

28 May 2020

Ms. Joanne Stampalia
Executive Director
Court and Tribunal Services
Department of Justice
GPO Box F317
PERTH WA 6841

Email: elisha.lafontaine@justice.wa.gov.au

Dear Joanne

PARTICIPATION OF PEOPLE WITH A DISABILITY IN JURY SERVICE

Community Legal WA (**CLWA**) welcomes the opportunity to provide a response to the Discussion Paper issued by the Department of Justice (WA) and other key stakeholders (**Discussion Paper**) in relation to the above.

About Community Legal WA

Community Legal WA is the peak body for Community Legal Centres in WA (**CLCs**). Located throughout the state, Community Legal Centres (**CLCs**) are independent, non-profit organisations which provide legal services to disadvantaged and vulnerable people or those on low incomes who are ineligible for legal aid.

Our member CLC's include those that are specialist and relate specifically to the needs of specified client cohorts, including people with disabilities; this within a framework of organisations that are:

- specialist, and relate to particular areas of law (including the law in relation to persons with disabilities and Australians from Culturally and Linguistically Diverse (CALD) backgrounds);
- generalist, servicing areas of the Perth metropolitan region, or regional WA; and
- Aboriginal Community controlled and managed.

CLWA's vision is one of a strong, connected and influential community sector seeking to achieve social justice. In advancing a fair and just legal system we are committed to equality of access to justice for all. This includes promotion of our jury system as representative of all members of the community, with no discrimination against any cohort through denial of participation in jury trials beyond the summons stage.

Participation in court proceedings should be open to those with hearing loss or partial hearing loss. It should also in our view be open to the wider community of persons with disabilities, so long as those persons have the mental faculties to understand the language and processes involved in carrying out jury duty, and can do so adequately if provided with appropriate assistance. If this can be reasonably accommodated, then they should be provided with that assistance.



We note particularly the reference by Deaf Australia to the Australian research¹ which provides evidence that deaf people can indeed participate effectively in jury deliberations, and that the legal profession supports generally the principle that deaf people should serve as jurors.

Other submissions

CLWA has no hesitation in endorsing the submissions of the following organisations:

- Sussex Street Community Law Service Inc. (**SSCLS**); and
- Deaf Australia Inc. (**Deaf Australia**).

SSCLS is a member of CLWA. We support their important work in the field of access to justice for persons with disabilities through their Individual Disability Advocacy Service, and recognise their expertise in this respect.

Deaf Australia we recognise as an expert in the field of hearing loss and partial hearing loss. We note the excellent advocacy by both organisations that has given rise to consideration of amendments to the current situation.

We support the case presented by both SSCLS and Deaf Australia in relation to the terms of the United Nations Convention on the Rights of Persons with Disabilities² (**UNCRPD**) to which Australia is a signatory. We agree that the UNCRPD creates an obligation to enable participation in jury duty by persons with a disability, and for all reasonable steps to be taken to accommodate a person's needs in this respect.

Proposal in the Discussion Paper

As dedicated advocates for all forms of social inclusion, CLWA applauds the Attorney General for his initiative in helping to ensure that persons with a hearing loss or partial hearing loss should be able to participate in jury trials, and for recognising the discriminatory effect of their not being able to do so.

Juries are an integral part of the judicial system in WA. It is perhaps useful to revisit the importance of juries outlined by former ACT justice Xavier Connor QC³:

- The twelve jurors chosen at random are likely to represent community views and values in a way that a single judge does not.
- Trial by jury is democratic in that the community participates in a vital way before people accused of serious crime can be convicted.

¹ Napier, Hale, Spencer, San Roque, Russell, Lim, Shearim and Martinex: "Changing the International Justice Landscape: Perspectives on Deaf Citizenship and Jury Service" (May 2019)

²[United Nations Convention on the Rights of Persons with Disabilities](#)

³ See Graham Fricke Law and Bills Digest Group: [Research Paper 11 1996-97](#) (Parliament of Australia Website) chapter on "History and Importance of Trial by Jury in a Democratic Society."

- Juries, because they do not give reasons for their decisions, can bring the conscience of the community to bear on issues in a trial in a way that a judge cannot do.
- The community participation in the administration of criminal justice, by way of jury service, promotes an understanding of the system and confidence in it in a way that no other system does.
- Trial by jury is and is seen to be a system better adapted than any other to preserving the liberty of the subject against oppression by the State.

Recognising that juries “facilitate the democratic participation of the community in the administration of justice”⁴ we draw attention to the observations of the Law Reform Commission in 2014 in recognising that there are “longstanding concerns that, in practice, persons with disability are prevented from serving on juries in Australia without sufficient reason.”⁵ The Commission goes on to sum up the unfairness of this as follows:

*The exclusion of people with disability from jury service means that juries are not composed of the full diversity of the Australian community. This means that the experience of disability is not available to the jury for consideration during trials, and defendants with disability cannot face a trial by peers.*⁶

Indeed, every jury member brings with them a unique set of experiences that provide in total for a balanced determination. We note the advantages that members of certain cohorts can bring to juries in terms of unique perspective and skills that may be invaluable to the pursuit of justice - for instance, the example given by Deaf Australia that deaf persons can sometimes pick up nuances and subtleties that others do not.

