



Government of **Western Australia**
Department of **Justice**
Courts and Tribunal Services

Participation of People with a Disability in Jury Service

Discussion Paper

March 2020

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Executive Summary

Jury service is an important part of the judicial system; it serves as a means for members of the community to participate in the administration of justice and to ensure that the application of law is fair and consistent with community standards. In Western Australia (WA), jury service is governed by the *Juries Act 1957* (WA) (the Act).

An essential characteristic of juries is that they be representative of the wider community. However, in practice, this is not necessarily the case. Currently, a person with a disability may be excused, exempt or ineligible from participating as a juror in most Australian jurisdictions including WA. This has been an area of concern in recent years with a significant amount of discussion and academic research conducted in relation to this matter. The focus of much of this has been based on the participation of people with partial or complete hearing loss in jury service.

1. Introduction

The Attorney General, Hon. John Quigley MLA, has requested that the Department of Justice (the Department) consider possible amendments to the Act in order to ensure that people with a disability are able to participate, as jurors, in court proceedings.

The Attorney General has requested that the Department consider possible amendments to the Act in light of:

- The Australian Capital Territory (ACT) amending its *Juries Act 1967* (ACT) in 2018 to remove the legislative barriers which previously prevented people with a disability from progressing past the summoning stage of the jury selection process.
- Recommendations from the Committee on the Rights of Persons with Disabilities, the Australian Law Reform Commission, the Law Reform Commission of Western Australia, the New South Wales Law Reform Commission and the Queensland Law Reform Commission over the past few years suggesting that amendments to existing legislation be made to enable the participation of people with a disability, as jurors, in court proceedings.

This Discussion Paper has been prepared to provide stakeholders with an overview of the relevant legislation in WA and other Australian jurisdictions. Questions have been posed in this Discussion Paper to elicit discussion with stakeholders in order to assist the Department to form a position and make recommendations to the Attorney General as to whether it is appropriate to make any changes to the current legislation.

Stakeholders and interested parties are requested to make written submissions in response to the questions raised and any other considerations relevant to this Discussion Paper.

2. Terms of Reference

In carrying out its review, the Department will consider:

- a) whether the Act should be amended;
- b) the extent of any potential amendments; and

- c) any other matter relevant to ensuring that people with a disability are able to participate, as jurors, in court proceedings.

3. Current Legislation in WA

In WA, section 34G(2)(f) of the *Juries Act 1957* (WA) states that:

“if a judge or the summoning officer is satisfied that a person who is summoned is not capable of serving effectively as a juror because he or she has a **physical disability or a mental impairment**, the judge or summoning officer must excuse the person from the summons”.

Further, according to section 53, a fine may be imposed on certain persons, including any summoning officer, who does not well and faithfully carry out any duty imposed upon him or her by the Act – such as not excusing a person who is not capable of effectively serving as a juror.

4. Legislation in other Australian Jurisdictions

4.1. ACT

The ACT amended its *Juries Act 1967* (ACT) in 2018 to remove the legislative barriers which previously prevented people with a disability from progressing past the summoning stage of the jury selection process. Under the amended *Juries Act 1967* (ACT), the trial judge must now consider whether support can be provided to enable a person with a disability to properly discharge their duties as a juror. If support can be provided, then a direction must be made. People can access an interpreter or support person, if necessary, to properly fulfill their role as a juror. Support persons and interpreters are required to take an oath and affirmation to the Court. As previously noted, the Attorney General has suggested that the Department consider similar amendments to the Act. The specific provisions of the amended legislation which are relevant to Western Australia's consideration are detailed in Attachment A. To date, under the new legislation, the ACT has not had anyone make an application to have reasonable support whilst undertaking jury service.

4.2. Other Australian Jurisdictions

In every other Australian jurisdiction, a person with a physical or mental disability is currently either excused, exempt or ineligible from serving as a juror. A snapshot of each jurisdiction's position is provided below, with the relevant legislative provisions provided at Attachment A.

Jurisdiction	Legislation	Jurisdiction's Position
ACT	<i>Juries Act 1967</i> (ACT)	Detailed above – judge considers whether support can be provided to enable person to discharge duties of juror.
New South Wales	<i>Jury Act 1977</i> (NSW)	Ineligible to serve as jurors – if unable, because of sickness, infirmity or disability, to discharge the duties of a juror.
Northern Territory	<i>Juries Act 1962</i> (NT)	Exempt from service as jurors – if blind, deaf or dumb or otherwise incapacitated by disease or infirmity.
Queensland	<i>Jury Act 1995</i> (QLD)	Not eligible for jury service – if have a physical or mental disability that makes them incapable of effectively performing the functions of juror.
South Australia	<i>Juries Act 1927</i> (SA)	Ineligible for jury service – if mentally or physically unfit to carry out the duties of a juror. <u>Note:</u> The Attorney General's Department released a Disability Justice Plan in 2017 in which a priority action was for further research to be conducted on identifying and overcoming barriers to jury duty for people with disability in South Australia. There has been little information released to date on the progress of this.
Tasmania	<i>Juries Act 2003</i> (TAS)	Ineligible for jury service – if have a physical, intellectual or mental disability that renders the person incapable of effectively performing the duties of a juror.
Victoria	<i>Juries Act 2000</i> (VIC)	Ineligible to serve as a juror – if have a physical disability, intellectual disability or a patient under the <i>Mental Health Act 1986</i> (VIC). While there is not an express exclusion of persons with sensory disabilities there have been no recorded instances of blind or deaf jurors serving on a jury.

