



Victorian
Law Reform
Commission

Inclusive Juries

– Access for People Who Are Deaf,
Hard of Hearing, Blind or Have Low Vision

CONSULTATION PAPER DECEMBER 2020

A COMMUNITY LAW REFORM PROJECT



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CHAIR

The Hon. Anthony North QC

COMMISSIONERS

Liana Buchanan*

The Hon. Jennifer Coate AO*

Kathleen Foley*

Bruce Gardner PSM*

Professor Bernadette McSherry

Dan Nicholson

Alison O'Brien PSM

Gemma Varley PSM*

Dr Vivian Waller*

*member of the division for this inquiry

SPECIAL ADVISOR TO THIS INQUIRY

Professor Ron McCallum AO

CHIEF EXECUTIVE OFFICER

Merrin Mason

REFERENCE TEAM

Emma Cashen (team leader)

Sarah Sacher (research and policy officer)

Grace Bramwell (researcher)

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Victorian
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Victorian Law
Reform Commission
GPO Box 4637
Melbourne
Victoria 3001
Australia
DX 144, Melbourne

Level 3
333 Queen Street
Melbourne
Victoria 3000
Australia

Telephone
+61 3 8608 7800
Freecall
1300 666 555
(within Victoria)
Fax
+61 3 8608 7888

Email
law.reform@lawreform.vic.gov.au
www.lawreform.vic.gov.au

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1 Introduction

- 1.1 In this community law reform project, the Victorian Law Reform Commission considers what changes to legislation and practices should be made to enable people who are deaf, hard of hearing, blind or who have low vision to serve as jurors in Victoria. We refer to people in these groups as **the subject groups**.
- 1.2 We are interested in hearing your views about the issues described in this paper. To find out how to share your views, see [1.22]–[1.33] of this paper.

A community law reform project

- 1.3 As well as inquiring into matters referred to it by the Attorney-General, the Commission may initiate its own inquiries into legal issues of general community concern, which are limited in size and scope.¹ These community law reform projects are often suggested to the Commission by community members or groups.
- 1.4 We started this project in response to ongoing advocacy for law reform on this topic and recent challenges to the law.² Other Australian and international law reform agencies and various reports have made recommendations for reform over the last fourteen years.³ A review is timely, of significant personal benefit to people in the subject groups and of wider benefit to the community and the justice system.
- 1.5 The Commission is not considering additional barriers to jury service that might arise for people in the subject groups because of their cultural background, race or religion. The Commission is also not considering whether people who cannot understand or communicate in English at all should be able to serve on juries.

1 Victorian Law Reform Commission Act 2000 (Vic) s 5(1)(b).

2 Deaf Australia, 'A Call for Change', *Jury Rights for All* (Web Page, 2016) <<https://juryrightsforall.org.au/>>; 'Deaf or Blind People Can't Serve on Juries—Here's Why the Law Needs to Change', *SBS The Feed* (Web Page, October 2016) <<https://www.sbs.com.au/news/the-feed/deaf-or-blind-people-can-t-serve-on-juries-here-s-why-law-needs-to-change>>; Annie Guest, 'Deaf Jurors Serve in US and New Zealand, but High Court Blocks Australian Gale Lyons Bid', *ABC News* (online, 5 October 2016) <<https://www.abc.net.au/news/2016-10-05/deaf-jurors-allowed-in-us,-nz/7905810>>; Lexy Hamilton-Smith, 'Deaf Woman Takes Queensland Government to High Court over 2012 Exclusion from Jury', *ABC News* (online, 25 July 2016) <<https://www.abc.net.au/news/2016-07-25/deaf-woman-sues-for-her-right-to-serve-on-a-jury/7652658>>; 'UN Committee Finds Denial of Accommodation for Jury Duty Discriminatory', *International Justice Resource Centre* (Web Page, 3 May 2016) <<https://ijrcenter.org>>; Jemina Napier, *SBS The Feed* (online, October 2016) <<https://www.sbs.com.au/news/the-feed/deaf-or-blind-people-can-t-serve-on-juries-here-s-why-law-needs-to-change>>.

3 Ruadhan Mac Cormaic, 'Commission Report Calls for Reform of Jury Service', *The Irish Times* (online, 15 April 2013) <<https://www.irishtimes.com/news/commission-report-calls-for-reform-of-jury-service-1.1360220>>; Department of Justice (WA), *Participation of People with a Disability in Jury Service* (Discussion Paper, March 2020); Sandra Hale et al, *Participation in the Administration of Justice: Deaf Citizens as Jurors* (Australian Research Council Linkage Project No 120200261, 2016); Irish Law Reform Commission, *Jury Service* (Report No 107, April 2013) <https://www.lawreform.ie/_fileupload/Reports/r107.pdf>; Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors* (Report No 99, April 2010); New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) <<https://www.lawreform.justice.nsw.gov.au>>; Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Discussion Paper No 81, 22 May 2014) <<https://www.alrc.gov.au/inquiry/equality-capacity-and-disability-in-commonwealth-laws/>>; Department of Justice and Regulation (Vic), *Equality and Fairness in Jury Selection* (Discussion Paper, 2016).

Terms of reference

1.6 The terms of reference define the purpose and scope of this inquiry.

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

Terms of reference

Matter initiated by the Commission pursuant to section 5(1)(b) of the *Victorian Law Reform Commission Act 2000* (Vic) on 12 March 2020.

The Victorian Law Reform Commission will consider what changes to legislation and practices should be made to enhance access for people who are deaf, hard of hearing, blind or have low vision who wish to serve as jurors in Victoria.

The *Juries Act 2000* (Vic) provides a list of people who are ineligible to serve as jurors. Among those excluded are persons with ‘a physical disability that renders [them] incapable of performing the duties of jury service’, and those who are ‘unable to communicate in or understand the English language adequately’.

Although people who are deaf, hard or hearing, blind or have low vision are not expressly precluded from jury service, prohibitions on allowing interpreters or communication assistants into the jury room mean that, for many, such service would not be possible.

The project will examine the current legal framework to consider whether legislative change is required, what practical supports would be necessary, and whether there are specific circumstances in which such jury service should be limited.

In conducting this review, the Commission will have regard to:

- Relevant legal and practice developments in domestic and international jurisdictions.
- Current practice and statistics in Victoria relating to excusal and disqualification of people who are deaf, hard or hearing, blind or have low vision as jurors.
- The common law rule prohibiting any non-jurors from being present in jury deliberations (the ‘thirteenth person’ rule).
- The interaction with discrimination law and human rights in Victoria.
- The interaction with peremptory challenges and crown stand-asides.
- The resourcing and training implications for court and jury offices staff and judicial officers.
- The importance of a fair trial and confidence in the jury system.

The Commission will not consider:

- Whether people who cannot understand or communicate in English at all should be able to serve on juries.

Barriers in current law and practice

- 1.7 Jury trials are a central feature of the justice system in Victoria.
- 1.8 People who are deaf, hard of hearing, blind or have low vision may be called for jury service along with others in the community but existing law and practice prevent many from serving as jurors. There are concerns that this occurs without sufficient reasons.⁴
- 1.9 The *Juries Act 2000* (Vic) (the Act) does not specifically exclude people in the subject groups from serving as jurors. The Act says that if a person 'is unable to communicate in or understand the English language adequately' or has a 'physical disability that renders the person incapable of performing the duties of jury service' they are ineligible to serve.⁵ Many limitations resulting from a person's disability can be overcome with supports (also described as adjustments or accommodations) but the Act does not mention the provision and consideration of those supports.
- 1.10 A further legal barrier exists in the old common law rule that no more than 12 jurors may be present in jury deliberations (the jury room). This is known as the '13th person rule', re-affirmed by the High Court in 2016.⁶
- 1.11 The combination of the 13th person rule and the lack of guidance about the provision of supports means that jury service is often not possible for people in the subject groups. In practice, it is likely that when people in the subject groups are selected for jury duty they are left with no option other than to seek to be excused or they are deemed ineligible to serve.
- 1.12 The Commission aims to enhance access for the subject groups. We will examine the current legal framework to consider:
- what legislative change is needed
 - what practical supports may be necessary
 - whether jury service might not be possible in some circumstances.

Reasons to make juries more inclusive

- 1.13 Reforming the law would align it with modern community expectations and standards. We discuss reasons for reform in Chapter 5.
- 1.14 The composition of juries has changed over time as society has changed. It was not until 1964 that women were able to serve⁷ and Indigenous people were only included as jurors in the 1960s as they were added to electoral rolls.⁸ It is again timely to reform the law to ensure that juries are representative of the broader community. The continued practical exclusion of people who are deaf, hard of hearing, blind or who have low vision relies on outdated ideas about their ability to comprehend evidence or participate in trials.
- 1.15 Participation in jury duty is an important civic duty associated with active citizenship.⁹ People who are deaf, hard of hearing, blind or who have low vision should be able to participate in civic life on equal terms with others. Reform will respond to recent decisions by the United Nations Committee on the Rights of Persons with Disabilities (the UN Committee) calling for change to jury laws in Australia.¹⁰

4 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Discussion Paper No 81, 22 May 2014) 234 [7.204] <<https://www.alrc.gov.au/inquiry/equality-capacity-and-disability-in-commonwealth-laws/>>.

5 *Juries Act 2000* (Vic) sch 2 cl 3(a).

6 *Lyons v State of Queensland* [2016] HCA 38, [33]; 259 CLR 518.

7 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, December 1997) vol 3, [3.26] <<https://www.parliament.vic.gov.au/315-lawreform/inquiry-template-sp-996>>, citing *Juries (Women Jurors) Act 1964* (Vic).

8 Thalia Anthony and Craig Longman, 'Blinded by the White: A Comparative Analysis of Jury Challenges on Racial Grounds' (2016) 6(3) *International Journal for Crime, Justice and Social Democracy* 25, 28.

9 Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th Session, UN Doc CRPD/C/15/11/2013 (25 April 2016) [8.6] ('*Beasley v Australia*'); Committee on the Rights of Persons with Disabilities, *Views: Communication No 13/2013*, 15th Session, UN Doc CRPD/C/15/D/13/2013 (30 May 2016) [8.6] ('*Lockrey v Australia*').

10 *Beasley v Australia*, UN Doc CRPD/C/15/11/2013 (25 April 2016); *Lockrey v Australia*, UN Doc CRPD/C/a5/D/13/2013 (30 May 2016).

- 1.16 Reform will also be consistent with the *Victorian Charter of Human Rights and Responsibilities*, which integrates international human rights standards into Victorian law. It includes the right to equality before the law and protection from discrimination, including on the basis of disability.¹¹
- 1.17 Overseas jurisdictions in the United States, Canada and New Zealand have facilitated jury service for people in the subject groups with reasonable supports for some time. Supports are provided in England outside of the jury room, where the 13th person rule still applies (see Chapter 4 and Appendix B). In 2018 the Australian Capital Territory (ACT) became the first jurisdiction in Australia to amend its laws to require consideration of reasonable supports and to limit the application of the 13th person rule.¹²
- 1.18 As the use of supports for those in the subject groups becomes increasingly visible in our daily lives, for example Auslan translators at coronavirus (COVID-19) and bushfire briefings¹³, many in our community may be surprised to discover that the law does not oblige the courts to consider supports to enable people in the subject groups to serve.
- 1.19 In developing recommendations for reform, the Commission will be examining options for enabling more representative juries and equality of civic obligations that also enable delivery of a fair trial. Any changes to legislation and practice must ensure that a jury can function effectively, that jurors can adequately perform their duties and that confidence in the jury system is maintained.

Community feedback

- 1.20 We are keen to hear community views about:
- How to change legislation and practice to ensure that the court considers and assesses reasonable supports for people in the subject groups to allow them to serve.
 - Safeguards to ensure that participation of people in the subject groups does not prejudice the fairness of trials. This might include a judicial discretion to exclude a prospective juror where they would not be able to perform their role even with supports because, for example, a particular trial depends on voice or photographic identification evidence.
 - How to overcome the prohibition on having thirteen people in a jury room and whether supporters and interpreters should provide an oath to the court affirming that they will maintain confidentiality and not be involved in deliberations.
 - Supports that will assist people in the subject groups to serve and processes to ensure that they can tell the court about their needs.
 - Whether people in the subject groups should still have the option of being excused from service because of their disability.
 - How to overcome common misconceptions and prejudices about the abilities of people in the subject groups to serve as jurors.
- 1.21 The Commission will consider recent changes to the law in the Australian Capital Territory, reports by other law reform agencies and overseas practice to develop recommendations for reform that will outline how change can be delivered in the Victorian courts and to the jury selection process. We are particularly interested in designing reforms that will work in the context of a busy and demanding court environment with resource constraints.

11 *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 8(2), (3).

12 *Juries Act 1967* (ACT) ss 16, 45A, 45B, sch 1.

13 Holly Tregenza, 'Coronavirus and Bushfires Have Thrust Sign Language into the Spotlight', *ABC News* (online, 10 April 2020) <<https://www.abc.net.au/news/2020-04-11/coronavirus-bushfires-thrust-auslan-interpreters-into-spotlight/12140824>>.

How to tell us your views

- 1.22 We are interested in hearing the views of anyone who has professional or personal experience in this area and anyone who has ideas for reform.
- 1.23 If you want to provide feedback to the questions in this consultation paper you can:
- 1) make a submission
 - 2) answer our online survey
 - 3) participate in a consultation.

Making a submission

- 1.24 You can tell us your views by sending us a submission. This paper asks a range of questions to guide you in writing your submission.
- 1.25 A submission is usually a written response. You can also record your response and send it to us in an audio file such as MP3.
- 1.26 Information about making a submission is found on pages 7–8. **Submissions are due by 28 February 2021.**

Answering our online survey

- 1.27 If you don't have time to answer the questions in this paper we would still like to hear from you. We have designed a short online survey to help us to understand your experiences and ideas. The summary of the consultation paper available on our website will assist you to answer the survey.
- 1.28 All are welcome to take the survey at <https://lawreform.vic.gov.au/inclusive>.
- 1.29 We may refer to individual survey responses in our reports or publications without identifying the submitter.
- 1.30 There are Auslan, audio and Word versions of the summary and survey available on our website. You can answer the survey in writing, by sending us an audio file such as an MP3 file, or as a video using Auslan.

Formal consultation

- 1.31 The Commission will meet with individuals and groups with experience or knowledge of the issues, including:
- members of the community
 - advocacy organisations
 - support providers/services
 - academics
 - court officers
 - judges
 - legal practitioners
 - Juries Victoria staff
 - interstate and overseas practitioners.
- 1.32 The Commission may group community consultees together or facilitate consultations with community members with the assistance of advocacy organisations.
- 1.33 Because of coronavirus (COVID-19) restrictions these consultations are likely to occur online via an electronic platform.

Next steps

- 1.34 After holding consultation meetings, considering submissions and examining survey results, the Commission will write a report detailing its recommendations for law reform.
- 1.35 The report will be presented to the Attorney-General for consideration, then tabled in Parliament. The Victorian Government will then consider its response to the report.

Call for submissions

The Victorian Law Reform Commission invites your comments on this consultation paper by **28 February 2021**.

What is a submission?

A submission is a response from a person or organisation, stating their views about the law under review. A submission may include personal experiences and ideas about how the law should change.

The Commission wants to hear from anyone who has experience of the issues we are looking at. Any contribution is welcome, large or small.

The details of the project are found in the 'terms of reference'. You can find the terms of reference on the Commission's website at www.lawreform.vic.gov.au

It helps to read the consultation paper and questions before making a submission.

How do I make a submission?

You can make a submission in writing in hardcopy or electronically. You can also record your response and send it to us in an audio file such as MP3.

Submissions do not have to follow a particular format. We prefer you to answer the questions we ask in the consultation paper, but you do not have to answer all of them. You can provide as much detail as you like – the more, the better, as long as it is relevant.

Submissions can be made by:

- Email: juries@lawreform.vic.gov.au
- Mail: PO Box 4637, GPO Melbourne Vic 3001

Assistance

If you need the help of an interpreter, or other assistance to have your views heard, please contact the Commission.

Public submissions

We refer to submissions in our reports, and we list the names of submitters in an appendix at the back of the report.

The Commission publishes submissions on our website to encourage discussion and to keep the community informed. We remove personal addresses, contact details and other personally identifying information from submissions before they are published.

If you do not want your name used, you can ask that your name be withheld.

The views expressed in submissions are those of the individuals or organisations who submit them. The fact that the Commission publishes a submission does not imply that the Commission accepts or agrees with these views. We will not place on our website submissions that contain offensive or defamatory comments.

We treat all submissions as public unless the submitter asks us to treat it as confidential.

Name Withheld

If you wish to make a submission but do not want your name made public, when we publish your submission, we will note that your name has been withheld. The submission will appear on our website and in our report as: *Submission no x (name withheld)*.

Confidential submissions

The Commission also accepts submissions in which the material is confidential. You can ask us to keep your submission confidential if it includes personal experiences or other sensitive information. We will not publish confidential submissions on the website or elsewhere.

However, we may refer to a confidential submission in our report, without identifying you.

Please note that because of the Commission's commitment to transparency and openness, we usually prefer to refer to public submissions, not confidential ones, in our reports. This does not mean that the content of a confidential submission will be treated as any less important. It will still be read carefully and used to decide on the recommendations and conclusions in the final report.

Any request by someone outside the Commission for access to a confidential submission will be refused unless a formal freedom of information request has been made. Such a request will be determined in accordance with the *Freedom of Information Act 1982 (Vic)*, which is designed to protect personal information and information given in confidence. Further information can be found at <https://ovic.vic.gov.au/freedom-of-information/>.

Anonymous submissions

Anonymous submissions – where the submitter does not provide a name – are accepted but, like confidential submissions, are less likely to be referred to in our reports for transparency and openness reasons.

Submissions that are late or beyond the scope of the terms of reference

The closing date for submissions is **28 February 2021**. This deadline is provided so that we have enough time to properly consider the issues and write the report.

We may not be able to consider a late submission in as much depth as other submissions.

Submissions must be relevant. The Commission only reviews the matters that are detailed in the terms of reference. We recommend using the consultation paper to help guide your submission.

If you have served on a jury please be aware that section 78 of the *Juries Act (Vic)* prohibits the publication of 'statements made, opinions expressed, arguments advanced or votes cast' in jury deliberations. Deliberation includes any discussion between two or more jurors at any time during a trial about matters relevant to the trial. There are penalties in the *Juries Act* for failure to comply with this provision.

Do not provide any information in your submission about the deliberations you participated in as a juror. Any information of this kind will be redacted from your submission and we may not be able to accept your submission.

More information

More information about this reference is available on our website: www.lawreform.vic.gov.au.

Question list

Chapter 3 – Current law in Victoria

- 1 Do you have any experience of not being able to serve as a juror in Victoria because you are deaf, hard of hearing or blind or have low vision? What happened? Did you excuse yourself or were you excused by the Juries Commissioner or the court?

Chapter 5 – Reasons to make juries more inclusive

- 2 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?

Chapter 7 – A system to make juries more inclusive

Provision of reasonable supports

- 3 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?
- 4 Is the ACT approach appropriate for Victoria?
- 5 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?

Assessment of reasonable supports

- 6 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?
- 7 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?
- 8 At what stage of the jury selection process should this assessment occur?
- 9 What role should the Juries Commissioner or Juries Victoria play in the assessment process? Should anyone else be involved?
- 10 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?
- 11 Should prospective jurors be questioned in open court, or in a private hearing?
- 12 Does the Juries Commissioner need any further powers to allow Juries Victoria to better channel a prospective juror into a more suitable jury pool?
- 13 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?
- 14 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?
- 15 If a juror is excluded from a particular trial should they be returned to the jury pool to serve on a different trial?

Limiting the 13th person rule

- 16 Should the common law prohibition on supporters or interpreters assisting in the jury room be modified by legislation?
- 17 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?
- 18 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?
- 19 Should supporters or interpreters be required to complete additional training to assist in jury deliberations and trial proceedings? What should that be?

Eligibility

- 20 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?

Excuse

- 21 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?

Peremptory challenges and stand asides

- 22 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?
- 23 Should there be guidelines for the Victorian Bar outlining that challenges should not be used on discriminatory grounds including on the basis of disability?
- 24 Should the judge make a statement discouraging the use of challenges on discriminatory grounds?
- 25 Should the guidelines for stand asides expressly state that disability is not a ground for the exercise of a stand aside?

Chapter 8 – Possible supports to enable inclusive juries

- 26 What technologies/supports would assist people who are deaf, hard of hearing, blind or who have low vision to serve as jurors?
- 27 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?
- 28 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?
 - a. How might a system respond to the unpredictability of the selection process?
 - b. How might a system respond to the small number of interpreters working in a legal setting?
- 29 How could supports be provided where courtrooms are not evenly accessible or equipped with aids?

Court familiarisation

- 30 Should there be an option for a person who is deaf, hard of hearing, blind or with low vision to be 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?

Guidelines for new laws

- 31 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?

Court room layout and trial adjustments

- 32 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?
- 33 What trial adjustments might be needed to accommodate a juror using supports to serve?
- 34 What is the best way of informing the court and parties about the use of supports in the trial process? When should this occur?
- 35 How should jurors be informed about how a fellow juror's supports will work?
- 36 Does the use of supports raise any questions about the accuracy of a trial record for appellate court consideration?

Costs

- 37 What are the likely cost implications associated with reforming the law?
- 38 Do the cost considerations differ in regional areas?
- 39 How could supports be provided in the most cost-effective way?

Chapter 9 – Creating cultural change for inclusive juries

- 40 Would Disability Awareness Training for court and Juries Victoria staff be useful to ensure reform is effective?
- 41 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?
- 42 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?

Vision and hearing loss in the Victorian community

- 14** People who are blind or have low vision
- 15** People who are deaf or hard of hearing
- 16** Aboriginal and Torres Strait Islander Peoples
- 16** Conclusions

2 Vision and hearing loss in the Victorian community

- 2.1 In this chapter we consider the cohort of people who are deaf, hard of hearing, blind or who have low vision in Australia and Victoria. There is limited data on the prevalence of hearing and vision impairments in Australia,¹ and a lack of up-to-date data for Victoria. In addition, the statistics relate to proportions of the overall population rather than the smaller proportion that may be eligible for jury service.²

People who are blind or have low vision

- 2.2 A person is considered blind if they 'cannot see at six metres what someone with normal vision can see at 60 metres or if their field of vision is less than 20 degrees in diameter'.³ A person has low vision if they 'have permanent vision loss that cannot be corrected with glasses and affects their daily functioning'.⁴
- 2.3 The Australian Institute of Health and Welfare (AIHW) describes 'vision impairment' as:
the partial or full loss of sight in one or both eyes. Visual impairment may be the result of disease or injury, may progress over time, and may be permanent or corrected with visual aids (such as glasses) or with surgery.⁵
- 2.4 The 2015 report *A Snapshot of Blindness and Visual Impairment in Australia* estimated that there were 576,000 people who were blind or visually impaired in Australia, and 66,000 people who are totally blind in Australia.⁶ The number of blind or visually impaired people was projected to reach 800,000 by 2020.⁷ This increase was predicted due to the ageing population 'and the fact that the risk of eye disease increases three-fold for each decade over the age of 40'.⁸ The report found that 60 per cent of blind or low vision service clients were 65 years or older.⁹

1 Australian Institute of Health and Welfare, *Australia's Health 2016* (Catalogue No AUS 199, 13 September 2016) 119 <<https://www.aihw.gov.au/reports/australias-health/australias-health-2016/contents/summary>>.

