

23 September 2021

Mr Paul McKnight
Deputy Secretary
Law Reform & Legal Services
Department of Communities and Justice
By email: policy@justice.nsw.gov.au

Dear Mr McKnight

Additional proposed jury reforms

Legal Aid NSW welcomes the opportunity to make a submission to the Department of Communities and Justice on the additional jury reform proposals as part of the Indictable Process Review.

On 10 May 2021, we provided feedback to the Department on the issues paper for the statutory review of the majority verdicts amendments, and the consultation paper on improving the operation and management of juries.

We provide responses to the additional proposed jury reforms below.

Proposal 8: Amend s75 of the Jury Act 1977 to allow for the electronic service of summons, notices and other documents required or authorised by the Act alongside postal service in certain circumstances.

Legal Aid NSW does not oppose this proposal. However, we suggest that there should be a protection which prevents collateral use of information collected for the purpose of contacting a person in relation to their summons. For example, limiting it to “use by the Office of the Sherriff for the purposes of contacting a person in relation to their summons or administering the roll, and only for that purpose”. This would protect jurors from having their emails used by the Office of the Sherriff for other purposes or investigations.

Proposal 9: Amend the Jury Act 1977 to make clear that, for the purposes of an exemption or excusal from jury service, “good cause” includes any circumstances that could affect a person’s ability to perform the functions of a juror (whether in relation to required presence throughout a trial, appropriately considering evidence and participating in deliberations, or coming to a verdict).

We query the need for this amendment. A variety of circumstances that may impact a person's capacity to perform the functions of a juror can already be considered by the Sherriff's existing discretion at section 14A(d) of the *Jury Act 1977* that "there is some other reason that would affect the person's ability to perform the functions of a juror." Given the generality of that provision, depending on how the amendment is framed, expressly identifying particular circumstances may in fact have the effect of limiting the circumstances that can be considered.¹

Proposal 10: Amend the Jury Act 1977 and/or Jury Regulation 2015 to improve the juror excusal process by providing that information jurors are required to be informed of should be shared with potential jurors before they enter the courtroom.

This would include requiring:

- ***the Crown to provide information about the nature of the charge, the identity of the accused and the identity of the principal witnesses in writing to potential jurors in advance of the trial listing, and***
- ***the court to provide potential jurors with a document addressing their roles and responsibilities and "good causes" to be excused before they enter the courtroom.***

Legal Aid NSW opposes this proposal. In our view, any perceived gains in efficiency are outweighed by the potential prejudice to the impartial administration of justice by jurors.

First, it would be inappropriate for the Crown to provide information about the nature of the charge, identity of the accused or witnesses to jurors in advance of a trial listing, or before they enter the courtroom. We are concerned about the potential risk of dissemination of information about the case by jurors, and how cases involving non-publication or suppression orders would be protected. Provision of early information about the accused and charges would inappropriately reinforce any biases or assumptions.

Moreover, the NSW Court of Criminal Appeal has recently confirmed in two cases that trials are primarily oral in nature, and while written material may be provided *in addition* to oral directions, it is inappropriate to have jurors simply read important material unsupervised.² Providing a potential juror with information to read about a trial would directly offend against this principle.

Secondly, while we support the provision of clear and plain English communication to better orientate jurors, we are concerned the provision of this information in written format is ineffective. Legal Aid NSW represents a wide range of culturally and

¹ Because of the maxim of statutory construction "*expressio unius est exclusio alterius*": the expression of one is the exclusion of others.

² *Trevascus v R* [2021] NSWCCA 104; *Bourke (a pseudonym) v R* [2021] NSWCCA 145.

linguistically diverse (**CALD**) clients, and we would welcome consultation on how information can be provided in accessible formats. In our view, written instructions to jurors documenting their roles and responsibilities, and “good causes” to be excused, would not be an effective way to communicate to CALD jurors, or to jurors with literacy impediments. Proposal 11 (below) is not supported for the same reason. It should not be assumed that jurors have good reading and comprehension skills.

We are also concerned the provision of information to jurors prior to entering the courtroom removes the seriousness imparted by the judicial officer directly explaining their roles and obligations. We are not aware of any research which suggests that jurors postpone seeking excusal because they feel intimidated during empanelment, as opposed to any other reason such as misunderstanding instructions or inattentiveness.

We therefore support the provision of additional information to help jurors orientate and feel more confident prior to entering a courtroom, but it should not replace the instructions provided by the judicial officer, nor contain any information about the particular matter at hand. We also support additional assistance for judges (for example, in the form of suggested plain English directions in the Judicial Commission of NSW Criminal Trial Courts Bench Book) which ensures the quality and comprehensibility of their oral instructions to a jury panel once inside the courtroom, as a further mechanism to ensuring jurors understand the nature of their duties.

Proposal 11: Amend the Jury Act 1977 to require any excusal applications to be made in writing.

For the reasons outlined above at proposal 10, Legal Aid NSW opposes this proposal.

Proposal 12: Amend the Jury Act 1977 to exclude persons convicted of homicide from serving on a jury for life

Legal Aid NSW is concerned about this proposal. As noted by the NSW Sentencing Council in its recent *Review of sentencing for murder and manslaughter*, it is generally accepted that the offence of manslaughter is almost unique in its variety, incorporating a wide range of circumstances and degrees of culpability.³ The objective seriousness of the offence ranges broadly, for example, “from a joke gone wrong to facts just short of murder.”⁴ A wide range of circumstances is reflected in the wide range of applicable sentences. Sentencing statistics confirm that a not insignificant percentage of individuals do not receive full-time custodial sentences. It is rare that a sentence for manslaughter approaches the maximum head sentence available.⁵

³ New South Wales Sentencing Council, *Homicide Report* (May 2021), 81.

⁴ Ibid.

⁵ Ibid, 83.

In our submission, it would be inappropriate to exclude as a category all individuals who are convicted of manslaughter, given the broad nature of the offence. The existing exclusion in Schedule 1 clause 2 strikes the appropriate balance: offenders who receive a significant sentence of imprisonment will be excluded – typically for more than 10 years, given the unlikelihood of receiving a sentence of less than three months. Those who avoid a sentence of imprisonment have, as indicated by that sentence, committed a less serious offence. They will remain excluded from jury service during the term of their non-custodial sentence (per Schedule 1 clause 4(1)). No sufficient rationale has been expressed to depart from the rule as presently expressed; the “impact on the integrity of and public confidence in the jury system if a person with a manslaughter conviction were to serve on a jury” would only be impacted if the assumption is made (contrary to the reality) that all manslaughters are of an equal and culpable nature.

Thank you for the opportunity to provide a submission on the additional jury reform proposals. If you require any further information, please contact Helen Cooper, Senior Law Reform Officer, on 9213 5229 or at helen.cooper@legalaid.nsw.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Brendan Thomas', with a stylized, cursive script.

Brendan Thomas
Chief Executive Officer