Submission No 6

INQUIRY INTO JURY AMENDMENT BILL 2023

Organisation: Office of the Director of Public Prosecutions (NSW)

Date Received: 17 January 2024

ODPP
New South Wales

Director's Chambers

Our Reference

Your Reference

17 January 2024

The Director,
Portfolio Committee No. 5 Justice and Communities
Parliament House
Macquarie Street Sydney NSW 2000.

By email: portfoliocommittee5@parliament.nsw.gov.au

Dear Sir/Madam

Inquiry into the Jury Amendment Bill

The Office of the Director of Public Prosecutions (ODPP) has been invited to make a submission to the above Inquiry into the *Jury Amendment Bill 2023 (NSW)* (the 'Bill') and to send a representative to give evidence before the Committee.

Deputy Senior Crown Prosecutor Brett Hatfield SC is attending to give evidence on 31 January 2024 on behalf of the ODPP. I would also like to make a brief submission on the Bill.

This Office is generally supportive of the Bill. Most of the proposed provisions relate to arrangements of an administrative nature relating to juries, including those regarding selection and empanelment.

There are however two aspects of the Bill about which this Office wishes to make more detailed submissions.

1. Schedule [8] Section 55F Majority Verdicts in criminal trials

The ODPP supports this amendment.

In our experience practical difficulties have emerged with the operation of the provision as currently framed. The designated minimum period of 8 hours can operate in a manner which is inconsistent with just outcomes and with the practical reality of jury deliberations in some cases, particularly in shorter and less complex trials.

First, prosecutors have found that jurors are frequently aware of the option of a majority verdict, and on occasion ask the court about it well before any majority verdict direction may be given by the trial judge. Such an awareness does not sit well with current legislation and practices which deprives a jury of accurate information about majority verdicts for a stipulated period of 8 hours, regardless of the complexity of the matter.

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Second, there are significant costs to the criminal justice system associated with hung juries, including the financial cost of re-running the trial, the additional burden on courts to re-list the matter which adds to the trial back-log affecting all matters, and perhaps most importantly the psychological and emotional cost on all stakeholders, including complainants and accused persons. The ODPP notes that some of the trauma from having to give evidence on multiple occasions is ameliorated for complainants in prescribed sexual offence proceedings by legislation which allow the playing the evidence from the first trial in subsequent trials, although in relation to hung juries these provisions are not absolute and an application may be made for a complainant to be recalled.[1] These provisions do not, however, remove the psychological burden on a complainant that may arise from the resolution of a trial being delayed, nor do they assist a complainant's family, kinship or friendship network, who will frequently be witnesses in the proceedings who will be required to give evidence again, which in turn may place an additional burden on the complainant.

Third, there are significant practical issues with the 8-hour period provided by s 55F(2), which are neatly encapsulated in the following comment by a Crown Prosecutor made in 2021 when this Office was first consulted about the proposed Bill:

> *I have conducted several short trials, where parties have narrowed the issues. The evidence might conclude in 1 or 2 days. There is not a lot for the jury to consider. A deadlock is reached quickly, say within the first 1-3 hours. If the jury are unable to reach a verdict, the Judge will routinely give the usual Black direction. A short time later they return again unable to reach a unanimous verdict (say around 3-4 hours after they went out).*
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> *What then should the Judge do with the jury? A majority verdict can't be taken because of s55F(2). Arguably the jury can't be discharged (due to their inability to reach a verdict) because the Judge couldn't be satisfied that they are unable to reach a majority verdict (because they don't know that such a verdict is available) ……Sending the jury back to the jury room (to wait out the 8 hours) after being told in unequivocal terms that they will not reach a verdict, particularly when the jury would have no idea how long they would be detained for, could well lead to undue pressure being placed on some jurors to reach a verdict consistent with the majority simply to be released…*
>
> *This issue isn't only apparent in short trials. Say a 5-10 day trial where the issue is narrow. Towards the end of the trial legal issues arise which require lengthy argument and rulings. The jury having heard most of the evidence are together in the jury room [discussing the evidence]. By the time they are 'formally' sent out on verdict, they have [already] spent hours, (possibly days) [discussing the evidence]. Again, they can't be instructed regarding a majority verdict until 8 hours formal deliberation time has expired.*

The authorities provide that when the jury indicates that they are deadlocked, they should not be told that within the relevant number of hours, a majority verdict may be taken: ***Hunt v Regina* [2011] NSWCCA 152. In the decision of** *Villis v R* [2014] NSWCCA 74**,** Fullerton J (with whom Bathurst CJ and Bellew J agreed) determined that until 8 hours has expired a jury cannot be discharged if they are unable to reach a unanimous verdict. However, the ODPP is aware of District Court decisions that are at odds with *Villis*.[2]

This Office considers that there is an increased risk of a miscarriage of justice if juries are persistently directed to continue deliberating because the circumstances for a majority verdict

[1] See Chapter 6, Part 5, Division 4 of the *Criminal Procedure Act 1986*
[2] See for example *R v BC* [2018] NSWDC 124

direction have not yet arisen, after clearly indicating that they are unable to reach a unanimous verdict and without being told how long this state of affairs must continue.

The ODPP considers that the current requirement under s 55F(2)(a) that trial judges assess whether the period of deliberation is "reasonable having regard to the nature and complexity of the criminal proceedings" before a majority verdict can be accepted, together with a reduced minimum period of 4 hours, strikes the correct balance on the one hand in striving for unanimity and ensuring that juries have engaged in an appropriate level of deliberation towards this end, and on the other addressing the practical realities of the criminal trial process.

2. Schedule 1 [13] Transitional and Savings Provisions

The Office does not support sub-clause (3), which holds that the amendment to the majority verdict timing will not apply to any retrials or further trials.

This provision has the capacity to perpetuate the problems with the current 8-hour minimum that have led to the proposed reform to s 55F. It is also not apparent that there is any unfairness to an accused person in there being a reduced time before a majority verdict can be taken in a retrial or further trial.

Thank you for this opportunity to comment on the Bill.

Yours faithfully

Frank Veltro SC
Acting Director of Public Prosecutions