2 There were 4,274,340 people on the electoral roll in Victoria as at 2 September 2020 (18 or over). Jurors are pooled from this group, less those deemed ineligible or disqualified under the *Juries Act 2000* (Vic): 'Electoral Roll Statistics', *Victorian Electoral Commission* (Web Page) <<https://www.vec.vic.gov.au/enrolment/electoral-roll-statistics>>. Approximately 76 per cent of the Victorian population is over 20 years old (the overall population is 5,926,624): '2016 Census QuickStats: Victoria', *Australian Bureau of Statistics* (Web Page) <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/2?opendocument>.

3 'Blindness and Vision Loss', *Vision Australia* (Web Page) <<https://www.visionaustralia.org/information/newly-diagnosed/blindness-and-vision-loss>>.

4 Ibid.

5 Australian Institute of Health and Welfare, *Eye Health* (Catalogue No PHE 260, 30 August 2019) <<https://www.aihw.gov.au/reports/eye-health/eye-health/contents/how-common-is-visual-impairment>>.

6 'A Snapshot of Blindness and Low Vision in Australia', *Every Australian Counts* (Web Page, 1 October 2015); B Ah Tong et al, *A Snapshot of Blindness and Low Vision Services in Australia* (Australian Blindness Forum Report, August 2015) 5 <<https://www.vision2020australia.org.au/wp-content/uploads/2019/06/A-snapshot-of-blindness-and-low-vision-services-in-Australia-1.pdf>>.

7 B Ah Tong et al, *A Snapshot of Blindness and Low Vision Services in Australia* (Australian Blindness Forum Report, August 2015) 5 <<https://www.vision2020australia.org.au/wp-content/uploads/2019/06/A-snapshot-of-blindness-and-low-vision-services-in-Australia-1.pdf>>, citing Access Economics, *Listen Hear: The Economic Impact and Cost of Hearing Loss in Australia* (Report, 2006) <<https://hearnet.org.au/wp-content/uploads/2015/10/ListenHearFinal.pdf>>.

8 B Ah Tong et al, *A Snapshot of Blindness and Low Vision Services in Australia* (Australian Blindness Forum Report, August 2015) 5 <<https://www.vision2020australia.org.au/wp-content/uploads/2019/06/A-snapshot-of-blindness-and-low-vision-services-in-Australia-1.pdf>>.

9 Australian Institute of Health and Welfare, *Eye Health* (Catalogue No PHE 260, 30 August 2019) <<https://www.aihw.gov.au/reports/eye-health/eye-health/contents/how-common-is-visual-impairment>>. See also more recent data for 2017/2018 can be found in B Ah Tong et al, *A Snapshot of Blindness and Low Vision Services in Australia* (Australian Blindness Forum Report, August 2015) 8 <<https://www.vision2020australia.org.au/wp-content/uploads/2019/06/A-snapshot-of-blindness-and-low-vision-services-in-Australia-1.pdf>>.

- 2.5 According to 2014 ABS data, there were an estimated 34,900 people in Victoria with complete or partial blindness (from a total Victorian population of 5.8 million people).¹⁰ Vision Australia estimated in 2015 that there were approximately 89,500 people with vision impairment, and that this was likely to rise to around 138,000 by 2030.¹¹

People who are deaf or hard of hearing

- 2.6 The World Health Organisation describes someone who is hard of hearing as having:
hearing loss ranging from mild to severe. People who are hard of hearing usually communicate through spoken language and can benefit from hearing aids, cochlear implants, and other assistive devices as well as captioning. People with more significant hearing losses may benefit from cochlear implants.¹²
- 2.7 Someone who is deaf is described by the World Health Organisation as a person who has 'profound hearing loss, which implies very little or no hearing. They often use sign language for communication.'¹³ The Deaf community is a distinct 'linguistic or cultural minority group' whose use of Auslan is the main unifying factor.¹⁴
- 2.8 People who have been deaf since childhood often have different lived experience and support preferences to those who lose hearing later in life or are hard of hearing. The former are more likely to know and use Auslan as their 'primary or preferred language', and to identify as part of the Australian Deaf community.¹⁵ Those that become deaf later in life, or are hard of hearing, are less likely to use Auslan or require interpreters, and are more likely to use hearing enhancements and identify with the primarily English-speaking 'hearing' community.¹⁶
- 2.9 Some people who are deaf from birth are not part of either the hearing or Deaf community and have learned little language. People who are deaf with 'minimal language competence' cannot communicate through English language or Auslan and cannot read or write English.¹⁷ People in this group often communicate through gestures known to their close family or household and require these people to act as intermediaries who support them to communicate with others.¹⁸ An inability to communicate in this manner would preclude jury service on the basis of English language skills, regardless of deafness.
- 2.10 The most recent statistics on people who are deaf or hard of hearing were collated by the AIHW in 2016 based on 2014–15 ABS data. Key findings include:
Over three million Australians (14 per cent) had at least one long-term hearing disorder.
The proportion of people with long-term hearing disorders increased with age, from three per cent of children aged 0–14, to 49 per cent of people aged 75 and over.
The most common long-term hearing disorder in Australia was complete or partial deafness, which affected one in 10 Australians.

10 Australian Bureau of Statistics, *National Health Survey: First Results, Australia, 2014–15* (Catalogue No 4364.0.55.001, December 2015) <<https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4364.0.55.0012014-15?OpenDocument>>; Australian Bureau of Statistics, *Population by Age and Sex, Regions of Australia, 2014* (Catalogue No 3235.0, 18 August 2015) <<https://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/3235.0Main%20Features202014?opendocument&tabname=Summary&prodno=3235.0&issue=2014&num=&view=>>>.

11 Vision Australia, Submission No 112 to Family and Community Development Committee, Parliament of Victoria, *Inquiry into Social Inclusion and Victorians with a Disability* (March 2014) <https://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Disability/Submissions/112_Vision_Australia.pdf>.

12 'Deafness and Hearing Loss', *World Health Organisation* (Web Page, 1 March 2020) <<https://www.who.int/news-room/fact-sheets/detail/deafness-and-hearing-loss#:~:text=Over%205%25%20of%20the%20world's,wil%20have%20disabling%20hearing%20loss.>>>.

13 Ibid.

14 'Becoming a Part of the Deaf Community', *Hearing Australia* (Web Page) <<https://www.hearing.com.au/Hearing-loss/Management/Becoming-a-part-of-the-Deaf-Community>>.

15 Deaf Australia, Submission No 37 to Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (20 January 2014) 14.

16 'Community and Culture', *National Association of the Deaf* (Web Page) <<https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/>>.

17 William Hewitt, *Court Interpretation: Model Guides for the Policy and Practice in the State Courts* (Report No 167, National Center for State Courts, 1995) 161; Office for Disability Issues, 'Some Differences in Deaf People Using Interpreters', *New Zealand Office for Disability Issues* (Web Page) <<https://www.odi.govt.nz/nzsl/tools-and-resources/some-differences-in-deaf-people-using-interpreters/>>.

18 William Hewitt, *Court Interpretation: Model Guides for the Policy and Practice in the State Courts* (Report No 167, National Center for State Courts, 1995) 161.

More than 1.1 million people (4.9 per cent) had other diseases of the ear and mastoid, and 79,000 (0.3 per cent) had otitis media (middle ear infection).¹⁹

- 2.11 The number of Auslan users has increased significantly since it was first measured by the Australian Census in 2001, when Auslan users numbered 5,306. This increased to 11,682 in 2016.²⁰ The 2021 Census will refer to Auslan as a language option for the first time.²¹
- 2.12 Again, Victorian data is limited. VicDeaf stated that out of Victoria's population of 5,737,600 in June 2013, 'over 900,000 people in the state have a hearing loss'.²² In 2016 the Victorian Government reported that there were 2,874 Auslan users in 2016 (up from 2,566 in 2011).²³

Aboriginal and Torres Strait Islander Peoples

- 2.13 The First Peoples Disability Network has found that Australia-wide almost half of Aboriginal and Torres Strait Islander people have a disability (45 per cent). Of those, 47 per cent have a sensory disability, which includes problems with sight, hearing or speech.²⁴ Aboriginal and Torres Strait Islander people are '10 times more likely to live with hearing impairments than the rest of the population',²⁵ while rates of low vision and blindness are three times higher for Aboriginal and Torres Strait Islander people.²⁶
- 2.14 According to the 2016 Census, approximately 0.8 per cent of the Victorian population identifies as Aboriginal or Torres Strait Islander (1.6 per cent of the population of Victoria excluding Melbourne, and 0.5 per cent of the population of Melbourne).²⁷ The participation of Indigenous people who are deaf, hard of hearing, blind or with low vision as jurors may be limited by additional factors. For example, higher rates of incarceration for Aboriginal and Torres Strait Islander people may mean that there is a greater likelihood of disqualification from service under the Juries Act.²⁸

Conclusions

- 2.15 The subject groups comprise a small proportion of the overall Australian and Victorian populations. This number is expanding in line with ageing population trends. However, only a small number of people are likely to need to serve with support on Victorian juries. The Juries Commissioner, has advised that in the last five years Juries Victoria has received approximately six enquiries from people with hearing or vision impairments who wished to serve as jurors but for whom supports were unable to be provided and who were therefore unable to serve.²⁹
- 2.16 The way that each person experiences their vision or hearing loss is unique and will vary considerably. Flexibility will be needed about the range of supports that can be offered to assist people to serve. We discuss this in Chapter 8.

19 Australian Institute of Health and Welfare, *Australia's Health 2016* (Catalogue No AUS 199, 13 September 2016) 2 <<https://www.aihw.gov.au/reports/australias-health/australias-health-2016/contents/summary>>.

20 Deaf Australia, 'Census 2021' (Media Release, 9 June 2020) <<https://deafaustralia.org.au/media-release-census-2021/>>.

21 Ibid.

22 Victorian Deaf Society (Vicdeaf), Submission No 88 to Family and Community Development Committee, Parliament of Victoria, *Inquiry into Social Inclusion and Victorians with a Disability* (February 2014) 2 <https://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Disability/Submissions/88_Vicdeaf.pdf>.

23 Department of Premier and Cabinet, *Population Diversity in Victoria: 2016 Census* (Report, 30 May 2018) 19 <<https://www.vic.gov.au/sites/default/files/2019-08/Full-Report-Population-Diversity-in-LGAs-2016-Census-Web-version-30May18.PDF>>.

24 First People's Disability Network, Submission No 355 to Productivity Commission, *National Disability Insurance Scheme (NDIS) Costs Position Paper* (July 2017) <https://www.pc.gov.au/_data/assets/pdf_file/0019/220492/subpp0355-ndis-costs.pdf>.

25 '10-Point Plan for Implementing NDIS in Aboriginal Communities', *First People's Disability Network* (Web Page) <<http://fpdn.org.au/10-point-plan-ndis>>.

26 Joshua Foreman et al, *National Eye Health Survey 2016* (Report, 2016) 18.

27 Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australia—Stories from the Census, 2016* (Catalogue No 2071.0, 23 May 2019) <<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20Population%20-%20Victoria~10002>>.

28 Thalia Anthony and Craig Longman, 'Blinded by the White: A Comparative Analysis of Jury Challenges on Racial Grounds' (2016) 6(3) *International Journal for Crime, Justice and Social Democracy* 25, 26; *Juries Act 2000* (Vic) sch 1.

29 Information provided from Juries Commissioner to Victorian Law Reform Commission, 6 October 2020.

Inclusive juries— current law in Victoria

18 Jury trials in Victoria

23 Can people who are deaf, hard or hearing, blind or who have low vision serve on juries in Victoria?

3 Inclusive juries—current law in Victoria

- 3.1 In this chapter we consider the role of the jury in Victoria, the number of jury trials and the jury selection process. This chapter examines the current law, which in practice has the effect of excluding people in the subject groups from serving as jurors. We also examine peremptory challenges and stand asides that occur late in the selection process. This provides the background to the consideration of how the system can be reformed to accommodate people in the subject groups serving on juries.

Jury trials in Victoria

The role of the jury

- 3.2 The role of a jury in both criminal and civil trials is to determine questions of fact, and to apply the law as stated by the judge, to those facts to reach a verdict.¹ The judge's role is to 'determine a question of law, such as what evidence can be presented in court'.²
- 3.3 The Commission identified the important purposes of jury trials in its 2014 report, *Jury Empanelment*.³
- Safeguarding the rights of the accused by limiting the power of the state.
 - Ensuring justice is administered in line with the community's standards, rather than just those of judges, who may not be considered representative of the broader community.⁴
 - Enabling the community to participate directly in the administration of justice, thereby increasing acceptance of trial outcomes, as well as confidence in the legal system more generally.⁵

1 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 8 <<https://www.lawreform.vic.gov.au>>.

2 Patrick Wright, 'Jury Duty: If You Have Questions, We Have Answers', *ABC Life* (Web Page, 15 October 2019) <<https://www.abc.net.au/life/jury-duty-guide-what-happens-when-you-get-called/11565176>>.

3 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 8 <<https://www.lawreform.vic.gov.au>>.

4 Mark Findlay, 'Juries Reborn' [2007] (90) *Reform* 9, cited in Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 8 <<https://www.lawreform.vic.gov.au>>.

5 Mark Findlay, 'The Essence of the Jury' (2000) 12(2) *Legaldate* 5, cited in Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 8 <<https://www.lawreform.vic.gov.au>>.

The number of jury trials

- 3.4 In Victoria, jury trials operate for every Supreme and County Court criminal trial and for some civil cases.⁶ In both 2018 and 2019 there were 599 jury trials,⁷ the majority in the County Court. In 2019 the County Court heard 470 criminal and 56 civil jury trials whereas the Supreme Court heard 45 criminal and 28 civil jury trials.⁸ Regional circuit courts heard 136 jury trials in 2019.⁹ The number of trials in regional jury districts varies depending on the location. For example, in 2019 the number ranged from 3 jury trials at Horsham to 33 at Ballarat.¹⁰

How is a jury selected?

- 3.5 In Victoria the jury selection process is regulated by the *Juries Act 2000* (Vic).¹¹ The Juries Commissioner is responsible for jury administration through Juries Victoria.¹²
- 3.6 Twelve jurors are generally selected for criminal trials and six jurors for civil trials.¹³
- 3.7 A person summoned to attend for jury service is not automatically included in a jury. There are five key stages in the jury selection process (see the diagram on page 20)

6 Victorian Government, 'Juries Victoria', *What Is Jury Service?* (Web Page) <<https://www.juriesvictoria.vic.gov.au/about-juries-victoria/what-is-jury-service><https://www.juriesvictoria.vic.gov.au/about-juries-victoria/what-is-jury-service>>. Currently some trials are conducted by the judge alone to reduce Covid backlogs: Karin Derkley, 'Judge-Alone Trials Help Reduce Backlog: Chief Judge Kidd', *Law Institute of Victoria* (Web Page, 19 August 2020) <<https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/August-2020/Judge-alone-trials-help-reduce-backlog--Chief-Judge>>; Supreme Court of Victoria, *Trial by Judge Alone COVID-19 Emergency Protocol* (Report, May 2020) <https://www.supremecourt.vic.gov.au/sites/default/files/2020-05/Judge%20Alone%20Protocol_SCV.pdf>.

7 Information provided from Juries Commissioner to Victorian Law Reform Commission, 6 October 2020.

8 Ibid.

9 Ibid.

10 Ibid.

11 *Juries Act 2000* (Vic).

12 Victorian Government, 'Juries Victoria', *What Is Jury Service?* (Web Page) <<https://www.juriesvictoria.vic.gov.au/about-juries-victoria/what-is-jury-service><https://www.juriesvictoria.vic.gov.au/about-juries-victoria/what-is-jury-service>>; *Juries Act 2000* (Vic) pt 9.

13 The Juries Act provides that up to three additional jurors may be empanelled in criminal trials and two additional jurors in civil trials. The purpose of empanelling additional jurors is to provide a buffer against attrition for example for illness or family reasons. It also acts as a safeguard against trials being aborted due to excessive attrition: Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) xiii <<https://www.lawreform.vic.gov.au>>; *Juries Act 2000* (Vic) ss 22, 23.

Figure 1: Jury selection and empanelment process



- 3.8 It is difficult to predict if a prospective juror will actually serve on a jury. The outcomes of some of the steps in the selection process are determined by random selection or ballot. Others depend on the outcome of challenges made by the parties. The challenge is how to ensure that supports can assist a juror through the empanelment process and remain at the ready to assist them as a juror in a trial if they are selected. Given the small number of people in the subject groups compared to the entire community, it is likely that only a small number of people from these groups will be summoned to serve on a jury and even fewer will ultimately be selected. The system must be flexible enough to respond to the few people who may need supports to serve. These challenges are not insurmountable, and we are keen to hear community ideas about possible solutions (see Chapters 7 and 8).

1 Random selection from the electoral roll

- 3.9 At the request of the Juries Commissioner, the Victorian Electoral Commission randomly selects the required number of people from each jury district.¹⁴ This becomes the jury roll for that district until a new one is prepared.¹⁵
- 3.10 Victoria has 14 jury districts, one in Melbourne and a jury district for each circuit town.¹⁶ The jury districts are Bairnsdale, Ballarat, Bendigo, Geelong, Hamilton, Horsham, Latrobe Valley, Melbourne, Mildura, Sale, Shepparton, Wangaratta, Warrnambool and Wodonga.¹⁷

2 Determination of liability for jury service

- 3.11 Juries Victoria sends out a questionnaire (jury eligibility form) to all people on the jury roll, or as many people as the Juries Commissioner deems appropriate.¹⁸ Answers to the questionnaire assist Juries Victoria to determine who is liable and qualified to serve.¹⁹ There are three types of exceptions to eligibility for jury service: 'those ineligible to serve, those excused from service and those disqualified from serving'.²⁰
- 3.12 Categories of people who are ineligible to serve include lawyers, public servants and those involved in the administration of justice.²¹ Others are disqualified (usually for a limited period) if they have been convicted of specified serious offences or are on bail/remand or undischarged bankrupts.²² Being excused from service means that a person has a reason for being unable to attend or to sit on a jury for a particular case.
- 3.13 It is at this first stage that people in the subject groups usually seek to be excused by Juries Victoria.

3 Summons

- 3.14 When Juries Victoria is notified that a trial is imminent, it issues a summons to prospective jurors on the list of those eligible to serve.²³ Juries Victoria also provides information about eligibility, deferral and excuse categories.²⁴
- 3.15 When a person receives a summons they can again apply to be excused from jury service.²⁵ The Act gives the Juries Commissioner the power to excuse someone if there is a 'good reason' for doing so. Good reasons listed in the Act include illness or poor health, substantial hardship to the person and advanced age.²⁶

14 *Juries Act 2000* (Vic) ss 4, 19.

15 *Ibid* s 19(4).

16 *Ibid* s 18(1).

17 Victoria, *Victoria Government Gazette*, No S 232, 5 September 2006 1; Victoria, *Victoria Government Gazette*, No G 12, 20 March 2003 44.

18 *Juries Act 2000* (Vic) s 20.

19 *Ibid* s 21.

20 Jacqueline Horan, *Juries in the 21st Century* (The Federation Press, 2012) 15.

21 *Juries Act 2000* (Vic) sch 2.

22 *Ibid* sch 1.

23 *Ibid* s 27.

24 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 15 <<https://www.lawreform.vic.gov.au>>.

25 *Juries Act 2000* (Vic) s 8(1).

26 See *ibid* s 8(3) for other 'good reasons'.

- 3.16 The Juries Commissioner may also permanently excuse a person for reasons including:
- continuing poor health
 - disability
 - advanced age.²⁷

4 The jury pool

- 3.17 Prospective jurors are required to attend court and become part of the 'jury pool'. The jury pool is then reduced to a smaller group called the 'panel' from which the jury will ultimately be selected.
- 3.18 The size of each day's jury pool is determined the day before, based on information received from court staff about prospective empanelments.²⁸
- 3.19 In Melbourne, the jury pool assembles in the County Court building and is available for any number of Supreme and County Court trials beginning on a given day. The jury pool is given an orientation program by Juries Victoria explaining the role of a juror and the selection process. The jury pool supervisor provides information about the expected length of the trial and the rate of pay, and reiterates the grounds for excuse.²⁹ This is another opportunity for people to seek to be excused, for example if a person is unavailable to serve on a trial because of its length.³⁰ This process helps to minimise the number of excuse applications heard in court.³¹
- 3.20 The Act provides the court with various powers to excuse a prospective juror on its own motion or on application from the Juries Commissioner if there are good reasons, if it is just and reasonable to do so or if a person may not be able to perform the duties of a juror.³²

Accessibility

- 3.21 The old Supreme Court building has poor accessibility. Where a Supreme Court empanelment is beginning and a person in the pool uses a wheelchair, the Juries Commissioner approaches the person and encourages them not to go into the ballot for the Supreme Court trial. The person would be balloted in the County Court instead. The Commission understands that this has occurred approximately 25 times over the past two years. Each time the person has opted out of the Supreme Court ballot.³³

5 Selection from the jury panel

- 3.22 Once all people who have been excused by the Juries Commissioner's Office from the pool leave the jury pool room, ballot cards are generated from the pool list for each prospective juror and are placed in the ballot box.³⁴ Jurors are randomly selected from that ballot box to form a panel. The average panel size for civil trials in 2019 was 24.6 in the County Court and 25.8 in the Supreme Court, and the average panel size for criminal trials was 33.5 in the County Court and 42.2 in the Supreme Court.³⁵ In 2019 the average jury panel overall was 31.2 people in Melbourne and 40.3 in regional Victoria.³⁶
- 3.23 The jury panel is then taken to the court room where the trial will be held. The judge informs the panel about the type of charge, the names of the accused and witnesses, and the length of the trial.³⁷ The court calls on prospective jurors who seek to be excused by

27 Ibid s 9(4).

28 Information provided from Juries Commissioner to Victorian Law Reform Commission, 6 October 2020.

29 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 15 <<https://www.lawreform.vic.gov.au>>.

30 *Juries Act 2000* (Vic) s 29(4B).

31 Information provided from Juries Commissioner to Victorian Law Reform Commission, 6 October 2020.

32 *Juries Act 2000* (Vic) s 11 (1), 12(2).

