

Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, and Minister for Justice) [5.11 p.m.]: I move:

That this bill be now read a second time.

The primary purpose of the Jury Amendment Bill 2008 is to amend the Jury Act 1977 to confer express powers on judges to discharge jurors for cause or due to irregularities in empanelment, and to allow trials to continue in appropriate circumstances. Trial by jury is one of the foundation stones upon which our system of constitutional democracy was established. Juries continue to play a central role in our criminal justice system today. Juries give legitimacy to the decisions made by our courts and provide the community with an ongoing opportunity to participate in the criminal justice system through an independent and impartial group of people drawn from the community. Public confidence in the institutions of the modern criminal justice system is critical to its continued successful operation.

In recent years there has been significant focus on juries and their role in the administration of justice in New South Wales. As society changes and develops, juries must keep pace so that they are able to meet these new demands. The bill implements the recommendations contained in chapter 11 of the New South Wales Law Reform Commission's Report 117, "Jury selection", which was released in January 2008. The bill proposes to implement the recommendations contained in that chapter with only minor modifications. Report 117 makes 74 recommendations about the jury system, including recommendations designed to widen the jury pool; improve juror fees, conditions and amenities; protect jurors' employment whilst they are serving on a jury; and review the adequacy of penalties for failing to attend court for jury service.

The Government has already implemented a number of other recommendations contained in the report, which concern the empanelment of additional jurors in long trials. These reforms commenced on 1 January 2008. The Government is continuing to consult with the community and stakeholders in relation to the report's remaining recommendations. However, it is important that the recommendations contained in chapter 11 of the report be implemented as soon as possible. It is anticipated that these reforms will reduce the need to hold retrials and thereby maximise court resources. The following organisations were consulted during the development of this bill: the New South Wales Law Reform Commission, the Supreme Court of New South Wales, the District Court of New South Wales, the Office of the Director of Public Prosecutions, the Law Society of New South Wales, the New South Wales Bar Association, the Public Defender's Office, and the Legal Aid Commission of New South Wales.

I now turn to the key provisions of this bill. Schedule 1 inserts new part 7A, sections 53A to 53C, into the Jury Act 1977. This part will confer express powers upon courts and coroners to discharge jurors during the course of a trial or inquest. At common law, if a juror died or was unable to continue due to illness, the whole jury had to be discharged and a new jury sworn. This resulted in an excessive number of retrials, which were costly and disruptive to the administration of justice. Section 22 of the Act was introduced to address this situation by allowing trials to continue in criminal matters where jurors have been discharged and the number of jurors does not fall below a prescribed number. However, the Act does not currently contain an express provision empowering judges to discharge individual jurors. The power to discharge individual jurors is currently only implied as necessary to give effect to section 22 of the Act.

As such, the bill will insert new sections 53A and 53B into the Act. These sections will give judges express legislative powers to discharge jurors. Section 53A will require a court or coroner to discharge a juror if, in the course of a trial or coronial inquest, it is found that the juror was mistakenly or irregularly empanelled, whether because the juror was disqualified or ineligible to serve as a juror, or was otherwise not returned and selected in accordance with the Act; the juror has become disqualified from serving, or ineligible to serve as a juror; or the juror has engaged in misconduct in relation to the trial or coronial inquest. Misconduct is defined for the purposes of the section as conduct that constitutes an offence against the Jury Act 1977, or other conduct that, in the opinion of the court or coroner, gives rise to the risk of a substantial miscarriage of justice in the trial or coronial inquest. In the circumstances set out in new section 53A, the discharge of the juror will be mandatory.

New section 53A will give a court or coroner discretion to discharge an individual juror in the course of a trial or coronial inquest on certain specified grounds or for any other suitable reason. The statutory grounds for discharge include: the juror becoming so ill or infirm as to be likely to become ineligible to serve or to be a health risk to other jurors; the juror appearing to be unable to give impartial consideration to the case; the juror refusing to take part in the jury's deliberations; or any other reason affecting the juror's ability to perform the functions of a juror.

New section 53C requires a court or coroner to discharge the entire jury if, following the death of a juror or the discharge of a juror, the court is of the opinion that to continue with the remaining jurors would give rise to the risk of a substantial miscarriage of justice. In assessing whether there is a risk of a substantial miscarriage of justice, it is expected that the court or coroner will consider whether the risk is a real one; that is, a risk which is a

material possibility, not a risk which a reasonable person would dismiss as being far fetched or merely fanciful. Further, it is intended that the death of a juror would only give rise to a risk of a substantial miscarriage of justice if the juror's death occurred in circumstances which are intended to, or likely to, intimidate or influence the deliberations or verdict of the remaining jurors; that is, it is not intended that the death of a juror, in and of itself, even if it causes a short disruption to the trial, will be sufficient grounds for the discharge of the remaining jurors.

