Submission No 2

INQUIRY INTO JURY AMENDMENT BILL 2023

Organisation: NSW Bar Association

Date Received: 13 December 2023

NEW SOUTH WALES
BAR ASSOCIATION

Our ref: DIV23/664

13 December 2023

The Director
Portfolio Committee No. 5 – Justice and Communities
Parliament House
Macquarie Street
SYDNEY NSW 2000
By email: portfoliocommittee5@parliament.nsw.gov.au

Dear Director,

Inquiry into the Jury Amendment Bill 2023

1. The New South Wales Bar Association (**the Association**) thanks the Parliamentary Committee "Portfolio Committee No. 5 – Justice and Communities" (**the Committee**) for the opportunity to make a submission to its inquiry into the *Jury Amendment Bill 2023* (**the Bill**).

Introduction

2. The Association limits its submission to the proposed reduction of the minimum eight-hour period of deliberation before a jury can be instructed that it may return a majority verdict.

3. The Association opposes this reform. Reasons for the Association's opposition to the proposed amendment of section 55F(2)(a) of the *Jury Act 1977* (NSW) are given in detail below. In summary, those reasons are that:
   (i) reducing the minimum deliberation time would risk undermining the safety and reliability of majority verdicts, which themselves represent a departure from the common law requirement for juror unanimity and potentially weaken the enhanced standard of proof in criminal proceedings;
   (ii) the absence of any change of circumstance since the enactment of the *Jury Amendment (Verdicts) Act 2006* (NSW)[1] suggests that the policy rationale given at the time the eight-hour rule was introduced remains sound;
   (iii) there is limited evidence for the assertion that jurors have been placed under undue pressure by fellow jury members because of the operation of the eight-hour rule;
   (iv) a consensus on the length of minimum deliberation times has not been reached in those Australian jurisdictions that permit majority verdicts;
   (v) no statistical evidence has been presented to substantiate claims that (a) jury deliberations have been prolonged by the operation of the eight-hour rule or (b) significant efficiency savings would be brought about by a decrease in the minimum deliberation period;
   (vi) estimates of costs saved by the removal or reduction of the eight-hour rule would, in any event, likely be minimal and would not reasonably justify diluting the procedural safeguards that ensure the integrity of majority verdicts; and,
   (vii) encouraging better case management, the post-pandemic use of audio-visual links for procedural hearings and the continued operation of the Early and Appropriate Guilty Plea scheme would likely provide better opportunities to save court time than the proposed reduction of the eight-hour rule.

[1] Schedule 1[1], which inserted s55F into the *Jury Act 1977* (NSW).

4. Rather than diminishing the procedural safeguards on the use of majority verdicts, the Association recommends for the reasons given below that:
   (i) the New South Wales Government commission an empirical study into the adequacy, and possible improvement, of strategies designed to assist the process of jury comprehension and deliberation if there are concerns about jurors' deliberation times;[2]
   (ii) such a study should also consider the efficacy of jury directions in their current form and examine the changes in Victoria towards more 'standardised' directions under the *Jury Directions Act 2015* (Vic) and its forbear the *Jury Directions Act 2013* (Vic);
   (iii) in response to perceived pressure on jurors to arrive at verdicts against their consciences, trial judges ought to be granted a specific statutory power under the *Jury Act 1977* (NSW) to discharge juries where it is clear that there is no prospect of a jury reaching any kind of verdict (whether unanimous or majority) without having to wait for the eight-hour minimum period to elapse and without having to give a majority-verdict direction; and,
   (iv) a statutory list of events to be excluded from the reckoning of the eight-hour period should be inserted into section 55F of the *Jury Act 1977* (NSW) to avoid inconsistencies in how judges calculate the minimum deliberation time.