33 Ibid.

34 Ibid s 30.

35 Information provided from Juries Commissioner to Victorian Law Reform Commission, 6 October 2020.

36 Ibid.

37 *Juries Act 2000* (Vic) s 31(1).

the trial judge.³⁸ The judge may excuse a person from service if satisfied that the person will be unable to consider the case impartially or is unable to serve for any other reason.³⁹ A person who is excused must return to the jury pool and may be selected or allocated to a different jury panel.⁴⁰

Criminal trial

- 3.24 In criminal trials the accused is brought before the court and the jury panel to be formally charged with offences (a process known as ‘arraignment’). Charges are read out and the accused pleads to each charge.⁴¹
- 3.25 Once a panel of prospective jurors has been allocated to a trial the parties are able to challenge prospective jurors to exclude them from the jury. These are called ‘peremptory challenges’ and the Crown right to stand jurors aside in criminal trials (‘stand asides’) and are discussed further below.⁴² Prospective jurors who are not challenged proceed to the jury box. When the required number of jurors (usually 12) are in the jury box, they are sworn or affirmed as the jury.⁴³

Civil trial

- 3.26 In civil trials 12 ballot cards are drawn from the box. The parties strike names off the list according to their respective challenges. This is done in writing. The names of the remaining jurors (usually six) are then called out and sworn or affirmed.⁴⁴

Can people who are deaf, hard of hearing, blind or who have low vision serve on juries in Victoria?

Legislation

- 3.27 The Act does not specifically exclude people who are deaf, hard of hearing, blind or who have low vision from serving as jurors in Victoria. Following the 1996 Parliamentary Law Reform Committee report, *Jury Service in Victoria*, the earlier prohibition preventing people ‘unable to hear or speak’ serving on juries was removed.⁴⁵
- 3.28 The Act now specifies that a person is ineligible to serve if they are ‘unable to communicate in or understand the English language adequately’ or have ‘a physical disability that renders the person incapable of performing the duties of jury service’.⁴⁶
- 3.29 Supports may render the person capable of performing jury service. The Act, however, lacks guidance about the consideration and provision of supports, without which jury service is often not practically possible.

The ‘13th person’ rule

- 3.30 The most significant barrier for people in the subject groups arises because of the long-standing common law rule that the jury must be kept separate to preserve the confidentiality of the deliberation process and validity of a verdict.⁴⁷ This means that non-jurors, including Auslan interpreters or communication supporters, are barred from jury deliberations.

38 Ibid s 32(2).

39 Ibid s 32(3).

40 Ibid.

41 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 16 <<https://www.lawreform.vic.gov.au>>; *Criminal Procedure Act 2009* (Vic) ss 215(1), 217.

42 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) xi <<https://www.lawreform.vic.gov.au>>.

43 *Juries Act 2000* (Vic) ss 36–42.

44 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 17 <<https://www.lawreform.vic.gov.au>>; *Juries Act 2000* (Vic) ss 33–35.

45 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, December 1997) vol 1 [3.132] <<https://www.parliament.vic.gov.au/315-lawreform/inquiry-template-sp-996>>.

46 *Juries Act 2000* (Vic) sch 2 cl (3)(a),(f).

47 William Blackstone, *Commentaries on the Laws of England* (W Clarke and Sons, 2nd ed, 1809) vol 3, 375; Sir Patrick Devlin, *Trial by Jury* (Stevens, 3rd rev ed, 1966) 41–42; Sir William Holdsworth, *A History of English Law* (Methuen, 6th rev ed, 1938) vol 11, 553–554.

- 3.31 The *Victorian Criminal Proceedings Manual* outlines the Victorian requirements for selecting a jury and the operation of Victorian laws to facilitate an additional person for a juror:
- In the absence of express statutory provisions, there is no power for a judge to empanel an interpreter for a juror, or allow a non-juror to be present during jury deliberations. At least in Queensland (and likely also in Victoria), this means that a person who is deaf is not eligible for jury service.⁴⁸
- 3.32 The rule was re-affirmed by the High Court in *Lyons v State of Queensland* in 2016.⁴⁹ The majority confirmed that:
- [the] prohibition on the presence of a 13th person in the jury room protects the jury from the suggestion of external influence and promotes the frank exchange of views.⁵⁰
- 3.33 The High Court confined itself to adjudicating on the Queensland law, and left it open to the state legislatures to determine the appropriateness of allowing interpreters in the jury room:
- It may be, as the appellant submits, that the secrecy of the jury's deliberations would not be compromised by the presence of an accredited Auslan interpreter in the jury room during the jury's deliberations. Nonetheless... Queensland law does not permit an Auslan interpreter to be present during the jury's deliberations.⁵¹

What happens in practice for the subject groups?

- 3.34 In practice, because there is no express obligation to provide supports to people in the subject groups, it is likely that if they are selected for jury duty they are left with no real option other than to seek to be excused or they are deemed ineligible to serve.
- 3.35 In 2014 Mr Brett Phillips, a deaf man, was summoned to serve in Victoria and requested an Auslan interpreter to assist him. Mr Phillips explained that the Juries Commissioner had told him:
- that they would not be able to provide Auslan interpreters, and that essentially deaf people were not able to serve on juries given the fact our presence on the jury would necessitate a '13th person' which is a breach of jury legislation in Victoria.⁵²
- 3.36 Mr Phillips said that people who are deaf should be given the opportunity to serve. He rejected the argument about the 13th person rule, noting that Auslan interpreters are qualified and accredited and abide by a strict code of ethics that includes confidentiality and impartiality.⁵³

Excused early

- 3.37 The Commission understands that most people in the subject groups are excused from jury service in response to the questionnaire (the jury eligibility form) at the earliest stage of the selection process.⁵⁴ Current practice does not capture information about disability nor enquire as to what supports might be needed to assist people to serve. Instead the Commission understands that people generally raise the issue of disability themselves with Juries Victoria.
- 3.38 The questionnaire asks whether a person wishes to be permanently excused due to advanced age or medical reasons, or excused on a particular occasion for medical

48 Judicial College of Victoria, '13.5.1 VARE Procedure', *Victorian Criminal Proceedings Manual* (Online Manual, November 2019) [11.1] <<https://www.judicialcollege.vic.edu.au/eManuals/VCPM/27695.htm>>; *Lyons v State of Queensland* [2016] HCA 38, [1], [33–36]; 259 CLR 518, [1], [33–36].

49 *Lyons v State of Queensland* [2016] HCA 38.

50 *Ibid* [33].

51 *Ibid* [37].

52 Sylvia Varnham O'Regan, 'Deaf Victorian Man Denied from Serving on Jury Calls for "Discriminatory" Law to Be Changed', *SBS News* (online, 24 November 2014) <<https://www.sbs.com.au/news/>>.

53 *Ibid*.

54 Information provided from Juries Commissioner to Victorian Law Reform Commission, 6 October 2020.

reasons.⁵⁵ Information can be provided on the form for consideration by Juries Victoria. No question about disability is included in the form. The Commission understands that most people identify that they have a disability in the 'medical reasons' sections.⁵⁶

3.39 A handful of people are excused later in the process in response to a summons.⁵⁷

Question

- 1 Do you have any experience of not being able to serve as a juror in Victoria because you are deaf, hard of hearing or blind or have low vision? What happened? Did you excuse yourself or were you excused by the Juries Commissioner or the court?

Peremptory challenges and stand asides

- 3.40 The law gives parties various rights to challenge the selection of prospective jurors without providing any reasons.⁵⁸ The two challenges to be considered under the terms of reference are peremptory challenges and stand asides. They are available to parties at the final stage of the selection of the jury. If exercised, the challenges prevent a prospective juror from serving in the trial. The number of challenges available to the parties has been reduced following recommendations by the Commission in its 2014 report, *Jury Empanelment*.⁵⁹
- 3.41 There is concern that by exercising these challenges the parties reduce the breadth of the community represented on juries. For example, women are more likely to be challenged in sexual assault trials than men.⁶⁰
- 3.42 Currently, people in the subject groups are unlikely to reach the challenge stage of the jury selection process because they are excused much earlier. If reforms improve the participation of people in the subject groups there is a risk that they may be removed by the parties through challenges. If those challenges are made solely on the basis of disability this would undermine the effectiveness of reform. The Commission is keen to hear community views about whether this is likely to be a problem and if so, whether anything can be done to reduce the likelihood of it occurring.

Peremptory challenges

- 3.43 During a criminal trial, the Act allows the accused to challenge three potential jurors peremptorily, that is, without giving reasons.⁶¹ In a civil trial, each party can challenge peremptorily two potential jurors.⁶²

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Ibid.

Ibid.

Ibid.

Juries Act 2000 (Vic) ss 38, 39.

Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) [3.270] <<https://www.lawreform.vic.gov.au>>.

Ibid xi, 34 [3.103].

Juries Act 2000 (Vic) s 39.

Ibid s 35.

- 3.44 The stated function of a peremptory challenge is to provide a safeguard to ensure the jury is impartial and the trial is fair.⁶³ They provide a way for the parties to quickly and expediently remove prospective jurors they know or believe not to be impartial.⁶⁴ However, peremptory challenges tend to be based on 'stereotypes and assumptions'.⁶⁵
- 3.45 A peremptory challenge allows the accused in a criminal trial to have some say in who tries them, so that they are likely to be more receptive to their case. This also improves the accused's confidence in the justice process.⁶⁶
- 3.46 In its report, *Jury Empanelment*, the Commission identified that peremptory challenges sometimes provide an expedient means of removing prospective jurors who appear to be unable or unwilling to serve—for example, a prospective juror who appears to have a disability which makes them incapable of fulfilling the duties of jury service.⁶⁷

Stand asides

- 3.47 The Crown right to stand aside is exercised differently to peremptory challenges. Stand asides ensure that the jury is unbiased and the trial is conducted according to law.
- 3.48 In a criminal trial, the Crown has the right to stand aside three potential jurors.⁶⁸
- 3.49 Stand asides are exercised less frequently and with more safeguards than peremptory challenges.⁶⁹ As a result, stand asides are not as vexed as peremptory challenges when it comes to avoiding discriminatory or arbitrary challenges. The Victorian Director of Public Prosecutions (VDPP) has published guidelines on the exercise of the right to stand aside a prospective juror. They state that the Crown's power to stand aside should be used sparingly, that the Crown's paramount concern is that the jury is impartial and that it complies with the Act.⁷⁰ The Crown 'must never use its power to stand aside on the basis of factors such as age, sex, occupation, ethnic origin, religion, marital status or economic, cultural or social background.'⁷¹ Disability is not currently included in this list and the Commission is keen to explore whether it should be added.

63 Mark Findlay and Peter Duff, *Jury Management in New South Wales* (Australian Institute of Judicial Administration, 1994); *Johns v The Queen* (1979) 141 CLR 409, 428; cited in Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 21 <<https://www.lawreform.vic.gov.au>>.

64 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 21 <<https://www.lawreform.vic.gov.au>>.

65 Ibid [3.127]. For example, teachers and nurses are challenged because of persuasive stereotypes that they have 'strong views' or are 'overly sympathetic to victims': Patrick Wright, 'Jury Duty: If You Have Questions, We Have Answers', *ABC Life* (Web Page, 15 October 2019) <<https://www.abc.net.au/life/jury-duty-guide-what-happens-when-you-get-called/11565176>>.

66 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 21 <<https://www.lawreform.vic.gov.au>>.

67 Ibid.

68 *Juries Act 2000* (Vic) s 38.

69 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) [3.65] <<https://www.lawreform.vic.gov.au>>.

70 Office of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (Policy, 17 September 2020) 18 [52] <<https://www.opp.vic.gov.au/Resources/Policy-of-the-Director-of-Public-Prosecutions-for-Victoria/Policy-of-the-Director-of-Public-Prosecutions-for-Victoria>>.

71 Ibid. See also Commonwealth Director of Public Prosecutions, *Guidelines and Directions Manual* (Report, 10 September 2012) 1 <<https://www.cdpp.gov.au/sites/default/files/CDPP-GDM-Jury-Issues.pdf>>. Other states such as Queensland and New South Wales have similar guidance. For example, New South Wales prohibits 'attempts to select a jury that is not representative of the community, including as to age, sex, ethnic origin, religious belief, marital status or economic, cultural or social background'; The Office of the Director of Public Prosecutions, *Prosecution Guidelines* (Report, 2007) 47 [25] <<https://www.odpp.nsw.gov.au/sites/default/files/prosecution-guidelines.pdf>>; Office of the Director of Public Prosecutions, *Director's Guidelines* (Report, 30 June 2016) 45 [32] <https://www.justice.qld.gov.au/_data/assets/pdf_file/0015/16701/directors-guidelines.pdf>.

The law relating to inclusive juries in other jurisdictions

28 The law in other Australian jurisdictions

31 The law in overseas jurisdictions

4 The law relating to inclusive juries in other jurisdictions

- 4.1 This chapter examines the law relating to inclusive juries that applies in other Australian jurisdictions. In particular we look at recent reforms in the Australian Capital Territory. People in the subject groups have served on juries in overseas jurisdictions for some time. We examine the laws and practices in overseas courts, and the experiences of jurors who have served.

The law in other Australian jurisdictions

- 4.2 Most states and territories in Australia have similar legislation to Victoria. In practice people in the subject groups are given no option but to seek to be excused from service because they are not provided with the necessary supports. The 13th person rule also applies, prohibiting anyone other than jurors from being present in jury deliberations. There is no legislative requirement for the consideration of supports to help people to serve, except in the Australian Capital Territory as discussed below. In New South Wales the Act states that the questionnaire ‘may include questions’ as to ‘whether assistance or aids are required for jurors with a physical disability and requires consideration of reasonable accommodations when determining excusal or exemptions for good cause’.¹
- 4.3 Legislation in Australian jurisdictions ‘refers to disability as a ground for disqualification from serving as a juror, or implies that persons with disability may be disqualified on the grounds that they are not capable of performing the duties of a juror.’² The Northern Territory law is blunter, specifying that a person who is blind or deaf is ineligible to discharge the duties of a juror.³
- 4.4 Only the Australian Capital Territory has implemented legislation to enhance the participation of people in the subject groups and to overcome the 13th person rule.
- 4.5 Appendix A contains an outline of the legislative position in other Australian jurisdictions.

Recent reform in the Australian Capital Territory

- 4.6 In 2018, the Australian Capital Territory amended the *Juries Act 1967* (ACT) to create a positive obligation on the trial judge to consider if ‘reasonable supports’ could be provided to enable a person with disability or insufficient understanding of the English language to properly discharge their duties if they wish to serve and are not otherwise excused.⁴ If satisfied that support could reasonably be given, the judge must make a direction for support to be provided.⁵ The legislation lists some considerations in assessing whether supports can be reasonably provided.⁶

1 *Jury Act 1977* (NSW) ss 13(2), 14A(c).

2 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Discussion Paper No 81, 22 May 2014) 234 [7.207] <<https://www.alrc.gov.au/inquiry/equality-capacity-and-disability-in-commonwealth-laws/>>.

3 *Juries Act 1963* (NT) sch 7 item 22 s 11.

4 Courts and Other Legislation Amendment Bill 2018 (ACT).

5 *Juries Act 1967* (ACT) s 16.

6 *Ibid* s 16(3)(c).

- 4.7 If the judge makes a direction allowing an interpreter or support person to assist the juror, the common law rule against having a juror in the jury room is limited by the Act.⁷ This direction is subject to the interpreter or the support person agreeing to make an oath or affirmation that they will not participate in or disclose anything about those deliberations.⁸
- 4.8 At the time of writing, these provisions have not yet been used to support a person with disability to serve on a jury.

Australian case law

- 4.9 In recent years several legal challenges have been brought in Australia by people who are deaf who wanted to serve as jurors but were prevented from doing so by the Sheriff or court.

New South Wales

- 4.10 In 2012 Gemma Beasley and Michael Lockrey, residents of New South Wales, were summoned as jurors. Despite wanting to serve they were excluded under the *Jury Act 1977* (NSW) on the basis of ‘good cause’.⁹ Requests that the court provide an Auslan interpreter and steno-captioning machine were not accommodated.¹⁰
- 4.11 The decision to exclude them was based on the lack of a legislative provision to swear in a supporter to assist in jury deliberations, and the protection of juror confidentiality. It was not because of a determination that they could not perform the functions of a juror.¹¹
- 4.12 Ms Beasley and Mr Lockrey were left without effective domestic remedies because, under the *Disability Discrimination Act 1992* (Cth) and the *Anti-Discrimination Act 1977* (NSW), it was not unlawful to discriminate against them on the basis of disability in the area of civic duties, including jury duty.¹² Further, in *Beasley* it was noted that it would have been futile to bring complaints before the Australian Human Rights Commission or the Anti-Discrimination Board of New South Wales as these are not judicial bodies and do not have power to order judicial review or consider remedies.¹³
- 4.13 Both complainants took their cases to the United Nations Committee on the Rights of Persons with Disability, arguing that they had been unlawfully discriminated against because of the failure to provide supports. They were both successful as discussed in Chapter 5.

Queensland

- 4.14 In 2016 the High Court upheld the 13th person rule in *Lyons*. That case originated in the Brisbane Ipswich Court in 2012 when Gaye Lyons was summoned to serve as a juror. Although she can lip read, Ms Lyons required the assistance of an interpreter to serve. This request was denied. The court and subsequent courts held that the 13th person rule prohibited the interpreter from being present during jury deliberations.¹⁴

7 Ibid s 16(4)(b).

8 Ibid s 16(4)(c).

9 Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th Session, UN Doc CRPD/C/15/11/2013 (25 April 2016) [2.2] (*Beasley v Australia*); Committee on the Rights of Persons with Disabilities, *Views: Communication No 13/2013*, 15th Session, UN Doc CRPD/C/15/D/13/2013 (30 May 2016) [2.2] (*Lockrey v Australia*); *Juries Act 1977* (NSW) sch 2.

10 *Beasley v Australia*, UN Doc CRPD/C/15/11/2013 (25 April 2016) [2.1]; *Lockrey v Australia*, UN Doc CRPD/C/a5/D/13/2013 (30 May 2016) [2.2].

11 *Beasley v Australia*, UN Doc CRPD/C/15/11/2013 (25 April 2016) [2.1]; *Lockrey v Australia*, UN Doc CRPD/C/a5/D/13/2013 (30 May 2016) [2.6].

12 *Beasley v Australia*, UN Doc CRPD/C/15/11/2013 (25 April 2016) [2.7]; *Lockrey v Australia*, UN Doc CRPD/C/a5/D/13/2013 (30 May 2016) [2.11].

13 *Beasley v Australia*, UN Doc CRPD/C/15/11/2013 (25 April 2016) [7.3].

14 *Lyons v State of Queensland* [2016] HCA 38, [8]–[24], [38]; 259 CLR 518 [8]–[24], [38].

- 4.15 In response to the initial rejection, Lyons remarked:
- we're the same as everybody else, we're human, we have kids, we go to work, we drive cars, we pay mortgages—I was just fuming because I could not have equal access to this.¹⁵
- 4.16 Ms Lyons believed that there was little to distinguish her request from the use of language interpreters currently working in legal proceedings. She is reported as saying:
- They trust interpreters to work in those settings—what's the difference with trusting them to relay in a jury room? What's the difference if they work in court anyway?¹⁶
- 4.17 She unsuccessfully appealed her claim to the Queensland Administrative Tribunal¹⁷ and its Appeal Division,¹⁸ the Queensland Supreme Court¹⁹ and ultimately the High Court.²⁰
- 4.18 The High Court decision turned on the prohibition on a non-juror (in this case, an Auslan interpreter) being present in the jury room. The plurality (Chief Justice French, Justices Bell, Keane and Nettle) considered that any suggestion that this is permissible 'must ... be rejected':²¹
- The presence of a person other than a juror in the jury room during the course of deliberations is an incurable irregularity regardless of whether the person takes any part in the jury's deliberations. The prohibition on the presence of a 13th person in the jury room protects the jury from the suggestion of external influence and promotes the frank exchange of views.²²
- 4.19 The president of the Queensland Law Society has called for the state's Jury Act to be changed.²³

Other Australian reviews of the law

- 4.20 Reviews in Queensland, New South Wales, Western Australia and by the Australian Law Reform Commission (ALRC) have all recommended that legislation be amended to better facilitate the participation of people in the subject groups as jurors.²⁴ The 2014 ALRC report *Equality, Capacity and Disability in Commonwealth Laws* called for reform to support participation of people who are deaf on juries. The ALRC was of the view that in practice, 'people with disability are prevented from serving on juries in Australia without sufficient reason.'²⁵
- 4.21 All reviews recommended that people should not be prevented from serving on the basis of disability alone but that judicial discretion to exclude people unable to perform the duties of a juror be retained. The reviews emphasised making a case-by-case assessment of the provision of reasonable adjustments to assist people to serve. At the time of writing, the suggested reforms have not been implemented.²⁶

15 Kim Sharnie, 'Deaf Queensland Woman Gaye Lyons Loses High Court Bid to Become Juror', *ABC News* (online, 5 October 2016) <<https://www.abc.net.au/news/2016-10-05/deaf-woman-gaye-lyons-loses-high-court-challenge-juror/7904324>>.

16 Ibid.

17 *Lyons v State of Queensland (No 2)* [2013] QCAT 731, [177].

18 *Lyons v State of Queensland* [2014] QCATA 302.

19 *Lyons v State of Queensland* [2015] QCA 159, [41].

20 *Lyons v State of Queensland* [2016] HCA 38.

21 Ibid [34].

22 Ibid [33].

23 Kim Sharnie, 'Deaf Queensland Woman Gaye Lyons Loses High Court Bid to Become Juror', *ABC News* (online, 5 October 2016) <<https://www.abc.net.au/news/2016-10-05/deaf-woman-gaye-lyons-loses-high-court-challenge-juror/7904324>>.

24 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Discussion Paper No 81, 22 May 2014) 234–5 <<https://www.alrc.gov.au/inquiry/equality-capacity-and-disability-in-commonwealth-laws/>> <https://www.alrc.gov.au/inquiry/equality-capacity-and-disability-in-commonwealth-laws/>; New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 56 [4.3]. <<https://www.lawreform.justice.nsw.gov.au>>; Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors* (Report No 99, April 2010) 107–7, Recommendation 56; Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) [8.123].

25 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Discussion Paper No 81, 22 May 2014) 234 [7.204] <<https://www.alrc.gov.au/inquiry/equality-capacity-and-disability-in-commonwealth-laws/>>.

26 A summary of these reviews can be found in: Ibid [7.209].

- 4.22 Most recently, the Western Australian Department of Justice has published a consultation paper exploring possible amendments to the *Juries Act 1957* (WA) to ensure people with disabilities can participate as jurors. The paper explores the provision of supports, adjustments to court room layout, costs, training and amendments to other legislation.²⁷

The law in overseas jurisdictions

- 4.23 People who are deaf, hard of hearing, blind or who have low vision have successfully served on juries for some time overseas. We discuss law and practice in overseas jurisdictions including Canada and Scotland in more detail in Appendix B.

