needed, to the judge and parties before the jury pool enters the courtroom. At that stage there should then be an opportunity for the parties and trial judge to discuss and decide whether proceeding with that potential juror, in that trial, should occur; the jury pool should not be present.

4 Jacqueline Horan and David Tait, ‘Do juries adequately represent the community? A case study of civil juries in Victoria’ (2007) 16 *Journal of Judicial Administration* 179, 198.

Critically, the trial judge must have the final decision as to whether to empanel a potential juror, with the assistance of the parties. The decision will involve an assessment of the nature of the evidence, the key issues at trial, and the potential juror’s individual impairments and the supports and adjustments available. This will mitigate the risk that an entire jury would need to be discharged and a new trial commenced, and the risk of a miscarriage of justice where visual or aural evidence cannot be properly scrutinised or assessed by a juror. We support legislation confirming the existence of a 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.

## Specific exclusions for types of evidence

VLA supports giving the judge the power to decide on a case by case basis, with the overriding test being the interests of justice in each case. Given the interrelationship between the potential juror’s individual impairments, the nature of the evidence, and the nature of the key issues at trial, as well as the rapid advancements in both technological supports and forensic evidence, it is not practical to set specific exclusions or exhaustive criteria.

However, there may be some trials where the nature of the visual or aural evidence places both the prospective impaired juror and the accused at insurmountable disadvantage, where the risk of a miscarriage of justice is high. For example, where physical, visual and/or voice identification is a key issue, it is more likely that the evidence will need to be seen or heard directly to be able to make an identification. It is typical in these trials to present closed-circuit television, telephone intercepts and other audio visual evidence. Ensuring that material can be assessed accurately through alternative means would be critical for safeguarding an accused person’s right to a fair trial.

## The thirteenth juror rule

VLA supports in principle amending the longstanding common law exclusion of non-jurors from the jury room to enable Auslan interpreters. We support requiring translators make an oath or affirmation and be subject to disclosure offences, as recommended by the NSW Law Reform Commission and the Australian Law Reform Commission.5

We note that concerns and potential risks have been raised by our practitioners. The effect of enabling interpreters to assist jurors is that the juror is receiving the evidence via another person rather than directly from the witness or via comment from counsel or the judge; the translation may be an interpreted or filtered version of the evidence. Because jury deliberations are confidential, there is no way of knowing whether the evidence has been correctly interpreted or whether slightly different nuances have been consciously or unconsciously added to the interpretation.

A further complication is that Auslan interpretation requires multiple interpreters over an extended period, meaning that a long trial and extended deliberations are likely to require several interpreters in the jury room.

5 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report No 124, 24 November 2014).

We support better research on these potential risks in the course of the implementation of this reform, as part of broader research on juries in Victoria (see further below).

## Peremptory challenges

VLA supports the current process of empanelling a jury, including the number of challenges available in criminal trials and the challenge provisions, and our submission is that changes do not need to be made to this aspect of the process.

Peremptory challenges provide a critical opportunity for accused people to be directly involved in their trial. More broadly, they provide one of the fundamental safeguards against a jury that is, or is perceived to be, biased or unfairly constituted. VLA considers that this balance can be achieved by maintaining the current number of peremptory challenges. A core feature of our system of trial by jury is that all accused are entitled to exercise peremptory challenges in whichever way they wish. Just as jury deliberations are confidential, so too are an accused’s reasons for challenging potential jurors.

Given the importance of the safeguard, we do not see the value in a non-binding guideline or caution by the court as proposed. However, we do think there would be value in education to the profession on these reforms and the importance of inclusive juries, and on matters such as unconscious bias, as set out below.

We are also of the view that substantive change to such a central part of the criminal trial process is not appropriate for a community law reform project, which are limited to “relatively minor legal issues”.6

## Supports and adjustments

It is essential that accessible options and processes are codesigned with people with lived experience of being deaf, hard of hearing, blind or having low vision, who have participated in courtroom proceedings.

VLA welcomes the VLRC’s proposal for prospective jurors to be asked what supports they require to participate as a juror, and for a flexible and case by case approach to be adopted for the provision of supports. Given the diversity of experience of people who have vision and hearing impairments, it is critical that people with a lived experience of these disabilities are consulted on the types of individual supports that will assist them to participate as jurors.

The judge should inform the parties and jurors about the use of supports in the trial process during the judge’s opening remarks to the jury when they typically make housekeeping directions; this occurs before Counsels’ opening addresses.

The Disability Access Bench Book is a resource currently available to judicial officers in all Victorian courts and tribunals. The Bench Book was developed by the Judicial College of Victoria in partnership with the Victorian Equal Opportunity and Human Rights Commission and provides information and guidance for judicial officers on their role in making the court system accessible for people with disabilities. We consider that this existing resource could

6 Section 5(1)(b) of the *Victorian Law Reform Commission Act 2000* states: (1) The functions of the Commission are— (b) to examine, report and make recommendations to the Attorney-General on any matter that the Commission considers raises relatively minor legal issues that are of general community concern if the Commission is satisfied that the examination of that matter will not require a significant deployment of the resources available to the Commission;

be updated to specifically address accessibility and supports for jurors who are deaf, hard of hearing, blind or have low vision.

VLA welcomes the VLRC’s proposal for disability awareness training to be delivered to court officers, judges, lawyers and Juries Victoria staff to promote cultural change. The disability awareness training should address unconscious bias and assumptions held about people who are deaf, hard of hearing, blind or have low vision.

While we are not providing specific suggestions or commenting on the costs of the changes, we note the broader need and social benefit of technological enhancements, such as hearing loops. Adjustments are needed and will benefit people who are hearing and vision impaired can participate on juries as well as judges, lawyers, parties to proceedings and witnesses.

## Evaluation and research

We propose that any reform should be evaluated after two years of operation. As noted by the VLRC, the quantity of juror cases in Victoria is not comparable to the small lists in the Australian Capital Territory. This means it is difficult to predict how the reforms would translate in the busy Victorian context, particularly the busy County Court.

We also recommend that the dearth of empirical research on juries be addressed. This should be through prioritising research, as well as through reducing the legal restrictions that protect the secrecy of jury deliberations and severely restrict disclosures by jurors. The paucity of empirical research on real jurors in Australia is underscored by this Review. This is a significant limitation in our capacity to understand and predict juror needs, behaviours and decision-making, and how these things might impact on the right of a fair trial.