Background: majority verdicts

5. At common law, jury verdicts must be unanimous, a rule that has been recognised for over six and a half centuries.[3] In Australia, the common-law principle of unanimity has informed the High Court's view that s80 of the Constitution requires that verdicts in Commonwealth trials on indictment be agreed upon by all jurors.[4]

6. The unanimity of jury verdicts is no mere technicality, but upholds the enhanced standard of proof in criminal proceedings. As the High Court has (unanimously) observed: 'a verdict returned by a majority of the jurors, over the dissent of others, objectively suggests the existence of reasonable doubt and carries a greater risk of conviction of the innocent than does a unanimous verdict'.[5]

7. While the Commonwealth Parliament is constitutionally prohibited from passing any law that would permit majority verdicts, States may lawfully introduce statutory provisions that encroach upon the common law requirement for unanimity in verdicts. However, though the terms of s80 of the Constitution are limited to federal laws, 'it is not unrealistic to expect that the tone of Australian law and practice, even at the State level, will be affected by th[at] [constitutional] provision'.[6]

8. Only cogent and compelling reasons can, therefore, justify the expansion of the scope of majority verdicts or the relaxation of the procedural safeguards that regulate their use.

The enactment of the eight-hour rule

9. The policy rationale for the introduction of majority verdicts in all criminal proceedings in New South Wales in 2006 was not to relieve lone jurors from the pressure to conform with the majority view to produce unanimous verdicts but to prevent 'rogue jurors' from bringing about hung juries through their intransigent refusal either to adopt the majority's view or to come to a decision at all.[7]

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[2] The New South Wales Law Reform Commission recommended a similar study in 2005 *before* the introduction of majority verdicts in this State: see *Majority Verdicts*, (Report 111; August 2005), Recommendation 2, p 83.
[3] *Anonymous Case* (1367) 41 Lib Ass 11.
[4] *Cheatle v The Queen* (1993) 177 CLR 541.
[5] Ibid., at 553.
[6] Australian Institute of Criminology, *The Jury*, Seminar Proceedings No 11, (May 1986), p 10.
[7] Second Reading Speech, Jury Amendment (Verdicts) Bill 2006 (NSW): New South Wales, *Parliamentary Debates,* Legislative Assembly, 5 April 2006, p 22161 (Bob Debus, Attorney General).

10. The safeguard provided by the eight-hour rule was central to the construction of New South Wales's provisions about majority verdicts:

> *The practical effect of having an eight-hour threshold instead of six hours is that a jury will be compelled to deliberate for more than one court day before it or a judicial officer can entertain a majority verdict. Until eight hours has elapsed, it must strive to reach a unanimous verdict.*[8]

11. Moreover, while '[e]ight hours of court time must elapse before a majority verdict can be considered' even then 'a judge can advise the jury to further deliberate',[9] with trial judges able to give a direction as to a majority verdict long after the expiration of that mandatory eight-hour period. A *Black* direction to jurors to persevere in its deliberations towards a unanimous verdict is not precluded merely because a court day has passed since the jury retired.[10]

12. The Department of Communities and Justice in its Issues Paper, referred to below, did not cite any case law, extra-curial remarks by judges, anecdotal evidence from legal professionals, academic research or empirical data on majority verdicts in support of its proposed changes to section 55F(2)(a) of the *Jury Act 1977* (NSW). As such, there appears to have been no change of circumstance since the enactment of the eight-hour rule in 2006 that would justify departing from the policy rationale behind the minimum deliberation period.

13. On the contrary, since the enactment of the *Jury Amendment (Verdicts) Act 2006* (NSW), concerns have been raised about the increased complexity of judicial directions to jurors, particularly in sexual assault trials.[11] There has also, in the experience of the Association's members, been a marked increase in the parties' reliance on electronic evidence such as telephone records and intercept evidence over the last decade and half. These developments would indicate that jurors will need more time to consider cases, which would, in turn, suggest that the minimum deliberation time ought, at the very least, to be maintained.

Issues Paper

14. In a 2021 Issues Paper[12], which initiated the statutory review of the amendments made to the *Jury Act 1977* by the *Jury Amendment (Verdicts) Act 2006*, the Department of Communities and Justice provided the following reasons for reducing or removing the minimum deliberation time of eight hours under section 55F(2)(a) of the *Jury Act 1977* (NSW):
    (i) adherence to the eight-hour rule 'may risk causing the jury to feel under pressure and compromise their position in the interests of reaching a verdict' or prompt jurors to '*exert improper pressure*' on one another to arrive at a verdict;
    (ii) lowering the minimum deliberation period would bring New South Wales 'into line with other Australian jurisdictions'; and,
    (iii) decreasing the period in which a majority verdict may be accepted 'would reduce unnecessary cost in **some** cases [emphasis added]'.[13]

15. In a response to the Issues Paper, the Association made a submission in May 2021 that opposed any change to the minimum deliberation period. The Association also wrote to the NSW Attorney General in February 2022 and the NSW Department of Communities and Justice in October 2023 opposing any change to the minimum deliberation period.