New Zealand

- 4.24 In New Zealand, sign language (NZSL) is an official language pursuant to the *New Zealand Sign Language Act 2006* and interpreters are required to be used in court where it is the preferred language of a party, witness, counsel or member of the court, and any other person with leave of the court.²⁸
- 4.25 The New Zealand Court Service requests that the court is contacted ahead of time so it can arrange supports for prospective jurors. Examples of supports mentioned on the court's online information page include:
- a sign language translator
 - documents in other formats (such as Braille or bigger type) if jurors have a vision problem
 - use of an accessible court room if jurors have a mobility problem
 - being seated near the witness or judge or getting sound reinforcement if jurors have a hearing problem.²⁹
- 4.26 Pursuant to the *Juries Act 1981* (NZ) a judge may cancel the summons of a person if satisfied that because of disability the person is not capable of acting effectively as a juror.³⁰ This can occur on the judge's own motion or in response to an application by the Registrar or staff responsible for jury service. The application must be made before the jury is constituted, is heard in private and conducted at the discretion of the judge.³¹
- 4.27 In 2005 Dr David McKee, a deaf studies teacher at Wellington University, received a summons to serve as a juror in the Wellington District Court. He reported that his involvement in the trial was facilitated by 'two interpreters who alternated because it was an all-day case, and yes, it proceeded quite smoothly.'³² He was elected by his fellow jurors as the foreperson in the trial.³³

England and Wales

- 4.28 The 13th person rule continues to apply in the United Kingdom (UK). This means that a juror with a disability cannot be assisted by a non-juror in the jury room.³⁴ However, people with disability including those who are deaf, hard of hearing, blind or with low vision are not disqualified from serving under the *Juries Act 1974* in England and Wales.³⁵

27 Department of Justice (WA), *Participation of People with a Disability in Jury Service* (Discussion Paper, March 2020).

28 Hayley Reffell and Rachel Locker McKee, 'Motives and Outcomes of New Zealand Sign Language Legislation: A Comparative Study between New Zealand and Finland' (2009) 10(3) *Current Issues in Language Planning* 272, 12. The purpose of the *Sign Language Act 2006* (NZ) is to 'promote and maintain the use of New Zealand Sign Language': at s(3). The Act also states that 'in any legal proceedings, any of the following persons may use New Zealand Sign Language' 'any other person with leave of the presiding officer': at s(7)(c).

29 'Disability Support', *New Zealand Ministry of Justice* (Web Page) <<https://www.justice.govt.nz/courts/jury-service/disability-support/>>.

30 *Juries Act 1981* (NZ) s 16AA(1).

31 *Ibid* s 16AA(4).

32 Annie Guest, 'Deaf Jurors Serve in US and New Zealand, but High Court Blocks Australian Gale Lyons' Bid', *ABC News* (online, 5 October 2016) <<https://www.abc.net.au/news/2016-10-05/deaf-jurors-allowed-in-us,-nz/7905810>>.

33 *Ibid*.

34 *Re Osman* 1 [1966] Cr App R 126.

35 *Juries Act 1974* (UK) s 1.

There are some differences in jury legislation across the UK,³⁶ however the jury selection processes are broadly similar with respect to jurors in the subject groups. There are protocols to accommodate people with disabilities and enable them to serve on juries, provided they do not need the assistance of an additional person in jury deliberations.

4.29 The process in England and Wales includes:

- Asking people to provide information about what supports they might need in response to the summons.
- Adopting a flexible case-by-case approach to the provision of supports
- Providing a range of supports including hearing enhancements such as hearing loops, speech to text services, Braille material, accommodations for guide dogs, vision aids such as magnifiers, dedicated court ushers and the provision of additional breaks during the court process. Pre-court visits can also be organised to explore supports with the court.³⁷
- The decision to exclude a juror with a disability from serving is made by a judge. A preliminary decision is made by a senior court official.³⁸ If reasonable supports cannot be provided and the person does not want to be excused, a hearing is scheduled before a judge. The prospective juror is able to attend the hearing to discuss this with the judge.³⁹

The experience of jurors in the UK

4.30 In August 2019 a deaf man with lip-reading skills and the help of court stenographers established a 'legal landmark' when he sat on the jury of three trials during a two-week period in the Crown Court. He also served as a foreman of the jury. He is one of at least three people who are deaf who have served on juries in the UK. *The Guardian* reported:⁴⁰

Johnston said: "They wanted to see me, how deaf I was, how well I could lip-read, and when they met me there was no problem."

After being convinced of Johnston's ability to serve without hindrance, and discussions with a judge, the officials secured financing for a two-person team of stenographers to transcribe everything spoken in court, which Johnston read on a tablet device from the jury benches.

Anthony Jarvis, who was on the same jury panel at Blackfriars as Johnston, said: "The processes in court seemed like they were in no way negatively impacted by having a deaf juror and that the court handled it very well. The trial carried on as if having a deaf juror was standard procedure. It didn't feel like this was the first time."

Johnston himself said that apart from a couple of small teething issues – his tablet ran out of battery charge at one point, and he also could not hear the announcements in the jury assembly area calling him to court – his time was entirely fulfilling.

"It worked. It can be done," he said. "It means that more people with hearing impairments can go on a jury. You've got a bigger pool to select."

36 See *Criminal Justice Act 1995* (Scot); *Criminal Procedure Act 1995* (Scot); *Juries Order 1996* (NI).

37 Information provided from Her Majesty's Courts and Tribunals Service to the Victorian Law Reform Commission, 17 August 2020.

38 'Making Jury Service More Accessible for Jurors', *Scottish Courts and Tribunals Service* (Web Page) <<https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2019/11/28/making-jury-service-more-accessible-for-jurors>>.

39 *Juries Act 1974* (UK) s 9(b).

40 Howard Swains, 'Subtitles Help Deaf Juror Past "13th Stranger" Court Rules', *The Guardian* (online, 28 August 2019) <<https://www.theguardian.com/law/2019/aug/28/man-sets-legal-landmark-as-first-deaf-juror-in-english-court>>.

Ireland

- 4.31 Historically the 13th person rule has prevented people from serving on juries in Ireland with supports. A change to the law in 2008 removed the explicit reference to people who are deaf as ineligible.⁴¹ Instead the law excludes a person with an ‘enduring impairment’ if it is not ‘practicable for them to perform the duties of a juror’.⁴²
- 4.32 In 2010 a deaf man challenged his disqualification resulting from his need for a sign language interpreter in the jury room. The Irish High Court accepted that with assistance in the form of an interpreter and technological supports, it was practicable for a deaf juror to serve.⁴³ In the judgment, Justice Carney commented that the 13th person rule could be:
- met by an appropriate oath being taken by the signer in which he would submit himself to the same obligations of confidentiality as the rest of the other jurors.⁴⁴
- 4.33 Following the judgement, the Irish Law Reform Commission released a report in 2013 scoping potential reforms to enhance participation with supports.⁴⁵ Those recommendations were not implemented in legislation. However, the Irish Court Service has developed processes to enable deaf jurors to serve, including by providing Irish Sign Language interpreters.⁴⁶ The Irish Court Service has a dedicated disability liaison officer and takes a flexible and individualised approach to providing reasonable accommodations for people with disabilities.⁴⁷
- 4.34 In October 2020 Patricia Heffernan became the first deaf person to deliberate on an Irish jury.⁴⁸ She was assisted in the deliberation by two Irish Sign Language interpreters. On two previous occasions she had been excused from jury service due to her disability.⁴⁹ Her experience was reported in the media:

... The Court Service assigned two interpreters, Vanessa O’Connell and Michael Feeney, who took turns translating the evidence into ISL for Ms Heffernan during the six-day trial.

It soon became obvious a third interpreter was required to accompany her during breaks.

This allowed O’Connell and Feeney time to discuss how to accurately interpret certain legal terms which may be confusing.

“ISL is my first language. English is my second language. So there were terms in English that would mean one thing but in a legal sense mean something different,” Heffernan said.

“There was a lot of terminology used that I would not be familiar with, like reasonable doubt. The interpreters were really good about explaining it.”

Judge Sinéad Ní Chúlacháin had to occasionally tell the parties not to talk over each other for the sake of the interpreters. According to one source familiar with the trial, this had the effect of making proceedings easier to follow for everybody involved, not just Heffernan.

“There were absolutely no issues around communication. Everything ran so smooth. I didn’t feel under any type of pressure,” Heffernan said.

41 Irish Law Reform Commission, *Jury Service* (Report No 107, April 2013) [4.04] <https://www.lawreform.ie/_fileupload/Reports/r107.pdf>. *Juries Act 1976* (Ireland).

42 Irish Law Reform Commission, *Jury Service* (Report No 107, April 2013) [4.13–4.14] <https://www.lawreform.ie/_fileupload/Reports/r107.pdf>, citing *DPP v O’Brien* [2010] IECCA 103.

43 Irish Law Reform Commission, *Jury Service* (Report No 107, April 2013) [4.13] <https://www.lawreform.ie/_fileupload/Reports/r107.pdf>.

44 Irish Law Reform Commission, *Jury Service* (Report No 107, April 2013) <https://www.lawreform.ie/_fileupload/Reports/r107.pdf>.

45 Mary Carolan, ‘Jury Service: Many with Disability “Would like to Do Their Civic Duty”’, *The Irish Times* (online, 4 February 2019) <<https://www.irishtimes.com/news/crime-and-law/jury-service-many-with-disability-would-like-to-do-their-civic-duty-1.3780755>>.

46 Ibid.

47 Conor Gallagher, ‘Galway Woman Makes History as First Deaf Person to Deliberate on Irish Jury’, *The Irish Times* (online, 5 October 2020) <<https://www.irishtimes.com/news/crime-and-law/galway-woman-makes-history-as-first-deaf-person-to-deliberate-on-irish-jury-1.4370644>>.

48 Ibid.

... In the beginning the other jurors felt “a bit awkward” as they got used to talking to Heffernan through an interpreter. “But it became so natural. After a bit we were cracking jokes and having fun.”

One of her interpreters, O’Connell, said at first she was nervous about the deliberations, despite having 15 years’ experience as an ISL interpreter. “After hearing all the specifics of the trial, to be silent during the deliberations was very difficult.”

After they returned a verdict, Judge Ní Chúlacháin noted the historic landmark and told Heffernan she was free to talk about her experience as long as she complied with the in-camera rule which applies to sexual assault cases.

“The deaf community need to know we’re all well able to do whatever everybody else is doing in society. We’re all equal. The only thing is we have a different language.”⁵⁰

United States

4.35 The legislative framework of the United States prevents the automatic exclusion of jurors with disability, including people who are deaf or blind. The *Americans with Disability Act* (ADA) states that:

No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.⁵¹

4.36 As a result of ADA obligations and case law precedent, the inclusion of people who are deaf on juries in the United States is relatively routine.⁵²

4.37 Courts are public entities for the purposes of the ADA.⁵³ Federal Courts are covered by the *Rehabilitation Act* which has the same substantive requirements.⁵⁴ Juries have been found to fall within the remit of court obligations under these statutes.⁵⁵

4.38 The ADA lists examples of aids that should be provided to ensure effective communication with people with disabilities:

Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

Acquisition or modification of equipment or devices; and

50 Ibid.

51 *Americans with Disabilities Act*, 42 USC Ch 126 §12132 (1990). See also Kristi Bleyer, Kathryn Shane McCarty and Erica Wood, ‘Access to Jury Service for Persons with Disabilities’ (1995) 19(2) *Mental and Physical Disability Law Reporter* 249, 250.

52 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 38 <<https://www.lawreform.justice.nsw.gov.au>>.

53 *Galloway v Superior Court of the District of Columbia*, 816 F Supp 12 (DDC, 1993) [19].

54 *Rehabilitation Act*, 29 USC § 794(a) (1994) ss 501, 504.

55 *Galloway v Superior Court of the District of Columbia*, 816 F Supp 12 (DDC, 1993) [18–19].

Other similar services and actions.⁵⁶

- 4.39 Courts have also addressed the treatment of the 13th person rule. For example, in *People v Guzman* it was held that the rule pertains to officers of the court such as bailiffs, judges, or counsel, and ‘the presence of the signer is a different matter entirely.’⁵⁷ This is because ‘the role of the signer is not that of a participant or an authorized official of the court but is that of a communications facilitator.’⁵⁸ In *United States v Dempsey* the court addressed the main concerns associated with the 13th person rule. As to whether an interpreter would compromise the secrecy of the jury room, the court found it no more likely that an interpreter would reveal confidences than the jurors themselves.⁵⁹ The court found that a 13th person was unlikely to have a ‘chilling effect’ on deliberations as they are ‘part of the background’ rather than ‘independent participants’.⁶⁰ Concerns as to any unlawful participation by the interpreter could be addressed through an oath and by the judge inquiring prior to the verdict whether the interpreter abided by their oath.⁶¹

The experience of jurors in the United States

- 4.40 The National Federation of the Blind’s newsletter, *Braille Monitor*, contains personal stories from people who are blind about their experiences of the jury process in the United States. Gwen Nelson was hesitant to serve but decided to proceed:

Then, as a [member of the National Federation of the Blind], I was really ashamed, because many blind people before me who believe as I do that blind people should be first-class citizens, had stood by their convictions so that now I had the opportunity to accept the responsibility and privilege of taking my turn on jury duty.

Yes, I did have to wait around the courthouse for hours. It was inconvenient, but I did serve on a jury. I had the assistance I needed to read printed materials submitted as evidence at the trial. And, as I look back, I am truly glad that I chose to fulfill my duty as a citizen. Jury duty was educational and rewarding...⁶²

56 *Americans with Disabilities Act*, 42 USC Ch 126 §35.104 (1990). See also United States Justice Department, *Title II Technical Assistance Manual* [11-7.1000] <<https://www.ada.gov/taman2.html>>.
 57 *People v Guzman*, 478 NYS 2d (1984) 473 (Goodman J).
 58 Ibid.
 59 *United States v Dempsey*, 724 F Supp 573 (ND Ill 1989) [24] (Hart J).
 60 Ibid [17].
 61 Ibid [22–25].
 62 Gwen Nelson, ‘My Experience As A Juror’, *National Federation of the Blind* (Web Page) <<https://www.nfb.org/sites/www.nfb.org/files/images/nfb/publications/books/kernel1/kernel0605.htm>>.

Reasons to make juries more inclusive

- 38** The jury should be representative of the community
- 39** Changed views about participation in civic life
- 41** Compliance with international and domestic standards
- 43** The impact of modern technology

5 Reasons to make juries more inclusive

- 5.1 This chapter examines why reform to law and practice is necessary. A jury should be representative of the community including people who are deaf, hard or hearing, blind or who have low vision. The law should be modernised to keep pace with contemporary views about equal participation in civic life and to comply with international legal standards.

The jury should be representative of the community

- 5.2 Key purposes of the *Juries Act 2000* (Vic) section 1 include:
- equitably spread[ing] the obligation of jury service amongst the community and
 - make[ing] juries more representative of the community.¹
- 5.3 Key benefits of a representative jury are that:
- it contributes to the legitimacy of jury decisions by enabling the community to participate in the administration of justice
 - it increases impartiality by bringing a diverse range of views to the case, which balances out any individual bias.²
- 5.4 There is debate about what it means for a jury to be representative.³ There are limits to achieving fully representative juries. In its 2014 report, *Jury Empanelment*, the Commission adopted the Parliamentary Law Reform Committee's articulation of the representative principle that juries should be:
- an accurate reflection of the composition of [Victorian] society, in terms of ethnicity, culture, age, gender, occupation, socio-economic status.⁴
- 5.5 Representativeness is sought through random selection of jury members, via the electoral roll and subsequent balloting of the jury pool and panel.⁵ Rules and practices in the jury selection and empanelment process then filter out certain groups of people. The use of peremptory challenges may impact on representativeness, with some groups more likely to be challenged than others.⁶

1 *Juries Act 2000* (Vic) s 1.

2 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 32 <<https://www.lawreform.vic.gov.au>>, citing Mark Findlay, 'Juries Reborn' [2007] (90) *Reform* 9, 3, 7, 10.

3 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 9 <<https://www.lawreform.vic.gov.au>> It has been argued in some cases that it can be interpreted to mean that the jury should represent the accused's own community: *R v Grant & Lovett* [1972] VR 423; *R v Badenoch* [2004] VSCA 95 (27 May 2004). The Irish Law Reform Commission has clarified that representativeness means that the panel of potential jurors from which a jury is selected should reflect the composition of society, but it does not mean that the resulting jury actually chosen for a specific case will do so: Irish Law Reform Commission, *Jury Service* (Report No 107, April 2013) 13 <https://www.lawreform.ie/_fileupload/Reports/r107.pdf>.

4 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, December 1997) vol 3, 7 [1.20] <<https://www.parliament.vic.gov.au/315-lawreform/inquiry-template-sp-996>>; Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 9 <<https://www.lawreform.vic.gov.au>>.

5 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 32 <<https://www.lawreform.vic.gov.au>>.

6 For example, women are more likely to be challenged in criminal trials: Jacqueline Horan, *Juries in the 21st Century* (Federation Press, 2013) 42–3; Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) 33 <<https://www.lawreform.vic.gov.au>>.

- 5.6 Representativeness is linked to the notion of a ‘trial by one’s peers’.⁷ Disability rights organisations have observed that defendants with disability are denied the right to a trial by a jury of their peers as the ‘experience of disability is not available for jury consideration during trials’.⁸ People with disability may bring an important perspective into deliberations, as many defendants, witnesses and victims experience disability. In the United States case of *Peters v Kiff*, the court observed:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.⁹

- 5.7 The right of a blind person to serve as a juror was upheld in the recent United States case of *Commonwealth v Heywood*. Justice Budd held that including jurors with disabilities is an essential part of the jury selection process.¹⁰ The court confirmed:

A cross section of the community necessarily includes, among others, citizens with disabilities, the defendant’s right to a fair trial and the protection against discrimination in jury selection works in tandem.¹¹

- 5.8 People who are blind, have low vision, deaf or are hard of hearing are part of the community and should therefore be represented in juries alongside other Victorians. Enhancing participation of members of the subject groups means that jurors will reflect broader life experiences. Mr Phillips, a deaf man who in 2014 was not allowed to serve in Victoria with an Auslan interpreter, noted:

Deaf people come from all walks of life: professionals, managers, lawyers, tradesmen, parents, and contribute to society as much as anyone else ... We should be given the opportunity to serve on juries, particularly if deaf people who are on trial are tried by a panel of non-deaf people.¹²

- 5.9 Better decision making through diversity benefits the broader justice system and society as a whole. Research on racial diversity from the United States which involved mock juries found that diverse groups perform better than homogenous groups when making decisions.¹³ Similar findings on the benefits of diversity have been made in the corporate context.¹⁴

Changed views about participation in civic life

- 5.10 The composition of juries has changed over time, as society has changed and the definition of a citizen has expanded. It is timely that law and practice evolve again to better reflect our modern community.

7 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) [3.83] <<https://www.lawreform.vic.gov.au>>.
8 Civil Society Report Project Group, *Disability Rights Now: Australian Civil Society Shadow Report on CPRD* (Report, August 2012) 81 <<https://pwd.org.au/our-work/policy-areas/human-rights-campaigns/united-nations-convention-on-the-rights-of-persons-with-disabilities/crpd-civil-society-shadow-report/>>.
9 Brock Budworth, Trevor Ryan and Lorana Bartels, ‘Reigniting the Lamp: The Case for Including People Who Are Blind or Deaf as Jurors’ (2017) 42 *University of Western Australia Law Review* 29, 36 citing, *Peters v Kiff*, 407 US 493 (1972) 506.
10 *Commonwealth v Heywood*, 484 Mass 43 (2020).
11 *Ibid* 1025.
12 Sylvia Varnham O’Regan, ‘Deaf Victorian Man Denied from Serving on Jury Calls for “Discriminatory” Law to Be Changed’, *SBS News* (online, 24 November 2014) <<https://www.sbs.com.au/news/>>.
13 ‘Racial Diversity Improves Group Decision Making in Unexpected Ways, According to Tufts University Research’, *ScienceDaily* (Web Page, April 2006) <<https://www.sciencedaily.com/releases/2006/04/060410162259.htm>>.
14 David Rock and Heidi Grant, ‘Why Diverse Teams Are Smarter’, *Harvard Business Review* (online, 4 November 2016) <<https://hbr.org/2016/11/why-diverse-teams-are-smarter>>.

- 5.11 In colonial times in Australia, there was no right to a jury trial until 1823, and subsequently only commissioned military officers could serve on juries.¹⁵ In 1851, following the introduction of responsible government in Victoria, legislation was passed to formalise jury trials in the state.¹⁶
- 5.12 Initially, only propertied men could serve on juries.¹⁷ Women were excluded from jury service until 1964, when legislation was passed to enable all 'persons' to serve on juries, rather than just 'men'. However, women could still be exempted on the basis of gender alone. There was no positive obligation to include women and they could be excluded if 'adequate amenities' could not be provided.¹⁸ In 1975 these two caveats were removed, and the automatic exemption was replaced with exemptions for pregnant women and carers.¹⁹
- 5.13 Aboriginal and Torres Strait Islander people were only included on juries in the 1960s. Changes to federal and state voting laws resulted in Aboriginal and Torres Strait Islander people being included on electoral rolls for the first time.²⁰
- 5.14 The exclusion of deaf and blind jurors is sourced in early Christian canon law, which excluded witness testimony from 'blind, deaf and dumb' people.²¹ This found its way into English law and was applied to automatically exclude jurors with those disabilities.²² Budworth et al observed that 'as with other exclusions from full citizenship ... this is a historical contingency, rather than a result of reasonableness of logic'.²³
- 5.15 As far back as 1984, the New York Supreme Court recognised that there is no longer a social or legal justification for excluding people who are deaf on juries:
- The Deaf are not poor creatures to be patronized by us, congratulated on their individual efforts to overcome their handicaps and summarily brushed aside ... the Deaf are part of our community and must be considered, evaluated and finally either accepted or rejected for service as individuals just as any other citizen. The grounds for exempting the Deaf from jury service have vanished.²⁴
- 5.16 The continuing exclusion of people in the subject groups relies on outdated ideas about their ability to comprehend evidence and is out of step with community expectations. Victorian society has become more inclusive and has recognised and codified the rights of people with disability into law and policy.
- 5.17 Communication tools for people in the subject groups are increasingly visible in our everyday lives. In 2020, for example, daily government briefings about the coronavirus (COVID-19) pandemic and bushfires have improved community understanding and familiarity with Auslan interpretation.²⁵ This public exposure to Auslan has coincided with a dramatic increase in enrolment in Auslan courses, indicating that positive public diversity

15 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, December 1997) vol 3, [1.82] <<https://www.parliament.vic.gov.au/315-lawreform/inquiry-template-sp-996>>.