5. Practical Considerations

If it is determined that the Act should be amended, there are several practical considerations which the Department will need to work through in order to facilitate this. Some of the main practical considerations are outlined below.

5.1. Adjustments to Courtroom Layout

Some adjustments to courtroom layout may be required to reasonably accommodate a person with a disability. There will be a cost associated with rearranging courtroom layout to accommodate one or two interpreters while also enabling a person with a disability to still have direct vision of the judge, accused, witness and counsel. The existing jury courtrooms in the State have not been designed to accommodate this and it may be difficult to meet this requirement without redesigning the layout. This impact could be minimised by identifying a small number of courtrooms that are amenable to such alteration. Any rearrangements such as this would need to be discussed and worked through with appropriate judicial Heads of Jurisdiction and court staff. Trials with a disabled juror would need to be listed in an appropriately configured courtroom and this

in itself may create some issues when listing trials. Reasonable adjustments to courtroom layout may also not be feasible in certain cases. For example, the case may feature non-verbal audio evidence that would be difficult or impossible for an interpreter to properly convey in context, or the case may be scheduled for many weeks, making access to the requisite number of interpreters impractical.

5.2. Complexity and Duration of a Trial

A trial usually commences immediately after the empanelment of jurors. However, if a disabled juror is empaneled, the Judge would need to take the time to consider whether the person can take in the evidence presented (e.g. video and photographic) and addresses by the parties and the Court; assess the reliability of witnesses; and communicate with other members of the jury during jury deliberations. The assessment would need to be on a case-by-case basis. If a disabled juror is determined as being able to serve, then the practical implications of this would need to be worked through (e.g. would interpreters be available immediately or will a trial be adjourned until an interpreter is available? Is the current courtroom suitable to accommodate the person with a disability and any reasonable support they may require?). The duration of a trial may also be increased if interpreters are required. An interpreter is generally only able to sign for 40 minutes before fatigue requires a second interpreter to interpret proceedings in turn. There would be a need to regularly adjourn for recess which would increase the length of the trial and this may be impractical for longer trials.

5.3. Training of the Legal Profession

The legal profession and court staff will need to be trained so that they are aware of various disabilities and how to reasonably accommodate these disabilities in court proceedings.

5.4. Amendments to other Legislation

Amendments to other legislation in WA such as the *Criminal Procedure Act 2004* (WA) may be required as a result of any amendment to the Act. Section 111 of the *Criminal Procedure Act 2004* (WA) provides that, during a trial, there must not be any communication between a juror and a person who is not a juror, unless the trial judge has exercised the discretion to permit such communication subject to any condition that the judge thinks necessary to impose in the interests of justice. This may be relevant given that there may be thirteen people present in the deliberation room if an interpreter is present.

5.5. Financial Costs

The Department may incur additional costs in order to ensure that people with a disability are able to participate, as jurors, in court proceedings. For example, there may be costs associated with adjusting courtroom layout and engaging Auslan interpreters if required.

6. Discussion Questions

Q1. Is the current legislation appropriate for people with a disability?

- Q2. If the answer to Q1 is no, do you believe that the legislation should be amended to accommodate people with a specific disability (such as partial or complete hearing loss) or all types of disability?
- Q3. Should amendments similar to those adopted by the ACT be adopted for the Act in WA?
- Q4. Are there any additional considerations that the Department may not be aware of but needs to consider?
- Q5. 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?

Responses to the questions raised and feedback on any other relevant considerations would be welcomed.

The closing date for submissions is **Monday, 11 May 2020**.

Submissions can be emailed to elisha.lafontaine.wa.gov.au or alternatively hard copies can be addressed to:

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Appendix A

Relevant Legislation in Australia – Comparative Table

Jurisdiction	Legislation	Relevant Legislative Provision(s)
Western Australia	<i>Juries Act 1957</i> (WA)	<ul style="list-style-type: none"> s34G(2)(f): states that a judge or summoning officer must excuse a person from jury duty if they are satisfied that that person “is not capable of serving effectively as a juror because he or she has a physical disability or a mental impairment”.
	<i>Criminal Procedure Act 2004</i> (WA)	<ul style="list-style-type: none"> s111(2)(c): provides that during a trial by jury there must not be any communication between a juror and a person who is not a juror except under subsection (4)(b). s111(4)(b): provides for the trial judge to permit a juror and a non-juror to communicate subject to any condition that the judge thinks necessary to impose in the interests of justice.
Australian Capital Territory	<i>Juries Act 1967</i> (ACT)	<ul style="list-style-type: none"> s16 – Reasonable support because of insufficient understanding or disability. <ol style="list-style-type: none"> This section applies if a judge is satisfied that a person summoned or appointed to attend to serve as a juror, and who has not claimed an exemption or otherwise been excused from attendance, may be unable to properly discharge the duties of a juror, because the person— <ol style="list-style-type: none"> has an insufficient understanding of the English language; or is suffering from a mental or physical disability. The judge — <ol style="list-style-type: none"> must consider if support that would enable the person to properly discharge the duties of a juror can reasonably be given; and if satisfied that support that would enable the person to properly discharge the duties of a juror can reasonably be given, must make a direction that the support be given. <p>Examples—support</p> <ol style="list-style-type: none"> an interpreter, including an Auslan interpreter an assistance animal, disability aid or support person <p><i>Note:</i> An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s126 and s132).</p> <ol style="list-style-type: none"> To determine if support can reasonably be given, the judge may consider the following: <ol style="list-style-type: none"> 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. If the judge makes a direction allowing an interpreter or support person to assist the person to properly discharge the duties of a juror— <ol style="list-style-type: none"> 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; and the direction is subject to the interpreter or support person agreeing to make an oath or affirmation in accordance with schedule 1, part 1.1A or part 1.1B. 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. <ul style="list-style-type: none"> s45A – Oath by interpreter Before assisting a juror to properly discharge the duties of a juror, an interpreter must make an oath or affirmation in the form stated in schedule 1, part 1.1A. <ul style="list-style-type: none"> <u>Part 1.1A – Interpreter’s Oath</u> I swear (<i>or the person taking the oath may promise</i>) by Almighty God (<i>or the person may name a god recognised by the person’s religion</i>) 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. <p>Interpreter’s affirmation – 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.</p> s45B – Oath by support person Before assisting a juror to properly discharge the duties of a juror, a support person must make an oath or affirmation in the form stated in schedule 1, part 1.1B.

Jurisdiction	Legislation	Relevant Legislative Provision(s)
		<ul style="list-style-type: none"> ○ <u>Part 1.1B</u> Supporter's Oath I swear (<i>or the person taking the oath may promise</i>) by Almighty God (<i>or the person may name a god recognised by the person's religion</i>) that I will well and truly support the juror to discharge the juror's duties, 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. <p>Supporter's Affirmation I solemnly and sincerely declare and affirm that I will well and truly support the juror to discharge the juror's duties, 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.</p> <p><u>Notes:</u></p> <ul style="list-style-type: none"> • In the ACT, courts decide on a case-by-case basis whether a person will be able to perform the role of juror despite their disability. The Judge has the discretion to determine whether the person summoned can properly discharge the duties of a juror and if required make direction for support to be given. • People can access an interpreter or support person if necessary to properly fulfill their role as a juror. Support persons and interpreters are required to take an oath and affirmation to the Court.
New South Wales	<i>Jury Act 1977</i> (NSW)	s14 of the Act enables a person to apply to the Sheriff for a permanent or temporary exclusion from jury duty if he or she falls within an 'excluded person' category listed in Schedule 1 or 2. Schedule 2 if they are "unable, because of sickness, infirmity or disability, to discharge the duties of a juror".
Queensland	<i>Jury Act 1995</i> (QLD)	Under s4(3)(l) if a person is not eligible for jury service if they "have a physical or mental disability that makes the person incapable of effectively performing the functions of juror".
South Australia	<i>Juries Act 1927</i> (SA)	Under s13, a person is ineligible for jury service if he or she: a) is mentally or physically unfit to carry out the duties of a juror; or b) has insufficient command of the English language to enable him or her to properly carry out the duties of a juror.
Tasmania	<i>Juries Act 2003</i> (TAS)	Under Schedule 2, a person is ineligible for jury service if they have "a physical, intellectual or mental disability that renders the person incapable of effectively performing the duties of a juror".
Northern Territory	<i>Juries Act 1962</i> (NT)	<ul style="list-style-type: none"> • Schedule 7 outlines that a person who is "blind, deaf or dumb or otherwise incapacitated by disease or infirmity" is exempt from serving as a juror. • Under s27(3), "the Sheriff and a Deputy Sheriff may, at any time before the juror's name is called in accordance with s37 or 39, question any juror chosen under s27 to ascertain whether that juror is able to read, write and speak the English language".
Victoria	<i>Juries Act 2000</i> (VIC)	<ul style="list-style-type: none"> • Under Schedule 2(3), a person is ineligible to serve as a juror if they: (a) have a physical disability that renders the person incapable of performing the duties of jury service; (b) is a patient within the meaning of the Mental Health Act 1986; or (c) has an intellectual disability within the meaning of the <i>Intellectually Disabled Persons' Services Act 1986</i>.