

Submission to the Department of Justice & Regulation

REVIEW OF EQUALITY & FAIRNESS IN JURY SELECTION

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INTRODUCTION

The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and those who work with them in the legal sector representing over 19,000 members.

This submission has been prepared by the LIV Criminal Law Section (the Section), which is comprised of over 2,500 members practising exclusively in criminal law. As such, comments made in this submission are limited to members' experience in jury trials within the criminal jurisdiction.

The Section has a long history of contributing to, shaping and developing effective criminal legislation, and has undertaken extensive advocacy on various law reform and policy issues.

The LIV welcomes this review and is grateful for the opportunity to provide the Department of Justice and Regulation (the Department) with a submission on the legislative reforms being considered regarding the jury selection and empanelment process, as outlined in the Discussion Paper: *Equality and Fairness in Jury Selection* (the Discussion Paper).

PROPOSED LEGISLATIVE REFORM

Criminal jury trials

The prime consideration when contemplating any legislative change to the criminal trial process is to ensure paramount protection of the fairness of the jury trial, and that is primarily a question of fairness to the accused.

Given the gravity of the matters to be decided by a criminal trial jury – most often guilt or innocence of offences for which the convicted person could be deprived of their liberty – the LIV submits that the evidence supporting a need for a change to the process must be clear and unambiguous.

Barriers to representation and participation for jurors with sensory disabilities

The LIV acknowledges that given the representative nature of juries and their important role in determining questions of fact in the justice system, persons with a sensory disability should not be discriminated against being able to serve on a Victorian jury. The LIV agrees that jury service should, in so far as possible, be accessible to the whole Victorian community.

In determining whether change is needed, the first question to consider is whether the current system prevents persons with a disability from serving on juries. The Discussion Paper suggests this is the case on page 3. The Appendix at the end of the Discussion Paper provides data for each state and territory, except Victoria, on the involvement of persons with a disability in jury service. NSW is the only state where it appears that persons with a disability are routinely refused by decision of the Sheriff. The situation in other states and territories varies, but the number of instances where jurors who are deaf or blind are summoned but seek exemption are significant.

The LIV submits that it would be helpful to collect data or evidence from those directly involved, on what is driving their decision not to participate. The commentary in the Discussion Paper suggests that disabled persons are either actively excluded or there is a passive systemic resistance to their involvement. Whether that is so, or whether there are other reasons for their exclusion, can only be determined by gathering relevant evidence.

If the evidence supports change, and that action must be taken to facilitate participation by persons with a disability in the jury, such action must not compromise the fairness of the criminal trial. The touchstone against which any change that must be measured is the requirement of a fair trial for the accused.

Mechanisms to support jurors with sensory disabilities

To ensure a fair trial and to enable full participation of jurors with sensory disabilities, jurors must be provided with the means of receiving or perceiving the evidence. The mechanisms, strategies and means for ensuring that the person with a disability is able to discharge their duty as a juror will depend on the nature of the disability, the type of evidence and the mode of its presentation or delivery. In considering the supports that may be required, the LIV notes there are a number of implementation issues that are likely to arise and will need to be addressed. Some measures may seem obvious, such as an Auslan signer for a deaf juror. However, some questions will arise, such as:

- Are multiple Auslan signers required? (i.e. one for the witness, and one for counsel?)
- Where should the signers be positioned?

In addition, technology will have a significant role to play in facilitating persons with a disability serving on a jury.

Such measures will involve additional costs to the Court. These measures may also increase the length of trials. If this occurs, costs for the parties – prosecution, legal aid and privately funded defendants – will increase. Ultimately, most of these costs will be borne by the community. Consequently, for people with a disability to participate effectively and to ensure a fair trial is preserved, the State must make substantial financial investment in the infrastructure and support processes for the Courts.

LIV members advise that it is conceivable that in some instances a party may wish to argue that due to the volume of a type of evidence or the delivery mode of particular evidence they, or the Court, should not incur additional expenses, including the cost of a longer trial arising from the use of alternate or augmented means of delivering the evidence. Time is the most expensive commodity in a trial. If it takes longer to run a trial, the costs increase dramatically:

*"On average, running a trial in an Australian superior Court is believed to cost about \$10,000 per day and an analysis of the Victorian Court systems in 2008 estimated that the facilities of a Supreme Court cost about \$645 per hour (a figure that does not include the prosecution's preparation costs or the accused's legal expenses)."*¹

Additionally, the way a party puts their case could potentially militate against participation of a disabled juror. A prosecution leading listening device recordings or telephone intercepts where reliance is placed upon nuances in tone and timing in the conversations, may argue that their case cannot be successfully signed via Auslan to a deaf juror; or in a case reliant on CCTV, that the vision cannot be adequately 'described' to a blind juror.²

¹ Flynn A. and Fitz-Gibbon K., "Weighing price of justice", *Sydney Morning Herald*, 11 March 2013 (<http://www.smh.com.au/national/weighing-price-of-justice-20130310-2ftyp.html>)

² Members of the LIV Criminal Law Section report that potentially, the whole matter of 'describing' the action depicted on the CCTV is problematic. The words to be used in description of activity seen on the CCTV could readily become the subject of dispute between parties to the litigation requiring argument and ruling by the Judge and thus creating potential points of appeal.