16 Ibid [1.91].

17 Thalia Anthony and Craig Longman, 'Blinded by the White: A Comparative Analysis of Jury Challenges on Racial Grounds' (2016) 6(3) *International Journal for Crime, Justice and Social Democracy* 25, 28.

18 Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, December 1997) vol 3, [3.26] <<https://www.parliament.vic.gov.au/315-lawreform/inquiry-template-sp-996>>, citing Juries (Women Jurors) Bill 1964 (Vic).

19 Ibid [3.27].

20 Thalia Anthony and Craig Longman, 'Blinded by the White: A Comparative Analysis of Jury Challenges on Racial Grounds' (2016) 6(3) *International Journal for Crime, Justice and Social Democracy* 25, 28.

21 Brock Budworth, Trevor Ryan and Lorana Bartels, 'Reigniting the Lamp: The Case for Including People Who Are Blind or Deaf as Jurors' (2017) 42 *University of Western Australia Law Review* 29, 32.

22 Brock Budworth, Trevor Ryan and Lorana Bartels, 'Reigniting the Lamp: The Case for Including People Who Are Blind or Deaf as Jurors' (2017) 42 *University of Western Australia Law Review* 29; *Mansell v The Queen* (1857) 120 ER 20.

23 Brock Budworth, Trevor Ryan and Lorana Bartels, 'Reigniting the Lamp: The Case for Including People Who Are Blind or Deaf as Jurors' (2017) 42 *University of Western Australia Law Review* 29, 32.

24 *People v Guzman*, 478 NYS 2d (1984) 474 (Goodman J).

25 Holly Tregenza, 'Coronavirus and Bushfires Have Thrust Sign Language into the Spotlight', *ABC News* (online, 10 April 2020) <<https://www.abc.net.au/news/2020-04-11/coronavirus-bushfires-thrust-auslan-interpreters-into-spotlight/12140824>>.

measures often have flow-on effects.²⁶ Auslan is increasingly taught in schools²⁷ and preschools.²⁸ Audio Description (AD) is now available for many television programs on free-to-air and pay TV.²⁹

5.18 Participation in jury service is an important civic duty associated with active citizenship.³⁰ People who are deaf, hard of hearing, blind or who have low vision should be able to participate in civic life in Victoria on equal terms with others.

5.19 Not being able to serve conveys the wrong message about who is considered a full and equal citizen in the eyes of the community and the state. As Emery has observed:

The notion of ‘citizenship’ is based on the social construct of individuals that can hear and speak, and therefore social policies are constructed in such a way as to exclude deaf people from civic participation.³¹

5.20 The experience of exclusion from community life can have debilitating effects on people with disabilities, affecting their self-worth and compounding feelings of isolation.³² Exclusion from juries may also reinforce misconceptions that people in the subject groups lack capacity to serve, that a trial will be too complex or too onerous for them to participate in. On the other hand, the inclusion of deaf and blind jurors may have a positive educative function for other jurors, court participants and legal professionals, with flow-on effects for the treatment of people with disabilities in Victorian society.

Compliance with international and domestic standards

5.21 Current Victorian legislation and practice lags behind other comparative common law jurisdictions and has been found to be contrary to Australia’s obligations under international law.

5.22 Australia is a signatory of the United Nations Convention on the Rights of Persons with Disability (UNCRPD), which is designed to protect the rights and dignity of individuals with disability and reflects international consensus and standards.³³

5.23 The UNCRPD Committee has held that people who are deaf should have the right to participate as jurors and that Australian courts should make reasonable adjustments to enable this to occur. In *Beasley v Australia* the UNCRPD Committee ruled on the case of a deaf woman named Gemma Beasley who had been excluded from jury service in New South Wales [see 4.10-4.13].³⁴ Ms Beasley’s request for an Auslan interpreter was denied because of the 13th person rule, and she was informed that an Auslan interpreter could not be provided by the court under the current legislation.³⁵ She was also told that real-time captioning was not available. Real-time captioning would have allowed her to read spoken word almost instantly.³⁶

26 Amanda Hooton, ‘Sign of the Times? More People Put Their Hands up to Learn Auslan’, *The Sydney Morning Herald* (online, 31 July 2020) <<https://www.smh.com.au/national/sign-of-the-times-more-people-put-their-hands-up-to-learn-auslan-20200626-p556hg.html>>; Rochelle Hunt and Warwick Long, ‘Auslan Enrolments Have “Skyrocketed”’, *The Conversation Hour* (ABC Radio, 31 July 2020) <<https://www.abc.net.au/radio/melbourne/programs/theconversationhour/the-conversation-hour/12494634>>.

27 ‘Auslan’, *Victorian Curriculum and Assessment Authority* (Web Page) <<https://www.vcaa.vic.edu.au/curriculum/foundation-10/resources/languages/auslan/Pages/default.aspx>>.

28 Philippa Carisbrooke, ‘Sign Language to Be Taught to Victorian Four-Year-Olds’, *SBS News* (online, 18 November 2018) <<https://www.sbs.com.au/news/sign-language-to-be-taught-to-victorian-four-year-olds>>; ‘Early Childhood Language Program’, *Department of Education* (Web Page) <<https://www.education.vic.gov.au:443/about/programs/Pages/eclanguageprograms.aspx>>.

29 Gwyneth Peaty and Katie Ellis, ‘Audio Description Finally Comes to ABC and SBS’, *The Conversation* (Web Page, 29 June 2020) <<http://theconversation.com/audio-description-finally-comes-to-abc-and-sbs-141276>>.

30 *Lockrey v Australia*, UN Doc CRPD/C/a5/D/13/2013 (30 May 2016); New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 11 <<https://www.lawreform.justice.nsw.gov.au>>.

31 Steven D Emery, ‘In Space No One Can See You Waving Your Hands: Making Citizenship Meaningful to Deaf Worlds’ (2009) 13(1) *Citizenship Studies* 31; Jemina Napier et al, ‘Changing the International Justice Landscape: Perspectives on Deaf Citizenship and Jury Service’ (2018) 19(2) *Sign Language Studies* 240, 241.

32 National People with Disabilities and Carer Council, *Shut Out: The Experience of People with Disabilities and Their Families in Australia* (Report, 2009) 52 <<https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/shut-out-the-experience-of-people-with-disabilities-and-their-families-in-australia>>.

33 *United Nations Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN Doc A/RES/61/106 (24 January 2007).

34 Committee on the Rights of Persons with Disabilities, *Views: Communication No 11/2013*, 15th Session, UN Doc CRPD/C/15/11/2013 (25 April 2016) (‘*Beasley v Australia*’)

35 *Ibid* [2.2].

36 *Ibid*.

- 5.24 Similarly, in *Lockrey v Australia*, the UNCRPD Committee ruled on the case of Mr Lockrey, a deaf man, who required real time steno-captioning to serve. He was informed that the device was not available when summoned for jury duty on three separate occasions.³⁷
- 5.25 In *Beasley* the UNCRPD Committee held as follows.
- The refusal to provide an Auslan interpreter was discriminatory as it was a denial of reasonable accommodation in violation of article 5(1), and it denied equal protection and benefit of the law contrary to article 5(3).³⁸
 - Article 9(1) was also breached. It requires States to take appropriate measures to 'enable persons with disabilities to live independently and participate fully in all aspects of life'. The Committee noted that jury duty is 'an important aspect of civic life within the meaning of Article 9(1) as it constitutes a manifestation of active citizenship'.³⁹
 - Australia had failed to uphold article 21(b) which protects freedom of expression and access to information, including in 'official interactions' because Ms Beasley was not provided with 'the format of communication she needs to enable her to perform jury duty and therefore to express herself in official interactions'.⁴⁰
 - This also amounted to a denial of access to justice (article 13) in conjunction with the right to participation in public life (article 29(b)). The Committee took a broad view of access to justice, considering it to encompass all participants, rather than solely claimants, victims or defendants.⁴¹
- 5.26 The UNCRPD Committee recommended that Australia enable participation in jury duty by providing 'reasonable accommodations in the form of Auslan interpretation in a manner that respects the confidentiality of proceedings'.⁴² Additionally, the following steps were required:
- Ensuring that every time a person with disabilities is summoned to perform jury duty, a thorough, objective and comprehensive assessment of his/her request for adjustment is carried out and all reasonable accommodation is duly provided to enable his/her full participation;
- Adopting the necessary amendments to the relevant laws, regulations, policies and programmes, in close consultation with persons with disabilities and their representative organizations;
- Ensuring that appropriate and regular training on the scope of the Convention and its Optional Protocol, including on accessibility for persons with disabilities, is provided to local authorities, such as the Sheriff, and the judicial officers and staff involved in facilitating the work of the judiciary.⁴³
- 5.27 Similar findings were made in *Lockrey v Australia*.⁴⁴
- 5.28 Disability groups in Australia and overseas have long advocated for law reform to create inclusive juries, in alignment with international human rights standards.⁴⁵

37 Committee on the Rights of Persons with Disabilities, *Views: Communication No 13/2013*, 15th Session, UN Doc CRPD/C/15/D/13/2013 (30 May 2016) [2.2] ('Lockrey v Australia').

38 *Beasley v Australia*, UN Doc CRPD/C/15/11/2013 (25 April 2016) [8.3-8.4]. A 'reasonable accommodation' means 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms': *United Nations Convention on the Rights of Persons with Disabilities*, GA Res 61/106, UN Doc A/RES/61/106 (24 January 2007) article 2.

39 *Beasley v Australia*, UN Doc CRPD/C/15/11/2013 (25 April 2016) [8.6].

40 Ibid [8.8].

41 Ibid [8.9].

42 Ibid [9].

43 Ibid.

44 *Lockrey v Australia*, UN Doc CRPD/C/15/D/13/2013 (30 May 2016) [2.1].

45 See, eg, Dan Hayes, 'Law: Not Fit for Jury Service', *The Independent* (online, 21 December 1999) <<https://www.independent.co.uk/arts-entertainment/law-not-fit-for-jury-service-1133906.html>>; 'Deaf Campaigner Takes Court Action over BSL Jury Ban', *Disability News Service* (Web Page, 23 August 2018) <<https://www.disabilitynewsservice.com/deaf-campaigner-takes-court-action-over-bsl-jury-ban/>>; 'In Search of Justice', *British Deaf Association* (Web Page, 18 September 2015) <<https://bda.org.uk/in-search-of-justice/>>; National Federation of the Blind, National Federation of the Blind of Massachusetts and Disability Law Centre, 'The Right of Blind People to Serve on Juries Comes to the Court' [2019] *Braille Monitor* <<https://www.nfb.org/images/nfb/publications/bm/bm19/bm1909/bm190912.htm>>; Deaf Australia, 'Home', *Jury Rights for All: Fundraising Initiative* (Web Page) <<https://juryrightsforall.org.au/>>.

- 5.29 The *Victorian Charter of Human Rights and Responsibilities Act 2006* (the Charter)⁴⁶ integrates international human rights standards into Victorian law and encourages a broader commitment to a human rights culture.⁴⁷ Public authorities have a statutory obligation to comply with the Charter.⁴⁸ This includes the right to equality before the law and protection from discrimination, including on the basis of disability.⁴⁹ It is arguable that the Charter places an obligation on Juries Victoria and the Juries Commissioner as public authorities to enable the subject groups to serve where possible, by providing supports and avoiding blanket exclusions. The Charter also applies to the courts when acting in an administrative capacity.⁵⁰
- 5.30 The Australian Capital Territory has already implemented changes to enable people who are deaf or blind to serve on juries (see Chapter 4).⁵¹ Its new laws and processes better align with the rights contained in the UNCRPD.

The impact of modern technology

- 5.31 As technology has improved, supports have become more sophisticated, reducing physical and communication barriers to participation. Costs associated with providing supports have also reduced. Moreover, in 2020 courts have had to adapt swiftly to new technologies following coronavirus (COVID-19) restrictions. Parallel adjustments for people with disabilities (who are reliant on similar technologies) have become more achievable. Chapter 8 explores the supports available to assist people in the subject groups to communicate.
- 5.32 Given that there are deaf and blind judges, magistrates and lawyers,⁵² and many people who are deaf and blind hold prominent positions within the Victorian community, there is logical inconsistency to the continued exclusion of these groups from jury service. Many people may be surprised that the law does not impose any positive obligation on the court to consider supports for jury service.

Question

- 2 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?

46 *Charter of Human Rights and Responsibilities Act 2006* (VIC).

47 'Human Rights Culture', *Victorian Equal Opportunity and Human Rights Commission* (Web Page) <<https://www.humanrights.vic.gov.au/for-public-sector/human-rights-culture/>>.

48 *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 38(1); *Equal Opportunity Act 2010* (Vic).

49 *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 8(2) and (3).

50 There are limited cases where the Charter directly applies to the courts in a judicial capacity through s6(2)(b): Judicial College of Victoria, *Charter of Human Rights Bench Book* (Online Manual, 1 September 2017) [2.5] <<http://www.judicialcollege.vic.edu.au/eManuals/CHRB/index.htm#57305.htm>>.

51 Courts and Other Legislation Amendment Bill 2018 (ACT).

52 Doron Dorfman, 'The Blind Justice Paradox: Judges with Visual Impairments and the Disability Metaphor' (2017) 5(2) *Cambridge Journal of International and Comparative Law* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2935540>; Colby Itkowitz, 'Supreme Court Chief Justice Learned Sign Language to Swear in Deaf Lawyers', *Washington Post* (online, 19 April 2016) <<https://www.washingtonpost.com/news/inspired-life/wp/2016/04/19/supreme-court-chief-justice-learned-sign-language-to-swear-in-deaf-attorneys/>>; KTUU News, 'How a Deaf Judge Runs a Rural Alaska Courtroom', *YouTube* (Web Page, 26 September 2014) <<https://www.youtube.com/watch?v=-fTFDEUM4tY>>; Barbara Slavin, 'A Judge of Character : Although He's Blind, David Tatel Skis, Runs and Climbs Mountains. By Summer's End, He May Be a Top Jurist Too', *Los Angeles Times* (online, 28 July 1994) <<https://www.latimes.com/archives/la-xpm-1994-07-28-ls-21024-story.html>>; The Associated Press, 'Richard Conway Casey, 74, Blind Federal Judge, Dies', *The New York Times* (online, 24 March 2007) <<https://www.nytimes.com/2007/03/24/obituaries/24casey.html>>.

Can inclusive juries prejudice fair trials?

46 The right to a fair trial

47 The competence of people in the subject groups

6 Can inclusive juries prejudice fair trials?

- 6.1 It is necessary that the participation of people in the subject groups does not prejudice the fairness of trials. In this chapter we refer to research showing that some members of the community and the legal profession hold the view that people in the subject groups may not be competent to fulfil the role of juror. We then refer to further research which demonstrates that these views are not based in evidence. Finally, we examine situations in which the accepted limitations of some people in the subject groups will prevent them from acting as jurors.

The right to a fair trial

- 6.2 The *International Covenant on Civil and Political Rights* provides that everyone shall be entitled to a fair and public hearing before a competent, independent and impartial tribunal.¹ This right is protected in Victoria by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter).² Under the common law, the right to a fair trial encompasses the hearing rule, which is the right to be heard before a competent tribunal, and the bias rule, which is the right of a party to have a matter determined by a decision maker who is free from bias and is seen to be unbiased.³
- 6.3 The right to a fair trial is a paramount consideration. The New South Wales Law Reform Commission (NSWLRC) observed:
- fairness of the trial takes precedence over the potential rights of a prospective juror. However, prospective jurors should not be lightly excluded from an important civic duty. It is important to ask whether the administration of justice is adversely affected by denying the contribution that some in the community would be willing and able to make, and whether thereby the representativeness of the jury is compromised.⁴
- 6.4 Examples of mechanisms to ensure impartiality in the jury system were provided by the Commission in its report *Jury Empanelment*, including:⁵
- the excusal process, which allows jurors to apply to be excused from particular trials
 - challenges, including peremptory challenges and challenges for cause and to the array⁶ as well as Crown stand asides
 - judicial discretion to exclude a prospective juror
 - the fact that jurors swear an oath or affirmation to maintain the secrecy of jury deliberations

1 *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UN Doc A/RES/2200A(XXI) (16 December 1966) article 14.

2 *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 24(1).

3 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) [3.140] <<https://www.lawreform.vic.gov.au>>.

4 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 11 <<https://www.lawreform.justice.nsw.gov.au>>.

5 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) [3.120] <<https://www.lawreform.vic.gov.au>>.

6 A challenge to the array is a common law right to challenge the entire panel. It requires the party to establish that there has been bias on the part of the Juries Commissioner or the pool supervisor or some other default in respect of the constitution of the panel. This form of challenge is rare: Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) <<https://www.lawreform.vic.gov.au>>.

- directions given by the judge to the jury to only take into account evidence presented at trial.
- 6.5 Improving participation for the subject groups does not mean undermining these safeguards.
- 6.6 It is fundamental to a fair trial that a juror can comprehend evidence, follow court proceedings and deliberate effectively with their fellow jurors. Two issues arise in relation to the competency of jurors in the subject groups. First, some people believe that a juror who is deaf, hard of hearing, blind or who has low vision is generally not competent to serve as a juror.⁷
- 6.7 Second, there is a concern that depending on their individual circumstances and the nature of the particular case at hand, a person in the subject groups may not be able to perform the duties required of a juror when it comes to evaluating certain types of evidence, even where reasonable supports are provided.⁸

The competence of people in the subject groups

Misconceptions

- 6.8 Academic research suggests that there are concerns both amongst legal professionals and people in the community about the accuracy of Auslan interpreting and misconceptions about the capacity of people who are deaf to participate as jurors.⁹ These misconceptions are often grounded in discriminatory views, beliefs and myths about people with disability.¹⁰ However, research has demonstrated that there is nothing inherent in hearing or vision loss that means a person cannot perform the role of a juror.

Deaf jurors

- 6.9 Extensive academic research has suggested that there are no significant practical impediments to people who are deaf serving on juries. Four key empirical research studies were conducted by Professor Jemina Napier, Professor David Spencer, Professor Sandra Hale and Professor Mehera San Roque from three different universities over the past decade.¹¹ The overall conclusion was that people who are deaf should be able to serve on juries because they ‘have the ability to understand complex legal discourse in a courtroom setting using sign language interpretation and, therefore, are able to discharge the functions of juror.’¹²
- 6.10 The accuracy and translatability of Auslan sign language interpreters was examined in two separate research projects. The first involved 12 jurors, the second involved 60 jurors. Half of the participants in the projects could not hear. The findings concluded that ‘both deaf and hearing jurors equally misunderstood some terms and concepts, and that deaf people do not appear to be at a disadvantage by accessing the information indirectly through an interpreter.’¹³ The initial study found that there was 87.5 per cent accuracy in

7 Jemina Napier and Alastair McEwin, ‘Do Deaf People Have the Right to Serve as Jurors in Australia?’ (2015) 40(1) *Alternative Law Journal* 23, 26; David Spencer et al, ‘Justice Is Blind as Long as It Isn’t Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach’ (2017) 23(3) *Australian Journal of Human Rights* 332, 341.

8 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 51 <<https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-114.pdf>>; David Spencer et al, ‘Justice Is Blind as Long as It Isn’t Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach’ (2017) 23(3) *Australian Journal of Human Rights* 332, 345.

9 David Spencer et al, ‘Justice Is Blind as Long as It Isn’t Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach’ (2017) 23(3) *Australian Journal of Human Rights* 332.

10 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) [1.9] <<https://www.lawreform.justice.nsw.gov.au>>. See also Sandra Hale et al, *Participation in the Administration of Justice: Deaf Citizens as Jurors* (Australian Research Council Linkage Project No 120200261, 2016).

11 UNSW Sydney, ‘Article on Deaf Jurors Wins Human Rights Award’, *Newsroom* (Web Page, 23 March 2018) <<https://newsroom.unsw.edu.au/news/social-affairs/article-deaf-jurors-wins-human-rights-award>>; Sandra Hale et al, *Participation in the Administration of Justice: Deaf Citizens as Jurors* (Australian Research Council Linkage Project No 120200261, 2016); Jemina Napier et al, ‘Changing the International Justice Landscape: Perspectives on Deaf Citizenship and Jury Service’ (2018) 19(2) *Sign Language Studies* 240; Jemina Napier and Alastair McEwin, ‘Do Deaf People Have the Right to Serve as Jurors in Australia?’ (2015) 40(1) *Alternative Law Journal* 23.

12 David Spencer et al, ‘Justice Is Blind as Long as It Isn’t Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach’ (2017) 23(3) *Australian Journal of Human Rights* 332, 332.

13 Jemina Napier and David Spencer, ‘Jury Instructions: Comparing Hearing and Deaf Jurors’ Comprehension via Direct or Mediated Communication’ (2017) 24(1) *International Journal of Speech Language and the Law* 1, 20.

the translation from English into Auslan, a mere 2.8 per cent difference in accuracy in the responses from hearing participants.¹⁴ Despite some shifts between legal definitions or objectively presented facts, the accuracy of the Auslan interpretation in both projects was such that the jurors were able to understand the information presented and contribute accordingly.

- 6.11 Observations of deaf jurors in United States court rooms, and surveys of interpreters and legal professionals about the role of the deaf juror in trials more broadly were also conducted. It was reported that:
- interpreters in the US with experience in interpreting for deaf jurors were confident, if protocols were established [in Australia], deaf people could effectively participate as jurors.¹⁵
- 6.12 In 2014 a mock jury trial was held in Paramatta, New South Wales, to investigate the capacity of people who are deaf who use sign language to serve as jurors.¹⁶ It was found that the deaf juror was an active contributor, contributing to 12 per cent of the overall jury deliberation process.¹⁷ The involvement of the interpreter did not undermine or destabilise jury deliberation and any distractions were only temporary.¹⁸ Finally, the judge reported that the mock trial was in no way different to other trials he had been involved in. The judge was of the view that judges and all court staff should be trained in how to run proceedings that involved Auslan interpreters.¹⁹
- 6.13 A recurring theme in the academic research is the importance of shifting prejudice and incorrect assumptions that a non-hearing juror would not be able to perform to the same standard as a hearing juror.²⁰ The main barrier to participation that was identified was navigating the standards, quality, supply and logistics of providing Auslan interpreters, but the research concluded that this did not represent a compelling reason to prevent participation.²¹

Blind jurors

- 6.14 Blind jurors can hear oral testimony, discussion, trial instructions and deliberations. The key issues raised in relation to blind jurors is their inability to observe visual evidence or the demeanour of witnesses.²²
- 6.15 In some situations, crucial evidence in a trial may be visual in nature. This may exclude a person who is blind from sitting on the jury. However, as the NSWLRC observes:
- the mere fact that there is evidence in the form of documents, diagrams, photographs and so on need not result in automatic exclusion of a blind juror, as in many cases there will be no issue as to its interpretation, and the content can be conveyed successfully through description or using technology. In the Commission's view the use of reasonable adjustments provide scope for facilitating the inclusion of a person who is blind or has low vision on the jury panel.²³

14 Jemina Napier and Alastair McEwin, 'Do Deaf People Have the Right to Serve as Jurors in Australia?' (2015) 40(1) *Alternative Law Journal* 23, 25.