We note that “one in six Australians currently suffer from hearing loss. This number is expected to rise to one in four by 2050, thanks to an ageing population and an increasing amount of people being exposed to dangerously loud noise”.⁷ Exclusion of this cohort from the jury process amounts to potential exclusion of a substantial section of the community.

Questions in the Discussion Paper

1. Is the current legislation appropriate for people with a disability?

No. Whilst less draconian than that in some other states, the WA legislation still does not adequately facilitate the inclusion of people with a disability, including those with forms of hearing loss.

We have nothing to add to the reasons put forward by SSCLS in this regard.

⁴ *Supra*

⁵ See Equality, Capacity and Disability in Commonwealth Laws (ALRC Report 124: 18.09.2014) re [Jury Service](#)

⁶ *Supra* at 7.205

⁷ See Connect Hearing: [Hearing Loss, Facts and Figures, Australia and Beyond.](#)

2. Do you believe that the legislation should be amended to accommodate people with a specific disability (such as partial or complete hearing loss)?

Yes. Further, we support the proposition that persons representative of all cohorts of people with disabilities should be included in consideration for jury participation, in accordance with the views of the Australian Law Reform Commission.⁸ We do not support any notion that one cohort of persons with a disability should be able to participate yet another may not.

In 2018 there were an estimated 4.4 million people or roughly 18% of the Australian population with some level of disability.⁹ This represents a substantial portion of the population in each State and Territory, resulting potentially in a substantial miscarriage of justice if persons with disabilities are not eligible for jury duty.

We would support Deaf Australia's submission regarding imposition of a caveat only on those who "do not have the mental faculties to understand the language and processes involved in carrying out jury duty."¹⁰ The numbered items in Recommendation 7-12 of the Law Reform Commission Report¹¹ perhaps illustrate this requirement. Such considerations will always be part of the requirements for a fair trial and need to avoid potential appeals in this respect. Any decision under any new equivalent of s.16(2) of the ACT legislation will be aimed at ensuring this.

3. Should amendments similar to those adopted in the ACT be adopted for the Act in WA?

CLWA recommends that the WA Government adopt a similar amendment made to the *Juries Act 1967 (ACT)*, which is reflective of our answer to the previous question. We have nothing to add to the submission of SSCLS in this regard, and note also that the word "suffering" should indeed be removed from s.16(1)(b) and replaced in the manner suggested.

4. Are there any additional considerations that the Department may not be aware of but needs to consider?

We agree with both SSCLS and Deaf Australia that the cost of required resources should not be a barrier to recognising the rights of persons with a disability and have nothing to add to the rationale and references put forward by SSCLS on page 3 of their submission. The caveats included in s.16(3)(a) of the *Juries Act 1967 (ACT)* will prevent participation in equivalent legislation where "the support would impose a disproportionate or undue burden on court resources, facilities and time frame" in any event, and we note that the judge could also exercise discretion in that respect under s.16(3)(c).

We would suggest that Deaf Australia and other specialist organisations provide the best means by which advice can be sought regarding specific guidelines and processes that would need to be developed to meet the needs of deaf and partially deaf people as jurors, as detailed on page

⁸ *Supra no.5*

⁹ See Australian Bureau of Statistics: [4430.0 - Disability, Ageing and Carers, Australia: Summary of Findings, 2018](#)

¹⁰ See submission of Deaf Australia at page 2

¹¹ *Supra no.5* see recommendation 7-12

2 of their submission. The expertise of other organisations who work with and represent various cohorts of disabled persons should be similarity sought, *as well as disabled persons themselves*.

We suggest that any new legislation be exercised in a spirit of flexibility, consultation and of maximising the abilities of individuals as much as possible. We believe there is considerable scope for “reasonable accommodation” of needs if this is done properly.

For instance, we note the recent case of Matthew Johnston from London UK, who is believed to be the first profoundly deaf person to sit on a jury in a crown court in England and Wales. According to the British Deaf News,¹² Mathew “read the subtitles on a tablet from the jury benches and relied on his lip-reading skills to participate in jury discussions – sitting at a round table in the jury deliberation room particularly helped him here. In two of the three cases, he served as foreman of the jury, which encouraged fellow jurors to speak clearly and direct their words to him.”

We agree with the establishment of a complaints mechanism as proposed by SSCLS.

5. Is there anything further that you would like to provide comment on that you believe would improve the participation of people with a disability in jury service?

Changes to legislation

We agree that the *Criminal Procedure Act 2004 (WA)* would need to be amended to accommodate a 13th juror - such as an Auslan interpreter- to be sworn in and that such persons would need to follow a Code of Ethics. There may be other legislation that requires amendments and we are confident that the Department of Justice will seek the advice of experienced drafters in order to ensure adequate coverage and consistency.

