# NSW Legislative Assembly Hansard

**JURY AMENDMENT (MAJORITY VERDICTS) BILL**

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**Bill introduced and read a first time.**

**Second Reading**

**Mr ANDREW TINK** (Epping) [10.06 a.m.]: I move:

That this bill be now read a second time.

The object of the bill is to amend the Jury Act 1977 to provide for majority verdicts by juries in criminal trials. The bill inserts a new provision in the Act, proposed section 55F, to enable juries in criminal trials to deliver a majority verdict if, in the case of 12 jurors, 11 of the jurors agree on the verdict. The bill also inserts a new provision in the Act, proposed section 56, to enable the court to discharge a jury of 12 persons after six hours of deliberations if it finds that the jury is not likely to reach either a unanimous or a majority verdict. The provisions relating to the discharge of juries in the existing section 56 are re-enacted for juries consisting of fewer than 12 persons. Some years ago I introduced a bill along similar lines but I reintroduce such a bill into the Parliament today in light of what I believe are some very important comments made by one of the most experienced criminal court judges in New South Wales and indeed the country, the Hon. Mr Justice John Dunford. Mr Justice Dunford presented a paper at the Criminal Law Conference at the Sydney Marriott Hotel on Tuesday 27 July 2004. He made extensive comments about majority jury verdicts that I will read onto the record. The judge was referring to a number of issues of concern to him about the direction of the criminal law and then said:

... there are some reforms which I believe could make the jury system more efficient. For one thing, I support the introduction of majority verdicts after a specified period of deliberation. I understand the proposal presently before the government is for an 11-1 majority, whereas in England and various other places a 10-2 majority is sufficient.

I do not know whether at that time there were any particular recommendations before the Government but my private members bill provided for an 11:1 majority verdict, as this bill does. Mr Justice Dunford continued:

I understand that in Scotland they have juries of 15, and an 8-7 majority is sufficient for conviction or acquittal, but I gather there are other safeguards.

The object of the 10-2 or 11-1 majority is to avoid new trials in cases where the jury is hamstrung by a perverse, disinterested or unreasonable, or simply incompetent juror, where the result of the new trial is going to be that of the overwhelming majority in the original trial. Bear in mind that the judge often knows the voting figures in the hung jury situation because it is at times included in the note he or she receives from the jury, although such figures are not disclosed to counsel, and it would be inappropriate to do so. No one so far as I am aware has suggested that say 8-4 or 7-5 majority should be sufficient for a conviction, or an acquittal.

I certainly do not want to second-guess Justice Dunford on that, but he made an important point: judges do know, to a very significant degree, what is going on in a jury room. Because judges get notes from juries they know the extent to which a hung jury issue is a problem, and by what margin. However, as the judge said, that material is not available to counsel. I infer from the judge's comment, rightly or wrongly, that through his experience of receiving notes from juries via the sheriff, he is aware that there is a significant hung jury problem. That is why he raised it in his speech. If the 11:1 majority were brought in that would, I infer, assist in dealing with some of the issues that have been identified in jury notes passed to a judge. Justice Dunford continued:

One possible amendment which, so far as I am aware, has not been seriously floated is that where a jury is unable to agree between conviction on a more serious and a lesser offence, for example, murder, or manslaughter, armed robbery or steal from the person, the judge should have the power to enter a conviction for the lesser offence, but only if, on his or her consideration of all the evidence, he or she considers it appropriate to do so.