15 *Ibid* 27.

16 Sandra Hale et al, *Participation in the Administration of Justice: Deaf Citizens as Jurors* (Australian Research Council Linkage Project No 120200261, 2016) 3.

17 *Ibid* 31.

18 *Ibid* 21.

19 *Ibid* 16.

20 *Ibid* 13.

21 David Spencer et al, 'Justice Is Blind as Long as It Isn't Deaf: Excluding Deaf People from Jury Duty—an Australian Human Rights Breach' (2017) 23(3) *Australian Journal of Human Rights* 332, 334.

22 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 50 <<https://www.lawreform.justice.nsw.gov.au>>.

23 *Ibid* [3.8].

- 6.16 In the United States, courts have held that people who are blind are also presumptively capable of assessing physical evidence, with appropriate supports, such as a trained describer.²⁴
- 6.17 In the recent case of *Commonwealth v Heywood*²⁵ the Supreme Court of Massachusetts considered on appeal whether an error in law had been made to allow a blind person to serve on the jury. The court held that:
- The trial judge did not abuse her discretion in finding juror competent to serve on jury despite the juror's blindness.²⁶
- The decision was entirely appropriate. Because the identification of perpetrator was not in question, the jury had to determine only whether the victim suffered serious bodily injury. As the injuries suffered by the victim were not visible at the time of trial, the ability to see the victim's face during his testimony was not essential to reaching a verdict. Similarly, because of the internal nature of the injuries and subsequent surgery, photographs of the victim's face taken close in time to the assault would not have assisted the jury in determining whether the victim suffered serious bodily injury. On the other hand, the juror had appropriate access to the testimony of the victim and the medical records, which were directly relevant to the question whether the victim suffered serious bodily injury.²⁷
- 6.18 United States courts have also determined that blind judges are able to assess evidence, although they may need to excuse themselves in cases that rely heavily on visual evidence.²⁸
- 6.19 The inability to visually observe the demeanour of witnesses is another issue raised to counter the involvement of blind jurors. The manner in which a person gives evidence, especially under cross-examination, can be important to determining credibility. Case law indicates that relevant factors include demeanour, tone of voice, manner of speech, spontaneity in answering the question and 'whether the plaintiff answered questions in a manner designed to satisfy the questioner or to give honest and truthful answers'.²⁹
- 6.20 The NSWLRC identified that judicial pronouncements have downplayed the significance of demeanour (and verbal cues) as a determinant of credibility in favour of more objective evidence.³⁰ This trend has continued.
- 6.21 In *Fox v Percy*, the High Court stated:
- In recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical.³¹
- 6.22 While recognising its drawbacks, demeanour evidence can still be a decisive factor in appellate courts giving weight to a trial judge's assessment of the evidence.³² For example, in a 2016 case the High Court indicated that 'the meaning of an admission depends

24 *People v Caldwell*, 661 NYS 2d (1997) 714; *People v Hayes*, 923 P 2d 221 (Colo App, 1995) 226–7.

25 *Commonwealth v Heywood*, 484 Mass 43 (2020) [43].

26 *Ibid* 1020.

27 *Ibid* [46].

28 See, eg, *People v Brown*, 62 NY 2d 743 (1984); *State v Cocking*, 55 Mont 169 (1923).

29 Judicial College of Victoria, *Serious Injury Manual* (Report, 2015) ch 5 <<https://www.judicialcollege.vic.edu.au/eManuals/SIM/53962.htm>>, citing *Woolworths Ltd v Warfe* [2013] VSCA 22 [114]; *Marks v Futuris Automotive Interiors & Anor* [2014] VCC 1420.

30 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) <<https://www.lawreform.justice.nsw.gov.au>> 51.

31 *Fox v Percy* [2003] HCA 22, [31]; (2003) 214 CLR 118, [31]. See also *CSR Ltd v Della Maddalena* [2006] HCA 1; (2006) 224 ALR 1.

32 David Hamer, 'The Unstable Province of Jury Fact-Finding: Evidence Exclusion, Probative Value and Judicial Restraint after *IMM v the Queen*' (2017) 41(2) *Melbourne University Law Review* 38, 26.

as much on the way it is stated as on its content; and, in this case, the judge had the significant advantage of seeing and hearing [the witness] make the admission'.³³ People in the subject groups have not served on juries in Victoria. The appellate courts have therefore not had to consider a scenario where a juror might not have been able to see or hear a witness and relies on other means to assess the credibility of a witness.

- 6.23 The abundant 'scientific research' referred to in *Fox v Percy* reveals that judges and lay people are routinely inaccurate when assessing the credibility of witnesses on the basis of their demeanour. For example, studies indicate that conventional wisdom about the behaviour of 'liars', including that 'liars look away, fidget, speak in a higher pitch or are more likely to be nervous' are unfounded in evidence.³⁴ Other studies have shown that a person's ability to discern when someone is lying 'functions only slightly better than random chance'.³⁵
- 6.24 The Judicial College of Victoria's *Serious Injury Manual* emphasises:

the importance of accounting for objectively established and undisputed facts. The existence of such facts may form a powerful barrier to any contrary conclusion, regardless of any credibility assessments the court makes in relation to individual witnesses.³⁶

- 6.25 Judges will often make a general direction to the jury that reliance on demeanour evidence must be 'kept in balance with other considerations'.³⁷

- 6.26 While people who are blind may not have access to visual cues, they can still assess credibility on the basis of verbal cues (with the opposite applying for deaf and hard of hearing jurors) and are not necessarily significantly disadvantaged in comparison to other jurors. The NSWLRC observed that people who are blind and deaf, 'like most others, have found ways of encountering, and coping with, everyday life, including the attempt to assess the truthfulness of what people say to them'.³⁸

- 6.27 The National Federation of the Blind cites studies finding that people who are blind are able to assess credibility evidence by focusing on verbal elements:

In evaluating testimony, blind jurors can concentrate on verbal testimony while avoiding distractions like a witness's facial expressions, dress, appearance, and body movements. Even visual cues indicating deception, like nervous tics, darting glances and uneasy shifting, are nearly always accompanied by a corresponding audible cue such as throat-clearing, swallowing, voice quavering, or inaudibility.

As one blind juror described, 'I've found that I've been pretty accurate—probably as, if not more accurate, than people who make eye contact, because people have gotten real good about fooling people on the visual level, but people often don't think about how they sound when they speak.' Another blind juror, who served on a murder trial, observed that '[p]eople can control face muscles ... Nobody thinks about the nuances of the human voice'.³⁹

33 *Robinson Helicopter Co Inc v McDermott* [2016] HCA 22, [54]; (2016) 331 ALR 550, [54].

34 Judicial College of Victoria, *Serious Injury Manual* (Report, 2015) ch 5 <<https://www.judicialcollege.vic.edu.au/eManuals/SIM/53962.htm>>, citing Michael Green, 'Credibility Contests: The Elephant in the Room' (2014) 18(1) *International Journal of Evidence and Proof* 28; Aldert Vrij, *Detecting Lies and Deceit: Pitfalls and Opportunities* (John Wiley and Sons Ltd, 2008); Paul Ekman and Maureen O'Sullivan, 'Who Can Catch a Liar?' (1991) 46(9) *American Psychologist* 913.

35 Judicial College of Victoria, *Serious Injury Manual* (Report, 2015) ch 5 <<https://www.judicialcollege.vic.edu.au/eManuals/SIM/53962.htm>>, citing Steven I Friedland, 'On Common Sense and the Evaluation of Witness Credibility' (1989) 40(1) *Case Western Reserve Law Review* 63; Charles F Bond Jr. and Bella M DePaulo, 'Accuracy of Deception Judgments' (2006) 10(3) *Personality and Social Psychology Review* 214.

36 Judicial College of Victoria, *Serious Injury Manual* (Report, 2015) ch 5 <<https://www.judicialcollege.vic.edu.au/eManuals/SIM/53962.htm>>. New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) [3.15] <<https://www.lawreform.justice.nsw.gov.au>>.

37 *Ibid* [3.16].

38 National Federation of the Blind, National Federation of the Blind of Massachusetts and Disability Law Centre, 'The Right of Blind People to Serve on Juries Comes to the Court' [2019] *Braille Monitor* <<https://www.nfb.org/images/nfb/publications/bm/bm19/bm1909/bm190912.htm>>, citing D Nolan Kaiser, 'Juries, Blindness, and the Juror Function' (1984) 60(2) *Chicago Kent Law Review* 19; and Matthew J Crehan, 'Seating the Blind Juror' (1997) 81(3) *Judicature* 104.

6.28 This is corroborated by findings that ‘the face is the easiest ‘channel’ for a liar to control, while voice is the hardest’.⁴⁰

6.29 The NSWLRC ultimately concluded that:

The argument that an inability to observe demeanour should disqualify a blind or deaf person from jury service contains at least three assumptions; first, that demeanour always conveys information that aids in the interpretation of what has been consciously communicated; secondly, that the witness to another’s demeanour can interpret it accurately; and thirdly, that blind and deaf jurors are deprived of the opportunity of detecting demeanour ...⁴¹

While it can be important, the value of observable demeanour evidence, according to a substantial body of research, appears to have been overstated and, as such, accorded too much value as a tool for judging credibility ... Consequently it is an inappropriate determinant in the issue of eligibility for jury service.⁴²

Actual capacity limitations

6.30 There may be situations where a prospective juror is unable to perform their role because of the nature of evidence in a trial and their inability to adequately comprehend it, even with supports.

6.31 An example might be if a case turns upon identifying a voice in a phone call or on identifying a person from a photograph or CCTV. In *Latorre v The Queen*⁴³ the key piece of evidence was a voice mail message, and the jury was required to determine whether it was the applicant’s voice on the line. In such cases, the submission of voice evidence does not require expert testimony and it ‘ultimately fall[s] to be considered by the jury in the context of appropriate instructions by the judge.’⁴⁴ This principle applies to both visual and voice identification evidence.⁴⁵ It may not be possible in this situation for a person who is deaf to serve.

6.32 In the next chapter the Commission explores how these concerns can be addressed.

40 Peter McClellan, ‘Juries—Common Sense and the Truth’ in *Law and Order and the Jury System* (Conference Paper, New South Wales Crown Prosecutors Annual Conference, 25 March 2008) <<http://138.25.65.17/au/journals/NSWJSchol/2008/5.pdf>>; Jeremy Blumenthal, ‘A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence’ (1993) 72 *Nebraska Law Review* 1157.

41 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) [3.14] <<https://www.lawreform.justice.nsw.gov.au>>.

42 *Ibid* [3.15].

43 *Latorre v The Queen* [2012] VSCA 280; (2012) 226 A Crim R 319.

44 *Ibid* [70].

45 *Ibid* [144].

A system to make juries more inclusive

54 Changes to the Juries Act

62 Peremptory challenges and stand asides

7 A system to make juries more inclusive

- 7.1 Chapter 5 explored some of the reasons why reform to law and practice is necessary to enable people who are deaf, hard of hearing, blind or who have low vision to serve as jurors in Victoria. A jury should be representative of the community including those in the subject groups. The law should be modernised to reflect contemporary views about equal participation in civic life and to comply with human rights standards.
- 7.2 In this chapter we seek to identify changes in the legal system that may be necessary to enable people in the subject groups to serve while maintaining confidence in the administration of justice. Then in the following chapter we identify some of the support mechanisms that could be used in the suggested system as well as possible adjustments to the trial process.

Changes to the Juries Act

- 7.3 One approach to improving participation would be to model reforms on recent changes to legislation and practice in the Australian Capital Territory (ACT). A similar approach exists in the United Kingdom (UK) for jurors who need supports to serve during the trial. In the UK a juror cannot be assisted by a non-juror in the jury room.
- 7.4 The Commission seeks community views about whether the ACT approach would work in Victoria. Those laws are broader than the reforms contemplated in this review. The new laws have not yet been used to assist a person in the subject groups to serve on a jury in the ACT. They appear straightforward and practical and are well supported by the practices and procedures of the ACT Sheriff's office.¹
- 7.5 However, the Victorian jury system is considerably busier than that of the ACT. In the ACT, juries are only used in cases where a person is accused of a serious crime in the Supreme Court.² In the year 2018–2019, 323 criminal cases were finalised in the ACT Supreme Court.³ In contrast the Victorian County and Supreme Courts heard 599 jury trials in 2018 and 599 in 2019.⁴ Judges in Victoria are less likely to know as far in advance about the nature of their upcoming trials and there is a much greater variability in terms of the accessibility of courtrooms across the Victorian County and Supreme Courts.⁵ In contrast the ACT Supreme Court is located in a recently renovated building.⁶

1 ACT Courts and Tribunal, *Reasonable Support for Jurors Policy and Procedure* (Report, June 2018).

2 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) Appendix E <<https://www.lawreform.vic.gov.au>>.

3 Supreme Court of the Australian Capital Territory, *2018–19 Annual Review* (Report, 2019) 58 <https://courts.act.gov.au/__data/assets/pdf_file/0011/1509419/ACT-Supreme-Court-Annual-Review-2018-19.pdf>.

4 Information provided from Juries Commissioner to Victorian Law Reform Commission, 6 October 2020.

5 Ibid.

6 Supreme Court of the Australian Capital Territory, *2018–19 Annual Review* (Report, 2019) 103 <https://courts.act.gov.au/__data/assets/pdf_file/0011/1509419/ACT-Supreme-Court-Annual-Review-2018-19.pdf>.

Obligation to consider providing reasonable supports

- 7.6 In the ACT, if a person wishes to serve and it is identified that they cannot perform their role because of disability or insufficient understanding of English, the judge must:
- consider if support that would enable the person to properly discharge the duties of a juror can reasonably be given;
 - and if satisfied of that direct that support be provided.⁷
- 7.7 Section 16 of the ACT Act includes a non-exhaustive list of examples of the kinds of supports to be considered, such as an Auslan interpreter, an assistance animal, a disability aid or support person.⁸

Questions

- 3 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?
- 4 Is the ACT approach appropriate for Victoria?

Early notification about the need for supports

- 7.8 In the ACT, prospective jurors are asked to advise the court if they have a disability and require support to serve. The summons form states:
- If you have insufficient understanding of the English language and/or are suffering from a mental or physical disability and you wish to serve as a juror, please inform the Jury Management Unit immediately of your situation. Arrangements will then be made for the matter to be heard before a judge.⁹
- 7.9 This approach is consistent with the *Disability Access Bench Book* for Victorian courts, which states that 'court staff should contact a person with disability as early as possible to assess their requirements and provide them with the necessary information for the hearing'.¹⁰
- 7.10 England, Scotland, Canada and New Zealand have processes that allow people to identify their needs and to discuss this with the court (see Chapter 4 and Appendix B).
- 7.11 The Commission understands that people in the subject groups usually self-identify to Juries Victoria about their disability. If legislation is changed so that there is a presumption that reasonable supports should be provided, current practices may need to change to ensure that the court has information about disability and required supports early in the selection process.

Question

- 5 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?

7 *Juries Act 1967* (ACT) 16(2).

8 *Ibid* s 16(2).

9 ACT Courts and Tribunal, *Reasonable Support for Jurors Policy and Procedure* (Report, June 2018) [4.1].

10 Judicial College of Victoria, *Disability Access Bench Book* (2016) [4.4].

Assessing whether support is reasonable

7.12 In determining whether a support can reasonably be given, the ACT Act provides that the judge may consider:

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.¹¹

7.13 The Commission understands that the ACT Sheriff makes an initial assessment about the request for reasonable supports in the form of a recommendation that will be considered by the judge. If the recommendation of the Sheriff is not to provide supports, the matter will be listed for a hearing before the judge. The Sheriff will advise the prospective juror of their recommendation and the hearing date.¹² After consideration of reasonable supports the Judge has a discretionary power to discharge a juror:

If the judge is not satisfied that support that would enable the person to properly discharge the duties of a juror can reasonably be given, the judge may discharge that person from further attendance on the Supreme Court under that summons or appointment.¹³

7.14 In New Zealand, Section 16AA of the *Juries Act 1981* provides a mechanism for the judge to consider whether a person with disability is capable of acting effectively as a juror. This process occurs before the jury is constituted, through a hearing that 'must be heard in private' where the judge may 'conduct the hearing and consider such evidence he or she thinks fit'.¹⁴

7.15 In the UK, the *Juries Act 1974* section 9B provides that:

Where it appears to the appropriate officer, in the case of a person attending in pursuance of a summons under this Act, that on account of physical disability there is doubt as to his capacity to act effectively as a juror, the person may be brought before the judge.

7.16 The approach recommended by the NSWLRC was:

A person who is blind or deaf and whose name has been included on the supplementary jury roll should complete a form accompanying the notice from the Sheriff disclosing his or her disability. The person should either claim exemption or, if prepared to serve, nominate the facilities that would assist him or her in participating as a juror. If summoned, the Sheriff's Office would be responsible for ensuring, in conjunction with the court of trial, that reasonable adjustments could be made available. Forewarned of potential problems, the trial judge could deal with the capacity of the juror to serve in the particular trial in the presence of counsel and prior to commencing empanelment. Otherwise the usual position would apply unchanged, that is that the juror could be stood aside by consent, or the prospective juror could be challenged either peremptorily or for cause.¹⁵

11 *Juries Act 1967* (ACT) s 16(3).

12 ACT Courts and Tribunal, *Reasonable Support for Jurors Policy and Procedure* (Report, June 2018) 5–6.

13 Ibid.

14 *Juries Act 1981* (NZ) s 16AA(4).

15 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 58 <<https://www.lawreform.justice.nsw.gov.au>>.

- 7.17 An ‘assessment process’ does not apply to other prospective jurors who may not be able to perform their role. In that situation, judicial discretion and challenges are relied upon to remove the juror where appropriate. The need for an assessment of supports for prospective jurors in the subject groups arises because of the intersection between disability and the nature of evidence in a particular case. In some situations it may also not be practical, or might be disproportionately expensive to arrange supports. For example, it might not be reasonable to allow a deaf juror to serve on a lengthy trial with Auslan interpreters because it may extend the duration and cost of the trial. The Commission does not expect a judicial hearing will be needed in all cases, particularly where there is a presumption that reasonable support will be provided. In most cases we anticipate that supports could be arranged by Juries Victoria without the need for a hearing.

Questions

- 6 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?
- 7 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?
- 8 At what stage of the jury selection process should this assessment occur?
- 9 What role should the Juries Commissioner or Juries Victoria play in the assessment process? Should anyone else be involved?
- 10 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?
- 11 Should prospective jurors be questioned in open court, or in a private hearing?
- 12 Does the Juries Commissioner need any further powers to allow Juries Victoria to better channel a prospective juror into a more suitable jury pool?

Actual capacity limitations

- 7.18 Even where all the appropriate steps have been taken to provide supports, a prospective juror who is deaf, hard of hearing, blind or with low vision may not be suited to perform their duty due to the particularities of the case at hand. In trials where the jury is called upon to assess voice or visual identification evidence, it may not be appropriate to include a juror who is deaf or blind. The issue is not the practicality of providing supports but whether the provision of support would overcome the juror’s disability sufficiently to allow them to perceive and deliberate on the particular type of evidence likely to arise in that trial.
- 7.19 The Commission does not anticipate that this would occur very often, but it is an important consideration. We seek community feedback on ways to address capacity limitations even when reasonable supports are available. One option is for the judge to consider this issue when assessing the reasonableness of providing supports. The judge could be provided with a power to exclude a juror where the judge concludes that the juror will not be able to perform their role, having considered the nature of the trial, the

likely evidence, the supports and the abilities of the juror. In this situation, the juror could be returned to the jury pool and serve, with supports, in a different trial with different types of evidence.

- 7.20 The explanatory memorandum to the recent reforms in the ACT describes the operation of section 16, which:
- recognises the reality that it may not always be possible or reasonable to provide support to a person to serve as a juror. For example, a person with a hearing impairment may not be able to effectively perform the functions of a juror during a trial at which voice identification is expected to be an issue.¹⁶
- 7.21 By ensuring that any matters relating to the ability of a juror to perform their role are determined early, the chance of the parties using peremptory challenges or stand aside challenges later may be reduced.
- 7.22 The New South Wales Law Reform Commission (NSWLRC) recommended that:
- the Court should have power to stand aside a blind or deaf person summoned for jury duty if it appears to the Court that, notwithstanding the provision of reasonable adjustments, the person is unable to discharge the duties of a juror in the circumstances of the trial for which that person is summoned. This power should be exercisable on the Court's own motion or on application by the Sheriff.¹⁷
- 7.23 In England, when the matter of the capacity of a juror with a disability to serve is heard, the judge shall determine whether or not the person should act as a juror; but he shall affirm the summons unless he is of the opinion that the person will not, on account of his disability, be capable of acting effectively as a juror, in which case he shall discharge the summons.¹⁸

Other powers to discharge a juror

- 7.24 Judges have inherent common law powers and powers under the Act to exclude jurors who may not be able to properly perform their functions.¹⁹ These powers might be exercised where incapacity only arises when a jury is empanelled and the trial is underway. It does not appear that any changes are required to these general powers. The alternative approach might be for the judge to rely on these existing powers when determining actual capacity issues of people in the subject groups.

Questions

- 13 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?
- 14 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?
- 15 If a juror is excluded from a particular trial should they be returned to the jury pool to serve on a different trial?

16 Explanatory Memorandum, Courts and Other Legislation Amendment Bill 2018 (ACT) 25, 26; *Juries Act 1967* (ACT).
17 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 59 <<https://www.lawreform.justice.nsw.gov.au>>.

18 *Juries Act 1974* (UK) s 9B.

19 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) [3.231] <<https://www.lawreform.vic.gov.au>>; *Juries Act 2000* (Vic) ss 12, 32(3), 43.

Limiting the 13th person rule

- 7.25 The ACT has addressed concerns about a non-juror assisting in jury deliberations in a very straightforward way. Pursuant to section 16, if a judge makes a direction allowing an interpreter or support person, ‘the common law rule against having a non-juror in the jury room is not a relevant consideration’ and ‘a direction to allow a non-juror to be present during jury deliberations is solely for assisting the person to properly discharge the duties of a juror’.²⁰ The direction is ‘subject to an interpreter or support person making an oath or affirmation’.²¹
- 7.26 The oath and affirmation criteria are outlined in sections 45A, 45B and Schedule 1 of the ACT Act. There are separate oaths/affirmations for interpreters and support people. After the jury is sworn in, the judge is also responsible for ensuring jury members are aware of confidentiality duties per section 46A.
- 7.27 For example, the affirmation that an interpreter must take is outlined in the ACT Act:
- 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.²²
- 7.28 The Commission is keen to hear community views about whether the approach in the ACT is appropriate to enable support persons (including interpreters) to assist in the jury room in Victoria.
- 7.29 In Victoria, Sections 42 and 49 and Schedules 3 and 4 of the Act set out the oaths that must be taken by jurors and the jury keeper. It may be necessary to incorporate additional oaths for interpreters and support people included in trial proceedings and jury deliberations into the Act. Section 78 of the Act may also need to be changed to ensure jury deliberations are not published or disclosed.