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[8] Ibid.
[9] Ibid.
[10] *Black v The Queen* (1993) 179 CLR 44.
[11] See, for instance, New South Wales Law Reform Commission, *Jury Directions*, Report 136 (November 2012); V Bell AC, Jury Directions: the Struggle for Simplicity and Clarity Banco Court Lecture Supreme Court, Queensland, 20 September 2018
[12] Department of Communities and Justice, *Issues Paper – Jury Reforms: Statutory Review of the majority verdicts amendments*, 2021.
[13] Ibid., p 9.

Report of the Statutory Review

16. The subsequent Report of the 'Statutory Review of the amendments made to the *Jury Act 1977* by the *Jury Amendment (Verdicts) Act 2006*' (the **Statutory Review**) was tabled in the NSW Parliament on 13 October 2023.

17. The Statutory Review "concludes that the policy objectives of the majority verdicts amendments remain valid"[14] and that "the terms of the amendments are largely appropriate for securing the policy objectives, with the exception of the eight hour rule"[15]. The Statutory Review makes a single recommendation to amend section[16]:

> *…55F(2)(a) of the Act to enable a majority verdict to be returned by a jury in criminal proceedings where a unanimous verdict has not been reached after the jurors have deliberated for not less than four hours, rather than not less than eight hours (and the other requirements for a majority verdict under the Act are met).*

The rationale for this recommendation was that "stakeholders provided a range of persuasive practical and academic reasons…, including in relation to inefficiencies for those engaged in the criminal proceedings and potential risks for jurors."[17] However, the Statutory Review does not provide any clear evidence in relation to the question of juror safety, nor empirical evidence as to the exact extent of any efficiencies gained by reducing the deliberation period. It is not clear how reducing the eight hour rule will increase the efficacy of the majority verdict amendments.

18. According to the Statutory Review, the prevalence of hung juries in NSW remains very low. Since 2003, around 2% of trials dealt with in the District Court of NSW each year have resulted in a hung jury, representing around 31 matters per year. Significantly fewer matters result in a hung jury in the Supreme Court.[18] Significantly, the Statutory Review concludes that the statistics on hung juries do not suggest that the majority verdicts amendments reduced the prevalence of hung juries in NSW.[19]

19. In light of this data and the findings of the Statutory Review, the Association considers that the case for such major change to the jury system in NSW has not been made out. To the extent that efficiencies may result, we consider that the dilution of longstanding procedural safeguards that ensure the integrity of majority verdicts as part of the right to a fair trial is not justified.

Undue pressure on jurors

20. The Statutory Review refers to a hypothetical situation in which jurors firmly disagree on an issue that does not require eight hours to consider, and their positions will not change. It is claimed that requiring the jury to continue to deliberate in such a situation, 'may risk causing jurors to feel under pressure and compromise their position in the interests of reaching a verdict' and 'may cause a juror or jurors to exert improper pressure in the jury room'.[20]

21. However, no clear evidence has been presented that the eight-hour rule has, in itself, caused jurors to feel under pressure to arrive at a unanimous verdict or has led to what would amount to misconduct by jurors, namely to coerce a member of a jury to change his or her 'vote' or to come to a position on the Crown's case.

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[14] NSW Department of Communities and Justice, 'Statutory Review – Majority verdicts amendments: Report of the Statutory Review of the amendments made to the *Jury Act 1977* by the *Jury Amendment (Verdicts) Act 2006*', May 2023, p 14.
[15] Ibid, p 12.
[16] Ibid, p 2.
[17] Ibid, p 12.
[18] Ibid, p 11.
[19] Ibid
[20] Ibid, p 8

22. The eight-hour rule ought, instead, to be considered as an important procedural safeguard that ensures that juries have fully explored the evidence admitted against, and for, a defendant and have carefully considered all judicial directions before arriving at a well-reasoned verdict.