Recently there have been a number of cases where convictions have been upset and new trials ordered because of the conduct of what had been described as "rogue jurors" that is, jurors who have done their own research such as by looking up newspaper cuttings of previous trials on the internet or by having a private view at night in the absence of the judge, the accused, counsel and their other jurors. I am not sure those person should be described as "rogue jurors"—they thought they were merely improving their chances at arriving at the correct end result; but, in both cases they disregarded … the principles of procedural fairness …

I think the judge is saying that at least in the case of a single rogue juror, all other things being equal, there ought to be an ability to deal with those persons. The majority verdict might, on certain models, provide some basis for doing so. I regret to say that the issue is relevant. Yet again there is a story in the *Sydney Morning Herald* about that type of broader

problem. In any event I certainly believe that the matter should be before Parliament again. My bill is for a simple 11:1 majority verdict, which, I suppose, is the most conservative of all possible alternatives to the current unanimous verdict requirement. I cannot even suggest that we go to a majority of 10:2 and certainly not to a bare majority as they have in Scotland. I feel most comfortable with the virtual unanimous majority bar one rogue juror. That would take into account, notwithstanding what the judge said, a significant number of matters.

I refer to other jurisdictions. In Victoria, a majority verdict involves 11 out of 12, or 10 out of 11, or 9 out of 10 in criminal trials, except for cases of murder or treason. In other words, depending on the final number of jurors who are required to bring in a verdict the requirement is down to a total of 10, with one juror out: so a verdict can be entered with one juror out. In Western Australia, the arrangement is for a majority of 10 out of 12, except in murder cases. In South Australia, a majority verdict is allowed with 10 or 11 out of 12, 10 out of 11, or 9 out of 10; again, down to a grand total of 10 to bring in a verdict. In Tasmania a majority of 10 out of 12 is allowed. In the Northern Territory, if a unanimous verdict is not reached in six hours, a majority of 10 out of either 11 or 12, or 9 out of 10 applies. In Queensland unanimous verdicts are required.

Around the Commonwealth there is strong precedent for one juror who cannot agree with the rest being discounted for the purpose of a decision. It has not been said anywhere in any other jurisdiction in this country that that has caused a problem to the administration of justice. It is very important to note that one of the strongest advocates for majority jury verdicts in this State is the Director of Public Prosecutions. It is well known, I think, that the Director of Public Prosecutions and I disagree on a few things, but not everything. Certainly on this topic we are in the strongest possible agreement. The Director of Public Prosecutions has been a very consistent and longstanding advocate of majority verdicts. This is important, because none of his views are one-offs: he has held all of his views on a long-term basis and there is particular consistency in his attitude to majority verdicts.

I demonstrate that consistency by referring to three occasions, which are well-spaced in time, on which the Director of Public Prosecutions made that point very strongly. First, on 23 June 1997 he wrote an article for the *Sydney Morning Herald* strongly in favour of majority verdicts. That article was opposed by Ian Barker, QC, who, it must be said, is a very experienced criminal barrister. On the jurisdictions I referred to previously, Mr Cowdery's first point stated:

There is no suggestion in any of these jurisdictions—

and that includes all the ones I referred to—

that majority verdicts as such have produced injustices, and no pressure to return to or to embrace unanimity …

Majority verdicts—even of only 11:1 (although other jurisdictions commonly allow for 10:2)—would avoid the huge costs associated with retrials of those cases.

Unanimity in fact may be more apparent than real. The requirement may well force jurors who disagree to reach compromise verdicts in order to bring the proceedings to an end.

Second, on 17 January 1999 the *Sun-Herald* reported the Director of Public Prosecutions as saying that majority verdicts were essential in cases that were held up by one juror who could not be persuaded by reason. Of course, the bill is designed to cover precisely that point. Third, in the weekend edition of the *Sydney Morning Herald* of 27-28 July 2002 a statement by the Director of Public Prosecutions, a critically important stakeholder in this debate, was reported. He said:

Majority verdict is my hobby horse … One juror who won't play the game properly can disrupt the entire process by being irrational, pig-headed and a disruptive individual. Under the system of unanimous verdicts, that person can do something that requires the whole process to go on again. I have letters from jurors—three or four a year—expressing tremendous frustration at not being able to do their job because of one irrational juror. When they're moved enough to write to my office, it suggests that this is something of great importance. Also, [discarding the unanimity requirement] narrows down the possibility of corruption. If you have a lot of money, you may be able to corrupt one juror, and possibly two jurors, but it's hard to see anyone being able to corrupt more than two. The views of the hold-out person should always be taken into account, and the rest of the jury should consider them. But the odds of a hold-out juror being a hero are pretty slim compared to the odds of the hold-out being an obstructive ratbag.