Specific legislative reform proposals

The LIV makes the following comments in relation to the specific proposed legislative changes under consideration, as outlined in 2.1.4 on page 12 of the Discussion Paper:

- *that people who are blind or deaf should be qualified to serve on juries, and not be prevented from doing so on the basis of that physical disability alone;*

The LIV agrees that the physical disability alone should not prevent participation to serve on juries.

- *that people who are blind or deaf should have the right to claim exemption from jury service;*

The LIV agrees with this proposal.

- *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;*

The LIV agrees with this proposal. The LIV also notes that the Judge will need to hear submissions and possibly argument on this matter. The Judge will not know the detail of how the parties propose to put their case. In order to determine the 'circumstances of the trial', the Judge will also need to determine whether the juror is able to discharge the duties of a juror.

- *that interpreters and stenographers allowed by the trial Judge to assist the deaf or blind juror should swear an oath faithfully to interpret or transcribe the proceedings or jury deliberations;*

The LIV agrees with this proposal.

- *that interpreters or stenographers allowed by the trial Judge to assist the deaf or blind juror should be permitted in the jury room during deliberations without breaching jury secrecy principles, so long as they are subject to and comply with requirements pertaining to the secrecy of jury deliberations;*

The LIV agrees with this proposal.

- *that offences be created in relation to the soliciting by third parties of interpreters or stenographers for the provision of information about the jury deliberations, and in relation to the disclosure of information by such interpreters or stenographers about the jury deliberations.*

The LIV agrees with this proposal.

Training for the legal profession

The LIV submits that to effectively address the need for appropriate training for the legal profession (as discussed in paragraph 2.1.5 on page 12 of the Discussion Paper), practitioners and Court staff must be aware of various disabilities and how to accommodate those disabilities in Court in an effective manner. Cohesive collaboration between the Judicial College of Victoria, the Courts and continuing professional education providers, such as the LIV, in the design of education/training programs is crucial to ensure consistency across the justice system. These programs must address both the nature of the disabilities as well as any professional obligations required for individual practitioners and specific organisations.

Peremptory challenges

LIV members report that in criminal trials, peremptory challenges are legitimately made and therefore important. Necessarily, peremptory challenges are made on the basis of very little information. Part of the only information available to legal practitioners is the appearance of the jury panel members and their behaviour during empanelment, together with their occupations. The use of peremptory challenges in this situation will always have the potential to be seen as arbitrary. There may be perceptions created that challenges are being exercised on the basis of ethnicity or certain occupation groups.

Jurors' perceptions of the process could be improved by providing them with more information and education about the fact that the use of challenges is designed to give the accused person some agency in the trial, and the sense that the jury selected will judge him or her fairly and without prejudice.

LIV members report that currently, peremptory challenges validly used by practitioners which are based on the appearance and behaviour of jury panel members provide the most regular basis for challenges in practice. Instructing solicitors observe prospective jury panel members as they enter the courtroom; as they listen to the arraignment and preliminary remarks from the Judge; and as panel members seek to be excused.

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

At other times, panel members have burst into tears, hyperventilated during the arraignment, yet still did not seek to be excused. At other times, jury panel members are inattentive or distracted, or conversing with their peers. Peremptory challenges are also frequently used where a jury panel member has sought to be excused from jury service but has been required to serve by the Judge. This can occur in a setting where the panel member has revealed a reason for wanting to be excused that might leave the juror feeling resentful, distracted or inattentive. All of these circumstances will legitimately give rise to a peremptory challenge.

The LIV notes that in Victoria, the number of peremptory challenges available in criminal proceedings has been reduced substantially over time, from fifteen in 1890 to six in 1993. The most recent reductions were justified on the basis that they would 'produce significant savings in the administration of the jury system'. These reductions were further justified on grounds that challenges, particularly where multiple accused are involved, could 'lead to distortions in the representative nature of the jury'.³

The LIV submits that further reducing the number to three peremptory challenges per jury panel in a criminal trial is unfounded. There is no evidence to suggest that reducing the number of challenges will improve a jury panel member's state of mind about the process and the basis upon which challenges are exercised. To remove the additional challenges may actually place at risk the proper conduct of fair trials; an outcome that has far greater potential to bring the jury system into disrepute than the occasionally misunderstood exercise of peremptory challenges.

The Discussion Paper acknowledges that the matter of impartiality, along with representativeness of the community is one of the key goals and benefits of jury trials. The LIV submits that peremptory challenges are one of the only tools the accused has to ensure they receive an impartial jury.

Calling of the panel by number

The LIV notes that Victoria is the only jurisdiction in Australia which enables the court to determine whether to identify prospective jurors in Court by name or number without providing any criteria to guide the Court's decision.

The LIV submits that the *status quo* and judicial discretion should be retained 'if the Court considers that the names on a panel should not be read out in open Court'.⁴

CONCLUSION

The LIV's comments aim to provide constructive feedback and points for further consideration regarding the proposed reform of the jury selection and empanelment process. We commend the Department for seeking stakeholder consultation in relation to these reforms.

The LIV would appreciate the opportunity to participate in any ongoing work proposed by the Department in addressing these issues.

³ VLRC Jury Empanelment Consultation Paper (2013) pg 18

⁴ *Juries Act 2000* (Vic) s 31(3)