23. The current eight-hour time limit on permitting majority verdicts recognises that, for a large number of jurors, their membership of a jury will be the first time they will have entered a criminal court, been exposed to in-depth explications of the law or been required to undertake a reasoned decision-making function with peers. Included in the initial eight hours in the jury room will inevitably be a period of individual jurors settling into their deliberative roles as the arbiters of fact within the trial process.

24. Far from placing jurors under pressure to come to a verdict, the eight-hour rule operates to ensure that juries are given sufficient time to arrive at a unanimous verdict and are not rushed prematurely into a majority verdict.

Comparisons with other jurisdictions

25. The Statutory Review provides a jurisdictional comparison of minimum deliberation times for majority verdicts across relevant Australian jurisdictions.[21]

26. While other relevant jurisdictions, with the exception of Queensland[22], have a minimum deliberation time for majority verdicts that is lower than eight hours, there is no consensus in Australia as to the minimum length of time for which a jury should deliberate before a majority verdict should be permitted.

27. Comparisons with other Australian States and Territories should be treated with caution. The various Australian jurisdictions that permit majority verdicts stipulate different numbers of jurors that are required to form a majority and only New South Wales and the Northern Territory allow majority verdicts for all offences, with the remaining jurisdictions excluding particular offences from their regimes. Moreover, two Australian jurisdictions do not permit majority verdicts; and, while in the case of the Commonwealth this is due to the existence of a constitutional impediment,[23] the Australian Capital Territory is unrestrained from permitting majority decisions and yet has determined not to allow anything other than unanimous verdicts in its criminal trials on indictment, although a bill has been introduced in the ACT Legislative Assembly to provide for a majority verdicts after a reasonable period of at least 6 hours.[24]

Comparisons with civil proceedings

28. The Statutory Review notes that in "civil proceedings in NSW, majority verdicts are available where the jury has deliberated for more than four hours."[25] The procedural regulation of majority verdicts in civil proceedings should also be treated with caution. Comparisons between jurors in civil

[21] Tasmania: 2 hours, s48, *Jury Act 1899* (Tas); Western Australia: 3 hours, s114, *Criminal Procedure Act 2004* (WA); South Australia: 4 hours, s57, *Juries Act 1927* (SA); Northern Territory: 6 hours, s368, *Criminal Code Act 1983* (NT); Victoria: allows for a majority verdict after a 'period of time that the court thinks is reasonable, having regard to the nature and complexity of the trial', s46, *Juries Act 2000* (Vic); Queensland: 8 hours, s59A, *Jury Act 1995* (Qld); Australian Capital Territory: Majority verdicts are not currently provided for in the *Juries Act 1967* (ACT) although a bill has been introduced to the ACT Legislative Council to introduce majority verdicts.

[22] Section 59A(6) of the *Jury Act 1995* (Qld) as amended by *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld).

[23] As noted above; see s 80 of the Constitution; *Cheatle v The Queen* (1993) 177 CLR 541.

[24] On 26 October 2023, the ACT Attorney General introduced the Crimes Legislation Amendment Bill 2023 (ACT) which would, if enacted, amend the *Juries Act 1967* (ACT) to allow for majority verdicts if the judge is satisfied that a reasonable period (of at least 6 hours) for the jury to deliberate on the verdict has passed, taking into account the complexity and nature of the trial and after examination on oath of 1 or more jurors that the jury is not likely to reach a unanimous verdict: see Crimes Legislation Amendment Bill 2023 cl 38.

[25] NSW Department of Communities and Justice (n14), p13; s57, *Jury Act 1977* (NSW).

proceedings and criminal trials are fraught with difficulties, particularly because jurors in the former are not required to determine matters where one party bears a burden of proof to the highest juridical standard. Moreover, unlike those empanelled in criminal proceedings, jurors in civil cases may return a verdict upon which only two thirds of them are agreed.[26]

Efficiency savings and court time

29. The Statutory Review rightly notes that there 'are costs associated with keeping juries, judges, court staff and practitioners engaged' for the current minimum deliberation period of eight hours but it also notes that the cumulative impact of the extra hours would not be a major factor in relation to 'the trial backlog in Higher Courts'.[27]

30. In relation to the concerns that the minimum deliberation period of eight hours is inefficient, the Association acknowledges that it is reasonable to consider costs but submits that the potential savings associated with a shorter minimum deliberation period would not be sufficiently large to justify the risks to the integrity of majority verdicts.