Questions

- 16 Should the common law prohibition on supporters or interpreters assisting in the jury room be modified by legislation?
- 17 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?
- 18 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?
- 19 Should supporters or interpreters be required to complete additional training to assist in jury deliberations and trial proceedings? What should that be?

20 *Juries Act 1967* (ACT) s 16(4)(a), (b).
 21 *Ibid* s 16(4)(c).
 22 *Ibid* sch 1 Pt 1.1A.

Eligibility

- 7.30 Schedule 2 of the Act currently specifies that a person is ineligible to serve if they are 'unable to communicate in or understand the English language adequately'.²³ It is beyond the scope of this project to address the ineligibility of non-English speakers, and to accommodate them to serve where possible (which is the case in the ACT).²⁴
- 7.31 The English language requirement is a means of ensuring juror competence, since proceedings are conducted in English.²⁵ The Law Reform Commission of Western Australia (LRCWA) considered that the primary concern is that 'all jurors should be capable of understanding the evidence (and court proceedings) as well as be capable of discussing this evidence and their views with other jurors.'²⁶ A juror with an inability to understand or communicate in English may be incompetent in those respects.
- 7.32 That a deaf juror requires the assistance of an Auslan interpreter does not mean they are unable to read or understand English. In the NSWLRC discussion paper this was briefly considered, and it was noted that:
- it is arguable that the situation of a deaf juror relying on an Auslan interpreter but bilingual in Auslan and English, can be distinguished from that of other prospective non-English speaking jurors. Auslan is related to English; should the need arise to convey a precise phrase or sentence (such as a term of a contract) into English, this could be achieved by transliterating Auslan signs into English word order. Furthermore, the life experiences of Auslan speakers have been gleaned in an Australian context, aiding comprehension of evidence adduced at trial.²⁷
- 7.33 This point may need to be reflected in the Act, so that people who are deaf who require interpreters are not unnecessarily precluded because they do not 'speak' English. Since the English provision is primarily in place to ensure competence, if supports are available to render a person 'competent' to the task of a juror, the justification for the exclusion of people who are deaf on this ground is unwarranted.
- 7.34 Schedule 2 also has the effect of excluding Auslan speakers who are not bilingual, that is, they only communicate through Auslan, and do not have English language or literacy skills (or have poor English skills). Auslan has no written form. A non-bilingual deaf person may face particular limitations dealing with documentary evidence in a trial. Auslan speakers who do not comprehend spoken or written English share commonalities with other non-English speakers who are automatically ineligible for jury service.
- 7.35 One reform option may be to amend the Act so that it simply reads that a person is ineligible if they are 'unable to communicate in or understand English or Auslan'. Alternatively, the provision may be amended so that rather than excluding Auslan-only speakers, that person's participation could be assessed by the judge on a case-by-case basis. This would address the concern that a person who communicates in Auslan but cannot read or write English would be unable to serve on a trial that involves significant documentary evidence.

Question

20 Does Schedule 2 of the Juries Act need to be amended to accommodate people who use Auslan? What form should this amendment take?

²³ *Juries Act 2000* (Vic) sch 2 cl 3(f).

²⁴ *Juries Act 1967* (ACT) s 16.

²⁵ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors* (Report No 99, April 2010) 93; Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) 211.

²⁶ Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors* (Report No 99, April 2010) 93.

²⁷ New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Discussion Paper No 46, 2004) [3.34] <<https://www.lawreform.justice.nsw.gov.au>>.

The right to seek to be excused regardless of supports

- 7.36 If the Act is amended to provide for the assessment and provision of reasonable supports or accommodations, how should the law handle excuse from service? Should there also be a right to be excused on the basis of disability? Or should a person in the subject groups only be able to be excused on the same grounds as everyone else, on a case-by-case basis for good reason?
- 7.37 In previous reviews of this issue, disability organisations have expressed differing preferences.²⁸ On the whole, there was a consensus in report recommendations that people with disability may sometimes need to be excused on the basis of disability despite being otherwise eligible to serve with accommodations.²⁹ Reasons included:
- the late onset of hearing or vision loss may mean that the person has not come to terms with their disability nor with assistive technology
 - a person who is blind may feel that they are more vulnerable, less safe in the community and more apprehensive about participating in an unfamiliar process.³⁰
- 7.38 There was no consensus in earlier interstate law reform commission reports about how legislation should provide for excuse on the basis of disability:
- The NSWLRC in its report on deaf and blind jurors recommended that a person who is blind or deaf should be able to participate with supports but should also ‘have an *unqualified* right to be exempt from jury service’.³¹ In 2007, a second NSWLRC report, *Jury Selection*, recommended that disability should enable excusal for good cause (now reflected in the law in New South Wales).³² It was noted:

The preferable course is to treat it, on a case by case basis, as a potential ground for excuse for good cause, reserving to the authority that administers the Act the capacity to grant either a permanent excusal, or an excusal for a particular trial.³³
 - The QLRC considered that there should be no excusal ‘as of right’,³⁴ including for people with disability.³⁵ Claims should instead be considered on a case-by-case basis and addressed by reference to criteria associated with ‘hardship or inconvenience’.³⁶
 - In Western Australia it was also recommended that where a person is unable to serve because of a physical disability despite reasonable accommodation, there should be no need to make a separate application to be excused. Additionally, guidelines should be developed to ensure that reasonable accommodations are considered, and that decisions made around excusal and deferral follow a set process.³⁷

ACT legislation

- 7.39 In the ACT there is no specific exemption or excuse ‘as of right’ for people with disabilities in the *Juries Act 1967*. However, the Act provides under Section 11 that regulations can be made setting out individuals who ‘may claim an exemption’. The *Juries Regulation 2018* prescribes these categories and includes ‘a person with disability’ including ‘a person who is totally or partially blind, or totally or partially deaf’.³⁸

28 See, eg, New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) [4.5–4.7] <<https://www.lawreform.justice.nsw.gov.au>>; Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) [9.21–9.22].

29 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors* (Report No 99, April 2010) 117; New South Wales Law Reform Commission, *Jury Selection* (Final Report No 117, September 2007) [5.15] <<https://www.lawreform.justice.nsw.gov.au>>; New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) [4.7] <<https://www.lawreform.justice.nsw.gov.au>>.

30 New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) [4.6–4.7] <<https://www.lawreform.justice.nsw.gov.au>>.

31 *Ibid* [4.7].

32 *Juries Act 1977* (NSW) s 14A(b).

33 New South Wales Law Reform Commission, *Jury Selection* (Final Report No 117, September 2007) [5.16] <<https://www.lawreform.justice.nsw.gov.au>>.

34 Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) Recommendation 9.1.

35 *Ibid* [9.26].

36 *Ibid*.

37 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors* (Report No 99, April 2010) 117.

38 *Juries Regulation 2018* (ACT) R3.3, sch 1 table 1.4 item 8.

- 7.40 Section 14 of the ACT Act also provides generally that ‘if the judge or the sheriff is satisfied that a person summoned or appointed to attend to serve as a juror has shown sufficient reason to be excused, the judge or sheriff may at any time after the service of the summons or the appointment, excuse that person ...’ Non-exhaustive examples of ‘sufficient reasons’ are provided, including ‘pregnancy’, ‘illness’ and where ‘the person has care of children or of aged or ill people’.

International examples

- 7.41 Comparative international jurisdictions take differing approaches. In the United Kingdom there is no excusal ‘as of right’ for people with disabilities. Section 9 of the *Juries Act 1974* provides for open-ended ‘excusal for certain persons and discretionary excusal’ and states that:

If any person summoned under this Act shows to the satisfaction of the appropriate officer that there is good reason why he should be excused from attending in pursuance of the summons, the appropriate officer may ... excuse him from so attending.

Question

- 21 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?

Peremptory challenges and stand asides

- 7.42 The issue of peremptory challenges and stand asides negatively impacting the representativeness of juries was considered in the Commission’s report, *Jury Empanelment*. The Commission concluded that these challenges are necessary because they enhance parties’ confidence in the jury, and provide a safeguard in the event that other processes have failed to remove prospective jurors who are biased or who appear to be unwilling or unable to serve.³⁹ The Commission recommended reducing the number of challenges available to the parties from six to three in criminal cases, and from three to two in civil cases.⁴⁰
- 7.43 These changes were implemented in Victoria in 2017.⁴¹ The effect of the changes on the representativeness of the jury is unknown at the time of writing.
- 7.44 If the law is changed to allow people to serve with reasonable supports, there is a risk that a prospective juror in the subject groups may be removed by the parties through challenges late in the selection process. This risk applies to all prospective jurors. However, if challenges are made solely on the basis of disability it would undermine the effectiveness of reform. The Commission is keen to hear community views about whether this is likely to be a problem and if so, whether anything can be done to reduce the likelihood of it.

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Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) [3.243] <<https://www.lawreform.vic.gov.au>>.
Ibid [3.270].
Justice Legislation Amendment (Court Security, Juries and Other Matters) Act 2017 (Vic).

Peremptory challenges

7.45 It may be difficult and inappropriate to introduce guidelines that seek to moderate how the parties exercise their peremptory challenges. Peremptory challenges, by definition, do not require explanation and it would be difficult and time consuming to prove that a challenge had been exercised on a discriminatory basis.⁴²

7.46 In the United States, cases have established that it is unacceptable for counsel to challenge jurors based purely on gender or race.⁴³ For example, in *Batson v Kentucky* a ruling was overturned as unconstitutional where the prosecutor used challenges to prevent black jurors serving on a case involving a black defendant.⁴⁴ However, as Horan and Goodman-Delahunty observe:

the United States approach redresses inappropriate bias in the peremptory challenge process but it is difficult to monitor because the parties will ensure that they justify their challenges with reasons unrelated to racism, sexism or other forms of prejudice.⁴⁵

7.47 The Commission is interested to hear views about whether introducing guidelines for defence lawyers would help to reduce the likelihood that peremptory challenges may be used on discriminatory grounds. While they would not bind the defendant, who ultimately may exercise their right on whatever grounds they choose, they may operate as an educative tool for the Bar and thus a means of discouraging discriminatory approaches generally. The guidelines might be supported by the court stating something like:

You have a right to challenge to ensure that the jury will act impartially. All jurors are summoned and required to serve. The Court will facilitate the provision of supports if needed. Nothing in the law says that a person's disability, age, gender or race will prevent them from fulfilling their role. You should exercise your right on the basis of the likelihood the prospective juror will act impartially in your trial.

7.48 This would serve to discourage the use of peremptory challenges on a discriminatory basis.

Questions

- 22 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?
- 23 Should there be guidelines for the Victorian Bar outlining that challenges should not be used on discriminatory grounds including on the basis of disability?
- 24 Should the judge make a statement discouraging the use of challenges on discriminatory grounds?

42 Victorian Law Reform Commission, *Jury Empanelment* (Report No 27, May 2014) [2.36] <<https://www.lawreform.vic.gov.au>>.

43 *Batson v Kentucky*, 476 US 79 (1986); *JEB v Alabama ex rel*, TB 511 US 127 (1994).

44 *Batson v Kentucky*, 476 US 79 (1986).

45 Jacqui Horan and Jane Goodman-Delahunty, 'Challenging the Peremptory Challenge System in Australia' (2010) 34(3) *Criminal Law Journal* 167, 180.

Stand aside challenges

- 7.49 In its report *Jury Empanelment* the Commission concluded that the Crown right to stand aside jurors in criminal trials should be retained, as it is an important safeguard to ensure a competent and impartial jury.⁴⁶
- 7.50 Stand aside challenges are less likely to be exercised arbitrarily, however there may be a need to amend prosecutorial guidelines in Victoria to explicitly disallow the use of stand aside challenges to exclude jurors on the basis of disability.
- 7.51 As noted earlier, the Victorian Office of Public Prosecution Guidelines state:
- The Crown must never use its power to stand aside on the basis of factors such as age, sex, occupation, ethnic origin, religion, marital status or economic, cultural or social background.⁴⁷

Question

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

Possible supports to enable inclusive juries

- 66** People who are deaf or hard of hearing
- 70** People who are blind or have low vision
- 73** Court familiarisation
- 73** Guidelines for new laws
- 74** Court room layout
- 74** Trial adjustments
- 75** Costs

8 Possible supports to enable inclusive juries

- 8.1 This chapter provides an overview of current supports that may assist people in the subject groups to serve on juries in Victoria. We seek community feedback on what supports would best help people to serve and how to make the delivery of those supports tailored to individual needs.
- 8.2 Australian courts already offer a range of supports for court users with hearing and vision disabilities, such as witnesses and parties. The *Victorian Disability Access Bench Book*, designed for all judicial officers in all Victorian courts and tribunals, provides guidance on the kinds of adjustments that may be required.¹ The courts routinely provide accessible materials, interpreters and hearing aids.
- 8.3 Some existing supports might need to be expanded to encompass the needs of jurors who are deaf, hard of hearing, blind or who have low vision. Advances in technology have led to a proliferation of accessibility tools for people who are blind, have low vision, are deaf, or hearing impaired. The pace and sophistication of technological change means that new and emerging supports may eventually become integrated into the court system as well.

People who are deaf or hard of hearing

Supports currently offered by Australian courts

- 8.4 People who are deaf or hard of hearing may currently use hearing loops, Auslan interpreters, support people, and captioning systems to participate in Victorian court proceedings.

Auslan interpreters

- 8.5 Australian Sign Language (Auslan) enables deaf and hard of hearing people to communicate and participate in society. Auslan is a visual form of language that uses hand, arm and body movements to convey meaning.²
- 8.6 The Commission understands that in the court context Auslan interpreters generally work in pairs in approximately 20-minute shifts. This would mean that two interpreters might need to assist in trials and deliberations, making it 14 (not 13) people in the jury room. If a trial was expected to be lengthy, a third interpreter might be needed to reduce the burden on the interpreters.

¹ Judicial College of Victoria, *Disability Access Bench Book* (2016) [1.2].

² National Disability Practitioners, *AUSLAN: What You Need to Know* (NDP Factsheet, August 2015) <http://www.ndp.org.au/images/factsheets/NDP_Factsheet04.pdf>.

Certification and training

- 8.7 Auslan interpreters are regulated by the National Accreditation Authority for Translators and Interpreters (NAATI).³ The three levels of NAATI proficiency are:
- entry level Certified Provisional Interpreter
 - Certified Interpreter
 - Certified Conference Interpreter.
- 8.8 The Victorian Government Policy on Interpreters requires legal interpreters to have a minimum qualification level of Certified Interpreter. They must have completed three years of work experience and undergo professional development training.⁴
- 8.9 When working in courtrooms, Auslan interpreters are required to abide by the Australian Sign Language Interpreters Association Code of Ethics (ASLIA).⁵ All sign language interpreters are also bound by the Legal Interpreting Policy.⁶ Both documents require accredited sign language interpreters to remain impartial during proceedings, not to contribute their opinions or ideas in any way and maintain strict confidentiality.⁷
- 8.10 There are currently 125 Certified Provisional Auslan Interpreters, 56 Certified Auslan Interpreters and one Certified Conference Auslan Interpreter in Victoria.⁸ Only a small pool of these interpreters do legal work. Expression Australia is one of three Victorian-based Auslan providers. It has advised the Commission that of 70 interpreters working in the legal setting (court, tribunal, other legal) through its service, 20 interpreters do 75 per cent of the work with not all requests able to be filled.⁹
- 8.11 During 2018–2020, Expression Australia recorded 1071 bookings for Auslan interpreters to work in legal settings. This contrasts with 1500 bookings per month for overall bookings.¹⁰
- 8.12 Because interpreters work in courtrooms across Victoria, metropolitan interpreters will generally travel to regional Victoria to conduct regional court work.
- 8.13 Usually, the court places a booking on behalf of a party who is deaf involved in a legal proceeding. Indicative costs from one service provider for two court interpreters working in tandem for two hours is \$440.00; a half day is \$880.00; and a full day is \$1760.00.¹¹ For multi-day court cases, additional interpreters may be required to keep interpreter consistency and ensure subject matter knowledge for the duration of the case.¹² Preparation and briefing time costs may be included for longer, more complex cases. Additional travel payments apply for non-metropolitan areas, and full costs are incurred if bookings are cancelled within 48 hours.¹³
- 8.14 The Victorian Government's guidelines specify that all government departments and funded agencies are responsible for ensuring that an interpreter will be provided and that the service is provided at no cost to the client.¹⁴
- 8.15 Furthermore, the *Victorian Disability Access Bench Book* states that in criminal proceedings an accused is entitled without discrimination to have free assistance of an

3 'Diploma of Auslan PSP51018', *Melbourne Polytechnic* (Web Page) <<https://www.melbournepolytechnic.edu.au/study/diploma/auslan/>>; 'Diploma of Interpreting (LOTE-English) PSP50916', *RMIT University* (Web Page, 2020) <<https://www.rmit.edu.au/study-with-us/levels-of-study/vocational-study/diplomas/diploma-of-interpreting-loteenglish-c5364>>.

4 'Auslan Pathways', *NAATI* (Web Page) <<https://www.naati.com.au/information-guides/certification-pathways/auslan-pathways/>>.

5 ASLIA, *Code of Ethics and Guidelines for Professional Conduct* (Report, 2007) <<https://aslia.com.au/wp-content/uploads/ASLIA-Code-of-Ethics.pdf>>.

6 ASLIA, *Legal Interpreting Policy* (Report, 2019) <<https://aslia.com.au/wp-content/uploads/Legal-Interpreting-Policy.pdf>>.

7 Ibid 2 [3].

8 Information provided from NAATI to Victorian Law Reform Commission, 28 September 2020.

9 Information provided from Expression Australia to Victorian Law Reform Commission, 28 September 2020.

10 Ibid.

11 Information provided from Expression Australia to Victorian Law Reform Commission, 20 October 2020.

12 Ibid.

13 Ibid.

14 Department of Premier and Cabinet (Vic), *Using Interpreting Services—Victorian Government Guidelines on Policy and Procedures* (Report, August 2019) 19 <<https://www.vic.gov.au/guidelines-using-interpreting-services>>.

interpreter if they cannot understand or speak English.¹⁵

Logistics of arranging Auslan interpreters

- 8.16 The nature of the jury selection process raises logistical problems with the booking of Auslan interpreters for jury service. One of the issues is that the selection process is unpredictable. It is impossible to say with certainty that a juror needing supports will be selected for a particular trial. The selection process commences with random selection from the electoral roll. The panel is selected by random ballot and the prospective juror may ultimately be challenged off the jury very late in the selection process.
- 8.17 In this situation it might be necessary to have an Auslan interpreter assist a prospective juror through the empanelment process as well as being able to call on multiple interpreters to assist in a trial. The likely duration of a trial may be unknown until a person is balloted on a particular panel on the day. It is therefore very difficult to know how long an interpreter will be needed. The small number of available interpreters who work in legal settings in Victoria also make it difficult to call on interpreters for a trial at short notice.
- 8.18 The Commission is keen to hear community views about how these logistical issues could be managed and Auslan interpreters booked in advance.

Hearing loops

- 8.19 Hearing loops are used by Australian courts including the County Court and Supreme Court in Victoria, as well as in courts in the UK, Ireland, New Zealand and the United States. However not all Victorian courtrooms are equipped with hearing loops. The *Disability Access Bench Book* notes that where hearing loops are not in place, 'judicial officers should consider whether a different courtroom is required'.¹⁶
- 8.20 Hearing loops enable people who wear hearing aids to hear more clearly by taking a sound source and transferring it directly into a hearing aid without background noise interference or distortion.¹⁷
- 8.21 Not all hearing aids will be compatible with all hearing loops. There are sometimes mismatches between the hearing aid and the hearing loop technology.

Communication Access Real Time Translation (CART)

- 8.22 Communication Access Real Time Translation (CART) is used by the Family Court of Australia and the Federal Court of Australia¹⁸ as well as by courts in the UK and some states of the United States. CART is a system run by specialised CART writers, stenographers and court reporters to transcribe and translate spoken words and sounds into text, in real time, on a big screen, phone, laptop or mobile device. Software is utilised by operators to translate speech to text. CART can be combined with an audio component (such as hearing loops).¹⁹
- 8.23 In the jury context it would be necessary to arrange for stenographers and court reporters to assist a deaf juror in advance of the jury selection process and trial.

Special materials and formats of evidence

- 8.24 It may be necessary to provide supplementary written materials or transcripts to jurors who are deaf or hard of hearing.

15 Judicial College of Victoria, *Disability Access Bench Book* (2016) ch 5.9; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(2) (i).

16 Judicial College of Victoria, *Disability Access Bench Book* (2016) [4.4].

17 'All About Induction Loops', *Ampetronic* (Web Page) <<https://www.ampetronic.com/wp-content/uploads/2018/03/UP30072-2-All-about-induction-loops.pdf>>.

18 'Service Charter for the Family Court of Australia and the Federal Court of Australia', *Family Court* (Web Page) <http://www.familycourt.gov.au/wps/wcm/connect/a9c09b4b-1e3c-41b6-85b2-2ea26995467ef/ServiceCharter_0313V1.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=a9c09b4b-1e3c-41b6-85b2-2ea26995467ef>.

19 'Captioning and CART', *Hearing Loss Association of America* (Web Page) <<https://www.hearingloss.org/hearing-help/technology/cartcaptioning/>>.

Other technological supports: current and emerging

- 8.25 As Artificial Intelligence (AI) technology becomes more sophisticated, technologies designed to ‘translate’ speech into text, or speech into Auslan, and vice versa, are developing. These are not necessarily appropriate in their current form, but may indicate future directions for available supports.