That is very strong stuff from the Director of Public Prosecutions. I suspect it indicates an underlying frustration held throughout his office by all the men and women who prosecute on behalf of the public of New South Wales that the system of justice does not work for the public, the system of justice does not work for the administration of justice, and in particular it does not work for the victims of crime— I will refer to that matter later—where there is a continuing requirement for unanimity. Another extremely important stakeholder and commentator in this business is Judge Reg Blanch, the Chief Judge of the District Court, a former Director of Public Prosecutions of this State. He is one of the most distinguished and respected judges in New South Wales. Judge Blanch was referred to in the *Daily Telegraph* of 30 May 1997 on one of the occasions on which this issue was being considered by the Parliament. The article states:

Chief Judge of the NSW District Court Justice Reg Blanch said it was a "very significant cost and waste of resources" that almost 25 per cent of trials held during 1996 ended in either the jury being discharged or deadlocked…

"One matter of particular concern in relation to criminal trials is 25 per cent in 1996 resulted in either a discharge of the jury or a disagreement.

The then Police Commissioner, Peter Ryan, expressed strong support for majority verdicts. I am absolutely confident that Police Commissioner Moroney and the 15,000 officers he leads would also strongly support majority verdicts. I turn to the

concerns of the victims of crime. They are perhaps best demonstrated in a letter written on 22 June 2000 by Anne Harsanyi, who was the acting co-ordinator of the North Sydney Sexual Assault Service, to the then Attorney General, the Hon. Jeff Shaw. All honourable members should pay careful attention to what she wrote. The letter expresses real concern about the cost of hung juries to the victims of crime. There is a great deal of talk about wasting State resources on retrials, and that is important, and concern is also expressed about many other issues facing the justice system. However, this letter details the cost to victims of crime, and particularly those who must repeatedly give evidence to a new jury, be cross-examined and face the alleged perpetrator because the jury cannot reach an 11:1 verdict. The important point is that although the letter is from someone who was working at North Sydney Health, she was writing on behalf of victims of assault throughout the State. The letter states:

Dear Mr Shaw,

I am writing to you on behalf of State-wide Sexual Assault Services to express our concerns about New South Wales' requirement that juries return unanimous verdicts. We are particularly concerned about this in relation to sexual assault trials and we ask that you consider dispensing with the requirement for a unanimous verdict.

Anecdotal evidence from this service and from other services state wide indicates that there are a significant number of sexual assault trials that result in hung juries. In most of these cases anecdotal evidence further suggests that it has been because of one or two dissenting jurors. We believe that sexual assault trials are more likely to result in hung juries because in many cases there is limited corroborative evidence and the prosecution's case is largely reliant on the victim's testimony.

Sexual assault, unlike other crimes, is one that carries with it considerable myths and misconceptions that jurors are likely to hold and be influenced by in deciding their verdict. The introduction of a majority of 10 or 11 verdict system may help to counteract the influence of these myths in the deliberation process.

This is very important. The letter continues:

The experience of going to court, giving evidence and being cross examined is already an extremely traumatising and harrowing experience for sexual assault victims. Victims whose trials result in hung juries are having to endure this whole traumatising trial process a second and sometimes even a third time, at the considerable risk of delaying their recovery. Many victims are having to wait long periods for a retrial causing further distress and anxiety.

There is a large loss of confidence in the community of the legal system. As a result many sexual assault victims are choosing not to proceed with legal action. The introduction of a majority of 10 or 11 verdict may encourage more victims to proceed.