31. In 1997, nearly a decade before the introduction of majority verdicts in New South Wales, the NSW Bureau of Crime Statistics and Research (**BOCSAR**) estimated that the introduction of 11:1 decisions in District Court trials would 'probably result in some administrative benefits' but that 'in general they [would] only [be] modest', amounting to 2.4 per cent of judge time.[28] The Association has yet to see figures that estimate the court resources that have been saved as a result of the introduction of majority verdicts or that would likely be saved were the minimum deliberation time to be reduced from eight hours to a shorter period.

32. It is likely that the 'unnecessary cost' saved by the proposed reduction in the prescribed deliberation period would be minimal. In 2022/23, the matters of 150,028 defendants were finalised in New South Wales criminal courts.[29] The vast majority (87.3 per cent) of defendants either pleaded or were found guilty to at least one of the charges against them, with 17,340 defendants proceeding to a defended hearing/trial. Of the defendants who contested the charges they faced, 694 (4 per cent) did so in the District Court; only 65 (0.37 per cent) accused persons who had defended trials appeared before the Supreme Court. Only 0.51 per cent of all finalised matters proceeded to a defended trial in a higher court. Of those matters that proceed to a defended trial in the higher courts in New South Wales, some will, of course, be judge-alone rather than jury trials. Moreover, any change to the minimum deliberation period would not apply to federal offences tried on indictment in State courts, with such proceedings being among the most complex for jurors and, consequently, likely requiring longer deliberation time to resolve.

33. The savings that could be obtained by reducing the eight-hour deliberation period would be limited to the 0.51 per cent of matters in New South Wales that proceed to a defended trial in either the Supreme Court or District Court.[30]

34. The proposed amendment of section 55F(2)(a) of the *Jury Act 1977* (NSW) is not supported by data on the current length of jury deliberations or any indication as to how much court time, resources and costs would be preserved in the approximately half a percent of defended trials in this State to which the changes would apply.

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[26] See s57(1)(b), *Jury Act 1977* (NSW).
[27] NSW Department of Communities and Justice (n14), p 8
[28] BOCSAR, Salmelainen, Bonney R, Weatherburn D, 'Hung Juries and Majority Verdicts', *Crimes and Justice Bulletin,* No 36 (July 1997) p 3.
[29] BOCSAR, *NSW Criminal Courts Statistics Jul 2018 - Jun 2023*, December 2023, available at: https://www.bocsar.nsw.gov.au/Pages/bocsar_publication/Pub_Summary/CCS-Annual/Criminal-Court-Statistics-Jun-2023.aspx.
[30] And within this small percentage of cases judge-alone and Commonwealth trials would be excluded from any savings.

35. Moreover, the proposed reduction in the minimum deliberation period appears to be based, in part, on the assumption that jury trials that result in a majority verdict come as a result of a majority-verdict direction given immediately upon the expiration of the minimum eight-hour period. It is, however, open to the court to allow a jury to consider a unanimous verdict for a period much longer than eight hours and for jurors to be permitted to deliberate for any period considered 'reasonable having regard to the nature and complexity of the criminal proceedings' before issuing a majority-verdict direction.[31]

36. Careful analysis of longitudinal statistics on the number and timing of *Black* directions given by trial judges, the number and timing of verdicts that were unanimous or by majority after the issuing of a *Black* direction and the number and timing of unanimous and majority verdicts delivered after the expiration of the minimum eight-hour period would be required to estimate the savings that would be brought about by the proposal. Calculating the effect of a decrease in the minimum deliberation time on court resources would even then be difficult, particularly as so many variables may justify a decision to permit a jury to continue to deliberation towards a unanimous verdict beyond the eight-hour period. The Association considers that savings, if any could be said to be brought about, would likely be small in any event.