Automated speech recognition

- 8.26 Certain apps can transcribe speech from multiple individuals onto a screen in close to real time by connecting to several devices with the app downloaded and microphones turned on. Automated speech recognition is used to assign text for each person in the group through colour coding.²⁰ These apps also add punctuation to speech.²¹ Alternatively, designated speakers may talk into a Bluetooth microphone, from some distance away, and still picked up by the user’s smartphone or device.²² Google Live Transcribe is a recently launched app of this kind. It is compatible with many devices and has sophisticated features including indicating the volume of speech as compared to background noise.²³

Sign language translators

- 8.27 Sign language translators are emerging AI systems designed to ‘translate’ sign language to spoken English. These technologies generally utilise gloves to capture signs, and/or cameras and sensors to pick up on movement and facial expressions, then convert this to speech or written English.²⁴ For example, the Signall system is a European development that involves a deaf user signing towards the camera, which is translated through AI, while a hearing user speaks and their speech is picked up by voice recognition, and translated into text.²⁵ However, members of the deaf community have noted that similar apps do not ‘translate’ ASL, rather they ‘merely recognise hand signals and turn them into an English word per sign’.²⁶

Lipreading devices

- 8.28 Many people who are deaf or hard of hearing use lipreading as a tool to understand speech. Lipreading devices use a camera to capture the lips of a speaker, via a headset worn by the speaker, so that an individual can gain a closer view.²⁷ AI is currently being developed to enable automated recognition of speech through machine learning of lip movements. In the future this could be developed into a device carried by a hearing impaired person to capture and translate speech via automated lip reading.²⁸

20 Larry Medwetzky, ‘Mobile Device Apps for People with Hearing Loss’ (2015) (September/October) *Hearing Loss Magazine* 26, 27.
 21 ‘Best Live Captions for All Conversations’, AVA (Web Page, 2020) <<https://www.ava.me/>>.
 22 Larry Medwetzky, ‘Mobile Device Apps for People with Hearing Loss’ (2015) (September/October) *Hearing Loss Magazine* 26, 27.
 23 Sagar Savla, ‘Real-Time Continuous Transcription with Live Transcribe’, *Google AI Blog* (Web Page) <<http://ai.googleblog.com/2019/02/real-time-continuous-transcription-with.html>>.
 24 ‘First System to Automatically Translate Sign Language’, *European Commission Cordis* (Web Page) <<https://cordis.europa.eu/article/id/411590-first-system-to-automatically-translate-sign-language>>.
 25 ‘Home’, *SignAll* (Web Page) <<https://www.signall.us/>>.
 26 Emily Matchar, ‘Sign Language Translating Devices Are Cool. But Are They Useful?’, *Smithsonian Magazine (online)*, (26 February 2019) <<https://www.smithsonianmag.com/innovation/sign-language-translators-are-cool-but-are-they-useful-180971535/>>.
 27 ‘Audisee’, *AbleData* (Web Page) </product/audisee>.
 28 Matthew Hutson, ‘Lip-Reading Artificial Intelligence Could Help the Deaf—or Spies’, *Science AAAS* (Web Page, 31 July 2018) <<https://www.sciencemag.org/news/2018/07/lip-reading-artificial-intelligence-could-help-deaf-or-spies>>.

People who are blind or have low vision

Special materials and format of evidence

- 8.29 It may be necessary to provide written materials in audio form, through tools discussed below. Documents may also be required in a larger font, in plain typeface with spacing between the words, or printed on a tinted paper.²⁹ Where a person wishes to use their own reading enhancement software, documents should be provided in Word format.³⁰ Where documents are not available in any accessible formats, a support person may be required to explain and assist the juror.³¹

Reading assistance software

- 8.30 Screen reading programs translate the written text displayed on a screen for a voice synthesiser which then reproduces the text as speech.³² Popular screen readers include the Jaws Screen Reader, which speaks electronic or scanned material and can also create Braille output.³³ Another is Zoom Text which 'enlarges and enhances everything on [a] computer screen, echoes your typing and essential program activity, and automatically reads documents, web pages, email.'³⁴

Magnifiers

- 8.31 Magnifiers are used to enlarge the size of images such as print or pictures. Magnifiers can be non-electronic or electronic.³⁵
- 8.32 Electronic magnifiers come in many different varieties. Some have a camera system that displays a magnified image on a monitor. Others are hand-held and portable. Electronic magnifiers can also be mounted on eyeglasses.³⁶
- 8.33 CCTV magnifiers have a camera that is on a frame, displaying a magnified image on a monitor. Text and images can be magnified and the contrast can be altered to brighten images. Sometimes CCTV magnifiers include speech output so that a person can hear the text being read as it is displayed on the monitor.³⁷

Braille material

- 8.34 Braille material can be created through Braille embossers which print Braille output from a computer onto paper.³⁸ Braille embossers are accompanied by Braille translation software that can translate documents in word processing programs into Braille.³⁹
- 8.35 Electronic or refreshable Braille displays are a tactile device that can be connected to computers or smart devices through bluetooth. They enable the user to read the contents of a screen through braille. Braille displays electronically raise and lower different combinations of pins in braille cells, and the display changes continuously as the user moves their cursor around on the screen.⁴⁰

29 *Equal Treatment Bench Book* (Judicial College UK, 2018) 346.

30 *Ibid.*

31 Judicial College of Victoria, *Disability Access Bench Book* (2016) [7.4].

32 'Computer Screen Readers', *Vision Australia* (Web Page) <<https://www.visionaustralia.org/information/adaptive-technology/using-technology/computer-screen-readers/>>.

33 'JAWS', *Freedom Scientific* (Web Page) <<https://www.freedomscientific.com/Products/software/JAWS/>>.

34 'ZoomText Magnifier/Reader', *ZoomText* (Web Page) <<https://www.zoomtext.com/products/zoomtext-magnifierreader/>>.

35 'Magnifiers', *Vision Australia* (Web Page) <<https://www.visionaustralia.org/information/adaptive-technology/using-technology/magnifiers/>>.

36 'Guide to Buying Low Vision Magnifiers', *All About Vision* (Web Page) <<https://www.allaboutvision.com/buysmart/magnifiers.htm>>.

37 Brian Gerritsen, 'Electronic Magnifiers and Magnifying Systems', *VisionAware* (Web Page) <<https://visionaware.org/everyday-living/helpful-products/overview-of-low-vision-devices/electronic-magnifiers/>>.

38 'Braille', *Vision Australia* (Web Page) <<https://www.visionaustralia.org/information/adaptive-technology/using-technology/braille/>>.

39 *Ibid.*

40 'Library Guide: Blind/Visual Impairment: Common Assistive Technologies', *Illinois Library* (Web Page) <<https://guides.library.illinois.edu/c.php?g=526852&p=3602299>>.

Assistance animals and mobility canes

- 8.36 Blind jurors may also rely on mobility tools to assist them to participate in the empanelment process at Court.
- 8.37 The physical accessibility of courts across Victoria are variable.⁴¹ In Melbourne, the County Court building is relatively new and accessible. However, the Supreme Court building is less accessible and may require forward planning for those with mobility difficulties. County and Supreme Court registries and services aim to provide assistance to people with mobility needs, and can be contacted by telephone in advance.⁴²
- 8.38 An assistance animal or mobility cane may assist a prospective juror to navigate and feel comfortable in a courtroom, jury room and within the court building.
- 8.39 The *Disability Access Bench Book* states that where assistance animals accompany court users with disability, there will be a need to allow water and toilet breaks.⁴³
- 8.40 Under the *Equal Opportunity Act* in Victoria, it is against the law to discriminate against a person because they have an assistance dog.⁴⁴
- 8.41 Mobility canes can 'enable a person who is blind or has low vision to detect all obstacles and hazards within their path of travel' and can aid balance and provide physical support.⁴⁵ White identification canes indicate to others that a person has low vision.⁴⁶

Support person

- 8.42 A prospective juror who is blind or has low vision may also need the assistance of a support person to help them to serve.
- 8.43 A person with disability can be assisted and supported by a range of people in court proceedings in Victoria. Some of the types of support people mentioned in the *Disability Access Bench Book* include:
- emotional support person
 - independent communication support worker
 - communication assistant
 - Court Network volunteer to offer support and non-legal information to people appearing in court.⁴⁷

Audio describers

- 8.44 Audio Description offers people who are blind or have low vision an understanding of what is happening visually within different arts and entertainment mediums.⁴⁸ In Victoria, the key audio description organisation is Description Victoria. Audio describers work across theatre shows, exhibitions, documentary videos, films, fireworks displays and live art experiences in Victoria.⁴⁹

41 Information provided from Juries Commissioner to Victorian Law Reform Commission, 6 October 2020.

42 *I Need Help— County Court of Victoria* (Web Page) <<https://www.countycourt.vic.gov.au/going-court/self-represented-litigants/i-need-help>>; Supreme Court of Victoria, *Support Services* (Web Page) <<https://www.supremecourt.vic.gov.au/going-to-court/support-services>>.

43 Judicial College of Victoria, *Disability Access Bench Book* (2016) [4.4].

44 *Equal Opportunity Act 2010* (Vic) s 7. See also *Domestic Animals Act 1994* (Vic) s 7(4).

45 'Accessible Equipment', *Vision Australia* (Web Page) <<https://www.visionaustralia.org/information/living-independently/accessible-equipment>>.

46 Ibid.

47 Judicial College of Victoria, *Disability Access Bench Book* (2016) [5.6.1]–[5.6.2], [5.6.8].

48 Vision Australia, 'Audio Description Services', *What Is Audio Description* (Web Page) <<https://www.visionaustralia.org/community/events/audio-description-services>>.

49 Description Victoria Inc, *Description Victoria* (Web Page) <<https://descriptionvictoria.com.au/>>.

- 8.45 In December 2019 the Australian Government announced funding to the ABC and SBS to introduce audio description services for television after 30 years of advocacy.⁵⁰ Vision Australia has offers audio description services across the arts and entertainment industry.⁵¹
- 8.46 Audio describers are not currently used in courtrooms in Australia. In the United States, audio describers work in courtrooms across the country. For example, the *New Jersey Bench Manual on Jury Selection* provides that audio describers can be used to support people who are blind. They serve a similar role to readers, note takers or transcribers, and any such person takes an oath or affirmation prior to assisting during the legal proceeding.⁵²

Emerging technology

- 8.47 AI developments have resulted in more sophisticated descriptive applications for people who are blind or have low vision. 'Seeing AI' is a phone camera app that narrates the world around an individual in real time, describing people, text and objects.⁵³ Amongst other things, the app can speak text as it appears in front of the phone camera, including handwritten text, recognise friends (through facial recognition) and describe people in the vicinity, including their age, gender and perceived emotional status. It can recognise currency, describe colours and the scene around a person.⁵⁴ Users can tap their fingers on an image on a touch screen to hear a description of an object and spatial relationships around it.⁵⁵

Questions

- 26 What technologies/supports would assist people who are deaf, hard of hearing, blind or with low vision to serve as jurors?
- 27 What role could a support person play in assisting people who are blind or who have low vision in the court room and in the jury room? Who is likely to perform this role?
- 28 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?
- (a) How might a system respond to the unpredictability of the selection process?
- (b) How might a system respond to the small number of interpreters working in a legal setting?
- 29 How could supports be provided where courtrooms are not evenly accessible or equipped with aids?

50 Department of Infrastructure, Transport, Regional Development and Communications, Australian Government, *Accessible Television* (Web Page, 2019) <https://www.communications.gov.au/what-we-do/television/accessible_television>.

51 Vision Australia, 'Audio Description Services', *What Is Audio Description* (Web Page) <<https://www.visionaustralia.org/community/events/audio-description-services>>.

52 New Jersey Courts, *New Jersey Judiciary Bench Manual on Jury Selection* (Manual, 4 December 2014) 32.

53 'Evolutionary Technology for the Blind', *The Blind Guide* (Web Page) <<https://theblindguide.com/evolutionary-technology/>>.

54 'Seeing AI App from Microsoft', *Microsoft* (Web Page) <<https://www.microsoft.com/en-us/ai/seeing-ai>>.

55 Devin Coldewey, 'Blind Users Can Now Explore Photos by Touch with Microsoft's Seeing AI', *TechCrunch* (Web Page, 12 March 2019) <<https://techcrunch.com/2019/03/12/blind-users-can-now-explore-photos-by-touch-with-microsofts-seeing-ai/?guccounter=1>>.

Court familiarisation

- 8.48 The *Disability Access Bench Book* states that court users with disability should receive a tour of the court and facilities. In this regard 'judicial officers can have a role in familiarising individuals at the commencement of and during hearings.'⁵⁶
- 8.49 Early visits to the court, prior to jury empanelment, would allow jurors to make a self-assessment of the supports they may require, and inform court staff at a preliminary stage. This would also be an opportunity for a prospective juror to become familiar with the courtroom layout to avoid additional stress on the day. This process is routine in the United Kingdom, and the Commission is informed that it can also occur in the Australian Capital Territory.

Question

- 30 Should there be an option for a person who is deaf, hard of hearing, blind or with low vision to be 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?

Guidelines for new laws

- 8.50 The experiences of people who are blind or deaf in the jury system in the United States suggests that the information and assistance provided by the first point of contact with jury or court officials can have a significant impact on that person's participation, regardless of their rights at law.
- 8.51 The National Federation of the Blind (NFB) has critiqued ongoing 'de facto' exclusion of many people who are blind from juries in the United States. It has reported that blind jurors may be turned away by court officials who presume that they will not be selected.⁵⁷ These instances occur despite disability legislation and cases confirming the rights of blind jurors to serve on juries, and even the recognition of the ability of blind trial judges to preside over cases with visual evidence.⁵⁸
- 8.52 In the ACT, courts and tribunals have developed policy guidelines to accompany its reforms⁵⁹ setting out the procedures that all staff in the Sheriff's office will follow if a member of the jury pool identifies as requiring reasonable supports.⁶⁰

Question

- 31 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?

56 Judicial College of Victoria, *Disability Access Bench Book* (2016) [4.4].

57 National Federation of the Blind, 'The Right of Blind People to Serve on Juries Comes to the Court', *Braille Monitor* (online, October 2019) <<https://www.nfb.org/images/nfb/publications/bm/bm19/bm1909/bm190912.htm>>.

58 National Federation of the Blind, 'The Right of Blind People to Serve on Juries Comes to the Court', *Braille Monitor* (online, October 2019) <<https://www.nfb.org/images/nfb/publications/bm/bm19/bm1909/bm190912.htm>>, citing *People v Hayes*, 923 P 2d 221 (Colo App, 1995); *Galloway v Superior Court of the District of Columbia*, 816 F Supp 12 (DDC, 1993), 17.

59 ACT Courts and Tribunal, *Reasonable Support for Jurors Policy and Procedure* (Report, June 2018).

60 *Ibid* 2.

Court room layout

- 8.53 Adjustments may need to be made to the layout of the courtroom and the jury room.
- 8.54 During the mock trial study in New South Wales it was suggested that interpreters be positioned at the bar table, which would 'enable the deaf juror to successfully view the interpreters, advocates, witnesses and the accused in the one field of sight'.⁶¹
- 8.55 The lighting in the courtroom may need to be adjusted for people with low vision or to assist with lip-reading.⁶² Sometimes it may be necessary to move positions as the light changes,⁶³ or for a juror to be seated near the witness stand.⁶⁴ This accommodation may necessitate listings within appropriately configured courtrooms, which is a further logistical consideration.

Question

- 32 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?

Trial adjustments

- 8.56 The Commission is keen to obtain community feedback on what other trial adjustments might be needed to accommodate jurors who are deaf, hard of hearing, blind or have low vision. For example:
- meal and rest breaks
 - instructions from the judge about how the trial will run with supports
 - the provision of some instructions in written form or in other accessible formats.⁶⁵
- 8.57 The *Disability Access Bench Book* encourages judicial officers to 'ask the person what will work for them and continue checking in with them to ensure they can understand'.⁶⁶ The additional time required for these adjustments may be factored into considerations around the reasonableness of supports in light of the anticipated length of the trial.
- 8.58 Jury directions are instructions provided by the judge to the jury. Another adjustment that can be made is to provide the jury with 'integrated directions'.
- 8.59 Integrated directions are also known as 'question trails'.⁶⁷ The *Criminal Charge Book* outlines that judges may 'give directions in the form of factual questions that address the matters the jury must consider or be satisfied of in order to reach a verdict'.⁶⁸ Integrated directions are usually a factual question combined with another issue, such as directions on the evidence and how the evidence is to be assessed, or counsels' statements about how the parties have put their case in relation to the issues.⁶⁹

61 Sandra Hale et al, *Participation in the Administration of Justice: Deaf Citizens as Jurors* (Australian Research Council Linkage Project No 120200261, 2016) [4.2.4].

62 Judicial College of Victoria, *Disability Access Bench Book* (2016) [5.5.2].

63 *Equal Treatment Bench Book* (Judicial College UK, 2018).

64 New Zealand Ministry of Justice, 'Disability Support', *Jury Service* (Web Page, 28 January 2020) <<https://www.justice.govt.nz/courts/jury-service/disability-support/>>.

65 Judicial College of Victoria, *Disability Access Bench Book* (2016) [4.4]; *Equal Treatment Bench Book* (Judicial College UK, 2018) 346.

66 Judicial College of Victoria, *Disability Access Bench Book* (2016) [4.4].

67 *Quail v R* [2014] VSCA 336.

68 'Criminal Charge Book', *Judicial College of Victoria* (Online Manual, 2017) [3.9]; *Jury Directions Act 2015* (Vic) s 67(3).

69 *McKinn v The Queen* [2019] VSCA 114, [78]; *Jury Directions Act 2015* (Vic) [67].

- 8.60 The purpose of an integrated direction is to assist the jury to understand the issues of law and the legal consequences that can arise from interpreting evidence. Integrated jury directions in written form may be of practical benefit to jurors from the subject groups. Research suggests that integrated jury direction approaches are more effective for juror comprehension generally.⁷⁰
- 8.61 A judge may also give the jury more general information in the form of a written ‘jury guide’ which contains integrated directions, evidentiary directions and/or evidence considered pertinent to the trial.⁷¹ This is a judge’s summary to assist the jury to understand the relevant matters of law, consider questions that may be pertinent to the trial, or describe the possible verdicts at which they may properly arrive.⁷²
- 8.62 A further issue for consideration is whether the use of supports may need to be incorporated into the record of the trial. The Commission is interested in hearing views about what might be done to ensure that an appellate court has an accurate record of the trial in situations where the juror uses a different method of comprehension or is supported to serve. This is unlikely to be an issue where a supporter provides an oath to the court that they will ‘well and truly interpret the proceedings and jury deliberations’.

Questions

- 33 What trial adjustments might be needed to accommodate a juror using supports to serve?
- 34 What is the best way of informing the court and parties about the use of supports in the trial process? When should this occur?
- 35 How should jurors be informed about how a fellow juror’s supports will work?
- 36 Does the use of supports raise any questions about the accuracy of a trial record for appellate court consideration?

Costs

- 8.63 Reforming the law to make juries more inclusive, and instituting processes to accommodate people with disability, will inevitably involve costs. Both the Juries Commissioner and the courts will require funding to implement reforms to practices and procedures.
- 8.64 However, because of the small number of trials likely to be involved and the fact that large-scale changes are not recommended, it is unlikely to impact court resourcing significantly.
- 8.65 Victorian courts are already equipped to address the needs of witnesses, parties and lawyers with disability. Many costs related to the extension of these supports to jurors would supplement existing efforts while also serving to make the courts more accessible for the public at large.
- 8.66 It is recognised that costs may not be evenly distributed amongst courts and regions, as some courts are presently less well equipped or resourced to accommodate people who have a disability.

70 Benjamin Spivak, James RP Ogloff and Jonathan Clough, ‘Asking the Right Questions: Examining the Efficacy of Question Trails as a Method of Improving Lay Comprehension and Application of Legal Concepts’ (2019) 26(3) *Psychiatry, Psychology & Law* 441.
71 ‘Criminal Charge Book’, *Judicial College of Victoria* (Online Manual, 2017) [3.9].
72 *Criminal Procedure Act 2009* (Vic) s 223.

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- 8.67 Supporting blind and deaf jurors to serve may impact trial duration which could have cost implications.

Questions

- 37 What are the likely cost implications associated with reforming the law?
- 38 Do the cost considerations differ in regional areas?
- 39 How could supports be provided in the most cost-effective way?

Creating cultural change for inclusive juries

78 Disability awareness training for court staff

78 Disability awareness training for judges and lawyers

9 Creating cultural change for inclusive juries

- 9.1 Reforms of the kind being considered by the Commission would involve cultural change. Staff of the courts and the justice system more generally may require special training to enable them to accommodate and support people in the subject groups who serve on juries.

Disability awareness training for court staff

- 9.2 It will be important to deliver training to court staff to assist them to make reasonable adjustments for deaf or blind jurors and respectfully communicate with people with disabilities, as previous reports have recommended. The training should have a practical focus.¹
- 9.3 The Commission understands that disability awareness training has been provided in the court system and to Sheriff office staff in the Australian Capital Territory. The ACT Courts website states that on-line training is offered to all staff to raise cultural awareness and competency and assist in the transition to implement the recent legislative amendments to allow people with disabilities to be jurors.²

Disability awareness training for judges and lawyers

- 9.4 Academic research suggests that there is prejudice and concern in the legal profession about the competency of jurors assisted by Auslan interpreters, the levels of Auslan comprehension, the translatability of legal concepts from English to Auslan and the role the interpreter would play during the legal proceedings. After conducting the 2014 Mock Trial, the researchers noted that legal stakeholders had 'reservations about the cognitive and language skills of prospective deaf jurors' and reported that 'education should take place regarding the perceptions of hearing jurors who may think that deaf people are not as smart as people who can hear.'³ To encourage cultural change it may be important for lawyers, judges, court officers and Juries Victoria staff to have access to disability awareness training.

1 Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors* (Report No 99, April 2010); New South Wales Law Reform Commission, *Blind or Deaf Jurors* (Report No 114, September 2006) 61 <<https://www.lawreform.justice.nsw.gov.au>> Recommendation 4; Queensland Law Reform Commission, *A Review of Jury Selection* (Report No 68, 2011) 228 Recommendation 58.

2 ACT Department of Justice and Community Safety, 'ACT Courts', *For the Multicultural Community* (Web Page) <<https://courts.act.gov.au/coming-to-court/get-support/for-the-multicultural-community>>.

3 Sandra Hale et al, *Participation in the Administration of Justice: Deaf Citizens as Jurors* (Australian Research Council Linkage Project No 120200261, 2016) 20.

- 9.5 Disability awareness training could be provided to the legal profession in a range of ways. Educational seminars could be offered to judges by the Judicial College of Victoria. The Law Institute of Victoria or the Victorian Bar could provide ongoing professional development sessions to legal professionals in partnership with advocacy organisations or service delivery agencies.⁴ Similar training could be a component of mandatory Practical Legal Training prior to legal admission for young lawyers.

Questions

- 40 Would Disability Awareness Training for court and Juries Victoria staff be useful to ensure reform is effective?
- 41 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?
- 42 Is there anything further that you would like to tell us about what you think would improve the participation of people who are deaf, hard of hearing blind or who have low vision on juries in Victoria?

4 Law Institute of Victoria, 'Legal Compliance', *CPD Requirements* (Web Page) <<https://www.liv.asn.au/Professional-Practice/Compliance/CPD-Compliance/CPD-requirements---FAQs>>.