In the event that the court or coroner is satisfied that there is no risk of a substantial miscarriage of justice, section 53C will allow the trial or coronial inquest to continue with a reduced number of jurors. The power to continue the trial or coronial inquest will continue to be subject to section 22 of the Act, which specifies that a trial or coronial inquest may only continue where there would be a sufficient number of jurors left to comply with that section of the Act. As such, the bill also makes consequential amendments to sections 19, 20 and 21 of the Act to make it clear that a jury will be treated as consisting of persons selected and returned in accordance with the Act if the court or coroner orders that a trial or inquest continue with the remaining jurors following the death or discharge of a juror under proposed part 7A, and the number of jurors does not fall below the numbers specified in section 22 of the Act.

These amendments are made in response to the decisions in *R v Brown & Tran [2004] NSWCCA 324* and *Petroulias v R [2007] NSWCCA 134*. In the Brown case, a juror received a jury summons but reported for jury service a day early. The mistake was not noticed and the person was empanelled. During the trial, the mistake became apparent and the juror was discharged, but the trial continued. The Court of Criminal Appeal held that the trial, and therefore the verdict, was invalid because of the failure to comply with the statutory requirement that a jury consist of persons returned and selected in accordance with the Act. In the Petroulias case, it was discovered mid-trial that one juror was the subject of an order disqualifying him from driving. Under the Act, such an order automatically disqualifies a person from jury service.

The trial judge discharged the juror, and elected to continue the trial with the remaining 11 jurors under section 22 of the Act. On appeal, the majority of the court held that the trial process was flawed from the outset because the jury did not consist of persons returned and selected in accordance with the Act. The Law Reform Commission's report argues that these cases were decided on arguably too narrow technical and procedural grounds. In its verdicts in both those matters, the Court of Criminal Appeal relied upon strict interpretation of the legislation. It is intended that the amendments contained in the bill will instead require an assessment of whether the irregularities in empanelment were likely to have unduly influenced the decision making of the other members of the jury.

The bill also amends section 73 of the Jury Act 1977 to ensure that the verdict of a jury is not invalidated if a juror who was summonsed for jury service was empanelled irregularly or by mistake, or becomes disqualified from serving, or ineligible to serve, as a juror during a trial or coronial inquest. The amendment to section 73 will clarify that when a mistake has been made in empanelment or a juror has become disqualified from serving, or ineligible to serve, during a trial or coronial inquest the verdict will not be invalidated solely on that basis. Section 73 will also be amended to make it abundantly clear that a verdict will not be validated under that section when there is evidence of an attempt to impersonate a juror or to otherwise deliberately manipulate the composition of a jury. This amendment will apply to all of the grounds under section 73.

Finally, the bill inserts a new section 75C into the Act to enable jurors and former jurors to report irregularities in the empanelment or eligibility of another juror, or in relation to a fellow juror's conduct or capacity. Jurors can report any reasonable concerns they may have about another juror to the court or coroner during the trial, or to the sheriff after the conclusion of the trial. It is envisaged that this amendment will assist in bringing to light any irregularities in a juror's empanelment or eligibility status, or any misconduct on the part of a juror.

Schedule 2 to the bill amends the Criminal Appeal Act 1912 to allow appeals to the Court of Criminal Appeal in circumstances where a trial judge has decided to discharge an entire jury. This amendment is complementary to section 5F of the Act, which already allows appeals against a decision to discharge a single juror and to continue a trial with the remaining jurors. These reforms will allow trial judges to remove individual jurors who have been wrongly empanelled or who have engaged in misconduct. Judges will be able to continue with a trial, provided they are satisfied that to do so would not give rise to the risk of a substantial miscarriage of justice and there remains a sufficient number of jurors to comply with section 22 of the Act.

These amendments will enhance the efficiency and effectiveness of the New South Wales justice system. In the normal course of events an entire trial should not be aborted simply because of circumstances affecting one or two jurors. Aborted trials are costly and delays in finalising proceedings can cause significant distress, particularly to victims and witnesses. Avoiding unnecessary retrials will ensure that limited court resources are not wasted unnecessarily. The New South Wales Government is committed to ensuring that the jury system is strong enough to meet the challenges of the twenty-first century. The Government's commitment is demonstrated by this bill. I commend the bill to the House.