37. When balancing the need for administrative efficiency and costs savings against the need to ensure that jurors are given adequate time to review and appropriately reflect on all evidence which has been presented, great weight needs to be given to the principles that lie behind the common law and constitutional requirements for jurors ordinarily to be in unison when convicting or acquitting defendants. As noted above, unanimous verdicts are directly linked to the criminal standard of proof and, thereby, the presumption of innocence and the burden of proof lying with the Crown in criminal proceedings.

38. Great care should be taken not to enshrine in law a rule that would inhibit jurors from following their oaths to 'give a true verdict according to the evidence'.[32] Juries must also be free to deliberate without any pressure being brought to bear upon them by anyone, including the trial judge.[33] In *Timbery v R*, the New South Wales Court of Criminal Appeal held that a trial judge's emotive comments that it would be 'just terrible' if the jury had to be discharged without a verdict after a trial of four weeks gave rise to a miscarriage of justice.[34] Removal of the eight-hour rule would, in effect, be for the legislature to sanction the hurrying of jurors towards a majority verdict before a reasonable opportunity had been given for unanimity to be achieved.

39. The minimum period of eight-hours of deliberation should be retained in order to ensure that juries have sufficient time to consider all evidence, reason, debate, and strive to achieve a unanimous verdict. It would be troubling were the minimum deliberation period to be reduced in the pursuit of uncertain and likely minimal costs savings.

Alternatives to the reduction of the minimum deliberation time

40. Efficient case management and the post-pandemic use of audio-visual links for procedural hearings will likely provide better opportunities to save court time, as will continued meaningful engagement between the parties in the Early and Appropriate Guilty Plea (**EAGP**) scheme. After the commencement of the EAGP reforms, for instance, there has been a 6.5 per cent increase in early guilty pleas, a decrease in days from committal to finalisation (from 182 days on average to 155 days) and an increase in the number of District Court finalisations of between 7.5 and 12.3 additional matters per week.[35]

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[31] Section 55F(2)(a) of the Jury Act 1977 (NSW). See also *AGW v R* [2008] NSWCCA 81 [23]; *Hanna v R* [2008] NSWCCA 173; 73 NSWLR 390 [62]-[72]; *RJS v R* [2007] NSWCCA 241; 173 A Crim R 100.
[32] Section 72A(4) of the *Jury Act 1977* (NSW).
[33] *Black v The Queen* (1993) 179 CLR 44 at 50; *R v Tangye* (unrep, 10/4/1997, NSWCCA).
[34] [2007] NSWCCA 355.
[35] BOCSAR, Klauzner I and Yeong S, 'The impact of the Early Appropriate Guilty Plea reforms on guilty pleas, time to justice, and District Court finalisations'*, Crime and Justice Bulletin*, N° 240, August 2021, p 1.

41. The Association recommends that, if there are evidence-based concerns regarding prolonged jury deliberations or undue pressure being placed on jurors, these would best be managed by jury training. As the New South Wales Law Reform Commission recommended in 2005 before the introduction of majority verdicts in this State, 'empirical studies should also be conducted into the adequacy, and possible improvement, of strategies designed to assist the process of jury comprehension and deliberation' before any change to the minimum deliberation time is considered.[36]

42. Any study of juror comprehension and deliberations should, subject to the limitations imposed by sections 68A and 68B of the *Jury Act 1977* (NSW),[37] also examine the length, complexity and tediousness of judicial directions and their potential to cause confusion in criminal trials. It is the experience of the Association's members that the problem of complex and sometimes needlessly long directions is an ongoing issue in proceedings in this State. The Association notes that significant work has been undertaken in Victoria to simplify standard directions,[38] culminating in the passage of the *Jury Directions Act 2013* (Vic) and two years later the *Jury Directions Act 2015* (Vic).[39]

Discharging juries where there is no prospect of a verdict

43. The perceived need to ensure that jurors are not placed under undue pressure by fellow jurors to arrive at a particular verdict seems to have partly motivated the Department of Communities and Justice's recommendation for the reduction of the minimum eight-hour period of deliberation.

44. No consideration, however, has been given to jurors being compelled to remain needlessly in retirement when it is clear that there is no real prospect of their reaching any kind of verdict, whether unanimous or majority.