Physical needs

We do not believe agree that an entire courtroom redesign is necessary to the legislation if the philosophy outlined in (4) above is applied. We agree with SSCLS in this respect and will be interested in the response by other organisations experienced in providing for particular needs in other situations, as the wording in paragraph 5.2 of the Discussion Paper is suggestive of a highly complex (and possibly insurmountable) task. We do not believe this to be the case. In any event, the caveats provided by an equivalent to s.16(3) of the *Juries Act 1967 (ACT)* will prevent any undue complex arrangements or cost.

Dedicated budgets and appropriate general protocols for particular cohorts as advised by those with relevant expert knowledge and experience are all essential to the introduction of the proposed legislation. We suggest that a Liaison Officer position perhaps be introduced to the Department of Justice, whose role would be to seek advice from appropriately qualified persons as to:

¹² [Man becomes first deaf juror in English court](#) British Deaf News; 29 August 2019

- The advice that should be provided in terms of whether:
 - A person with a disability is able to discharge their responsibilities as a juror; and
 - Any specific needs can be reasonably accommodated.
- The means by which those needs can be effectively accommodated; and
- Other matters such as establishing a pool of approved interpreters, their roles, placement and use of videoconferencing as outlined by Deaf Australia in their submission on page 2.

Cohorts within cohorts

Finally, when considering practical arrangements, we also emphasise the importance of recognising “cohorts within cohorts” such as the inclusion of disabled persons with Cultural and Linguistic Diverse (CALD) backgrounds and those from Aboriginal and Torres Strait Islander (ATSI) backgrounds.

The 2016 Western Australian census revealed that around 32% of Western Australians were born overseas, and that this includes a high proportion of non-English speaking members of the community.¹³ We know that Australians from CALD backgrounds have similar rates of disability and needs for formal assistance as other Australians, and also that disability born in non-English speaking countries are about half as likely to receive formal assistance as people born in Australia.¹⁴

Similarly whilst 24% (125,000 people) of ATSI people in Australia were living with disability in 2015, ATSI Australians were - compared with non-Indigenous Australians - 1.8 times more likely to have a disability and twice as likely to use disability support services provided under the NDA (2017–18)¹⁵.

This makes due consideration of inclusion of these cohorts particularly important. We emphasise that consultation with appropriate representatives of both the CALD and ATSI community *must* be undertaken in order to ensure that both cultural security and practical considerations are taken into account in any new scheme.

Training and adequate legal assistance

We agree that the legal profession will require training in a number of respects, including the judiciary, lawyers, support workers and court personnel.

Because of the specialised nature of this area of law and the high number of members of the cohort who do not have the means to seek legal advice from the private legal sector, we suggest that resources be provided within appropriate legal assistance services from whom advice can be sought by potential jurors, particularly if any complaints/review procedure is to

¹³ See [Cultural and Linguistic Diversity in Western Australia\(WA\)2016 Census](#)

¹⁴ See report of Settlement Services International: [Still outside the tent: cultural diversity and disability in a time of reform – a rapid review of evidence \(2018\)](#) at page 2

¹⁵ See Australian Institute of Health and Welfare: [Disability support for Indigenous Australians \(2019\)](#)

operate effectively. We suggest that this will greatly enhance the potential success of any new arrangements and will deliver practical, social and cost benefits.

Summary of Recommendations

1. We agree with proposed legislative changes that would allow jury participation by persons with disabilities, including those with hearing loss or partial hearing loss.
2. Exclusion should be limited to where there exists a lack of ability to understand, retain, weigh, use or communicate information that is such as to prevent a person from adequately discharging their duty as a juror, or if for any other reason they are unable to adequately discharge that duty.¹⁶
3. The ACT legislation would represent an appropriate change, subject to the amendment we have suggested.
4. With respect to any other legislation that may require effective amendment, advice should be sought from persons suitably experienced with legislation, with a view to achieving consistency.
5. There should be a dedicated budget to accommodate the new arrangements, to include the preparation of appropriate guidelines and protocols.
6. Advice from appropriately expert persons, including in relation to CALD and ATSI persons, should be sought in relation to any new arrangements; this together with advice from persons with disabilities themselves.
7. A flexible “can do” approach should be adopted, whereby accommodation in jury participation occurs wherever reasonably practicable.
8. The WA Government should consider appointing a dedicated Liaison Officer to facilitate participation in jury trials by persons with disabilities.
9. A complaints/review of decisions process must be included.
10. Appropriate resources should be provided within the legal assistance sector to facilitate and enhance any new arrangements.

We thank again the Western Australian Government for its attention to this important issue, particularly given the challenges at the present time.

Please do not hesitate to contact the writer for further discussion of any points raised.

Yours sincerely,

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Sharryn Jackson
Executive Director
Community Legal WA

¹⁶ See footnote 11