Concerns have been expressed this week about child pornography issues, and I gather that two people have been arrested today for allegedly spiking women's drinks and sexually assaulting them. That behaviour is the issue in this debate and it must be weighed up when considering majority verdicts. Ms Harsanyi's point is that majority or unanimous verdicts may be critical for women who have been assaulted in those dreadful circumstances in deciding whether to approach the authorities. One factor that might weigh on their minds is that if they go through the process of making a complaint and have someone prosecuted there is a real risk that they will have to go through it repeatedly. People who are assaulted in any way are encouraged to come forward in the knowledge that there is a good chance that their matter will be disposed of by a jury after only one trial. Any concern they will have about the possibility of having to go through the process again will discourage them from reporting the crime in the first place, and perpetrators will not be prosecuted and will be encouraged by default to continue their behaviour. That is the issue at stake and it is high time we introduced 11:1 majority verdicts.

I was astonished that at the time the letter was written the Premier said that although he would allow debate on a bill addressing the issue he was absolutely opposed to changing the current system that insists on a unanimous verdict for murder. He did not express a view about unanimous verdicts generally. He prides himself as being evidence based when it comes to making these decisions. Surely the concerns expressed by the Director of Public Prosecutions, the Chief Judge and Mr Justice Dunford would be enough to make him move. Various Attorneys General of this State, including the current Attorney General and certainly Mr Shaw, have taken refuge in crime statistics produced by Dr Don Weatherburn in July 1997. The *Crime and Justice Bulletin* No. 36 of July 1997 states:

… the introduction of majority verdicts would save approximately 39 trials.

That would have an impact on 39 victims of crime, apart from anything else. Those 39 victims, especially those who have suffered a sexual assault, would have to go through the trauma of presenting their evidence and being cross-examined only once. In other words, the Government should have taken notice of that potential reduction in 1997. The fact that people such as Justice Dunford have reignited the issue is reason enough for it to be considered.

I remain perplexed by the Government's attitude in 1997. At that time, Minister Iemma, while speaking on behalf of the Government in response to a private bill I introduced, said that he would await the outcome of Attorney General's Department deliberations about majority verdicts. When Mr Justice Dunford made his recent comments, the Premier said in this place that he would refer the issue to the Law Reform Commission. In other words, after having had the issue on the table since 1998, the Attorney General's Department is apparently still deliberating. The only decision the Cabinet reached was that, in light of Justice Dunford's remarks and after seven years, it could not resolve the issue of majority verdicts and it would have to be flicked off to the Law Reform Commission. That is not good enough given that this is a fundamentally important issue in the Attorney General's portfolio.

The Government should have reached a decision and should support 11:1 majority verdicts. It is appalling that the letter written to the then Attorney General in 2000 by a person speaking on behalf of all sexual assault victims in this State has not resulted in any action. The best the Premier can do is to have the Attorney General's Department deliberate for seven years—and certainly over the four years since that letter was sent. There is still no decision and the issue has been referred to the Law Reform Commission. I think it is time the Government made up its mind. The Coalition has had its mind made up for some time now that we should follow the overwhelming majority of other States that have majority verdicts; that we should come into line with them and have the same standard of practical and effective justice in New South Wales that those jurisdictions have.

Once again I commend the bill to the House and hope that on this occasion the Government will see its way clear to supporting the bill, especially bearing in mind the wishes of the Chief Prosecutor of this State, the Chief Judge of the District Court of This State, the spokesperson for all sexual assault victims in this State, and, last but by no means least, Justice Dunford of the New South Wales Supreme Court, who is a highly respected criminal Court judge. Further, Don Weatherburn's statistical analysis referred to the fact that 39 trials each year could have been saved by majority verdicts. Whenever one talks about the jury in a criminal trial these days one is talking about a jury hearing serious criminal charges and, almost invariably, a traumatised victim of one type or another. It is therefore significant that each year 39 victims will be saved from the trauma of a retrial if this bill is passed. With those sentiments I commend the bill to the House.

**Debate adjourned on motion by Mr Neville Newell.**

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