45. In *Villis v Regina*, the Court of Criminal Appeal observed that there was no power to discharge a jury until it had been deliberating for eight hours even where there was evidence that jurors were, and would be, unable to reach either a unanimous verdict or a majority verdict.[40] Some judges, however, have taken the view that in some circumstances, a jury can be discharged at an earlier time when it is apparent that neither a unanimous nor majority verdict is possible to avoid a miscarriage of justice.[41]

46. Jurors who have (repeatedly)[42] communicated their insurmountable divergence of opinions to a trial judge but are, nevertheless, directed to persevere in their deliberations might conclude that:

> *the only way they could leave is to compromise their individual attitudes to a correct verdict. In such cases a jury may well feel that the only way out of their Kafkaesque predicament is to deliver a verdict. The integrity of such a verdict is obviously doubtful.*[43]

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[36] New South Wales Law Reform Commission, *Majority Verdicts*, (Report 111; August 2005), Recommendation 2, p 83.

[37] Which together make it an offence to solicit information from jurors about their deliberations or for jurors to reveal information about their deliberations.

[38] Victorian Law Reform Commission, *Jury Directions*, Final Report 17 (May 2009); Judicial College of Victoria, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (2012); Department of Justice, *Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group* (August 2012); Department of Justice, *Jury Directions: A New Approach* (2013);

[39] As amended by, *inter alia*, *Jury Directions and Other Acts Amendment Act 2017 (*Vic).

[40] [2014] NSWCCA 74.

[41] *Regina v BC* [2018] NSWDC 124.

[42] As in *Regina v BC* [2018] NSWDC 124.

[43] *Villis v R* (2016) 23 Criminal Law Notes, LexisNexis, P Berman and RA Hulme, at [3694], cited in *Regina v BC* [2018] NSWDC 124 at [29].

47. The Association recommends that any pressure on jurors to arrive at verdicts against their consciences would be better alleviated by granting trial judges a specific statutory power to discharge juries if it is clear that there is no prospect of the jury reaching any kind of verdict (unanimous or majority) without having to wait for the eight-hour minimum period to elapse and without having to give a majority-verdict direction.

Ensuring deliberation times are calculated in a consistent way

48. The Statutory Review appears to assume that the eight-hour period of 'deliberation' is calculated in the same way by all trial judges and that their calculations fairly represents the time during which jurors can safely be presumed to have been discussing the case.

49. In the experience of the Association's members, there are inconsistencies in how trial judges calculate the minimum period of deliberation before issuing a majority-verdict direction. For instance, some judges take into account lunchtimes when calculating the eight-hour 'deliberation' on the basis that jurors are likely discussing the case during their meal. Such judicial assumptions appear to be without a firm foundation.

50. Rather than reducing the minimum deliberation period under section 55F of the *Jury Act 1977* (NSW), consideration should instead be given as to whether a clear statutory definition is needed of what periods of time cannot be used to calculate the minimum eight hours' deliberation.

51. The Association notes that the rules governing majority verdicts in Queensland define what periods during a jury's retirement should be excluded for the purpose of calculating the 'prescribed period' of eight hours before a majority-verdict direction may be given. Section 59A(6) of the *Jury Act 1995* (Qld) stipulates that:

> ***prescribed period*** *means—*
> *(a) a period of at least 8 hours after the jury retires to consider its verdict, not including any of the following periods—*
> *(i) a period allowed for meals or refreshments;*
> *(ii) a period during which the judge allows the jury to separate, or an individual juror to separate from the jury;*
> *(iii) a period provided for the purpose of the jury being accommodated overnight* [.]

52. The Association recommends that a similar list of events to be excluded from the reckoning of the eight-hour period should be inserted into section 55F of the *Jury Act 1977* (NSW) to avoid inconsistencies in how judges in this State determine whether the minimum deliberation time has passed.

Conclusion

53. For the reasons given above, the Association urges caution when considering proposals to weaken the procedural safeguards that regulate majority verdicts in New South Wales and opposes the proposed reduction to the minimum deliberation period.

54. Should you have any questions about this letter, please contact in the first instance Harriet Ketley, Director, Policy and Law Reform

Yours sincerely,

Ruth Higgins SC
President