

**Submission  
No 7**

## **INQUIRY INTO JURY AMENDMENT BILL 2023**

**Organisation:** New South Wales Council for Civil Liberties

**Date Received:** 17 January 2024

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**NSWCCL SUBMISSION**

**LEGISLATIVE COUNCIL OF NSW**

**JURY AMENDMENT BILL 2023**

**17 JANUARY 2024**

### ***Acknowledgement of Country***

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

### ***About NSW Council for Civil Liberties***

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

NSWCCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

### ***Contact NSW Council for Civil Liberties***

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The NSW Council for Civil Liberties (**NSWCCL**) is grateful for the opportunity to make a submission to the Legislative Council of NSW.

## Introduction

1. The NSWCCL recognises the importance of increasing the efficiency of jury empanelment, the provision of enhanced support for jurors to perform their role and reducing the expenditure of resources on trials that are ultimately aborted or result in hung juries. The NSWCCL also recognizes the validity of majority verdict legislation in criminal and coronial trials.
2. However, the NSWCCL is concerned that the proposed amendment to section 55F of the *Jury Act 1977* (**the Act**) may compromise a jury's ability to properly consider the guilt or innocence of an accused person, and that such a compromise is made in exchange for a speculative and nominal reduction in the expenditure of resources on trials and reduction in hung juries.
3. The NSWCCL is further concerned that the proposed amendment to section 73A(1) of the Act unnecessarily broadens the investigative power of the NSW Sheriff's Office (**Sheriff**). The broadening of the investigative power is significant and not safeguarded or constrained by current legislation.

## Proposed Amendment to Section 55F of the Act

There is no evidence that the proposed amendment will reduce the expenditure of resources on trials or reduce the number of hung juries

4. The NSWCCL considers that the '*Report of the Statutory Review of the amendments made to the Jury Act 1977 by the Jury Amendment (Verdicts) Act 2006 dated May 2023*' (**the Report**), from which the proposed amendment was recommended, has not sufficiently explained, with evidence, how the amendment will reduce the expenditure of resources on trials or reduce the number of hung juries.
5. The Report acknowledges that there were '*significant limitations in terms of available data for both hung juries and majority verdicts*'<sup>1</sup> and has relied upon the majority view of stakeholders in making a recommendation. We consider that the reliance on stakeholder opinions, without empirical or statistical evidence, is problematic where the integrity of a verdict may be at stake (discussed further at paragraphs [10] to [19] below).
6. We note that where statistics were available, it showed that '*from 2007 onwards an average of 1.9% of trials dealt within the District Court of NSW resulted in a hung jury*'. We consider this figure to be extremely small and unlikely to make a substantive impact on the trial backlog or expenditure of resources, particularly where other aspects of the trial process can be reformed to greater effect (discussed further at paragraphs [18] to [19] below).
7. We also consider the figure of 1.9% to be tolerable and even indicative of a healthy trial process. A hung jury trial should not be considered a failed trial (unlike an aborted trial), but rather a byproduct of a complex event where jurors have taken their duties seriously in the consideration

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<sup>1</sup> Report of the Statutory Review of the amendments made to the Jury Act 1977 by the Jury Amendment (Verdicts) Act 2006 dated May 2023 at [4.4]

of the evidence and directions. It will be inevitable that jurors (in a small number of trials (1.9%)) will reach a different conclusion about the guilt or innocence of an accused.

8. The NSWCCCL is aware of the recent Court of Criminal Appeal decision of *Vella*<sup>2</sup> and while we are concerned about the matters raised in this case, we believe that these situations are better addressed by more effective juror induction processes, judicial directions, and juror discharges. Further, the proposed amendment to s53D of the Act will give more confidence to judicial officers to discharge misbehaving jurors like the juror in *Vella*.
9. The NSWCCCL is also aware of several practical aspects in respect of trial processes that suggest the proposed amendment would not achieve its stated objectives. In particular:
  - (a) in respect of reducing the backlog of trials, we understand that the day on which a verdict is returned by the jury is a much more critical factor in the reduction of the backlog of trials than the minimum number of hours the jury is to deliberate before a majority verdict. For instance, if a verdict is returned by a jury on a Wednesday, it is highly unlikely that the next jury will be available for empanelment on the Thursday or Friday. In those circumstances, the next trial would be stood over to commence on the next Monday, and the Thursday and Friday would be allocated to other short matters<sup>3</sup>. We believe that better case management of trials and pre-empanelment processes are likely to have a greater impact on reducing the backlog of trials;
  - (b) in respect of reducing the number of hung juries, we consider that for the proposed amendment to reduce the number of hung juries, it must be accepted that a particular jury's verdict will change from at 4 hours of deliberations to after 8 hours of deliberations. Consider, for example, a case where the verdict ratio of a jury at 4 hours is 11 to 1 (which according to the proposed amendment would enable a majority verdict to be taken). For the proposed amendment to *reduce* the number of hung juries, it must be accepted that after 8 hours of deliberations the same jury would have returned a different verdict ratio of say 10 to 2 (which would result in a hung jury). This is noting that if the jury verdict ratio remained at 11 to 1 after 8 hours, then a majority verdict could still be taken under the current legislation and would not have resulted in a hung jury and thereby not reduce the number of hung juries. We consider that this speculation into jury conduct and reasoning is unhelpful and not probative of the veracity of the proposed amendment.
  - (c) in respect to expenditure, we understand that judicial officers use jury deliberation time to preside in unrelated short matters such as sentences and appeals, bail applications and pre-trial argument in other unrelated trials. We therefore believe that jury deliberations do not unjustifiably waste department expenditure, but rather the time is repurposed to other criminal matters.

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<sup>2</sup> *Vella v R* [2022] NSWCCA 204

<sup>3</sup> We acknowledge that jury availability and empanelment process can vary between court centres, particularly in regional or circuit courts

## Jury deliberation is a critical phase in a criminal trial

10. Jury deliberations are one of the most important phases of a criminal trial, where the guilt or innocence of a person is decided, and should not be made shorter for the sake of an unknown and speculative reduction of expenditure on resources and hung juries.
11. The NSWCCCL believes that the proposed amendment may encourage verdict-driven deliberations rather than evidence-driven deliberations. Research has shown that verdict-driven deliberation is marked by early and frequent polling and pressures to conform to the majority, whereas evidence-driven deliberation is correlated with high levels of participation and wide-ranging discussions, with a focus on the review of facts, evidence and judicial directions.<sup>4</sup> We believe that the proposed amendments are likely to reduce the time for high levels of participation and wide-ranging discussions between jurors, and will instead facilitate premature polling (at 4 hours) and pressures to conform to the majority.
12. We also note that a jury's early indication of deadlock may not always result in a hung jury. The court in *Black*<sup>5</sup> recognized the value in directing the jury to persevere for unanimity and to listen to the views of others in a calm and considered way, including a rogue juror.<sup>6</sup>
13. The NSWCCCL recognizes that the court is constrained from taking a majority verdict within 8 hours even where a jury has indicated deadlock without hope of unanimity.<sup>7</sup> The Hon. Mark Buttigieg in his Second Reading speech suggested that the prolonging of deliberations in such circumstances may impact on juror well-being.<sup>8</sup> While we accept this may occur in a small percentage of cases, we believe that an improved juror induction process and new jury directions or warnings may have a greater impact on the improvement of juror well-being in such cases.
14. In that regard, the report prepared by the Australian Institute of Criminology '*Practices, policies and procedures that influence juror satisfaction in Australia*' found that jurors generally expressed a preference for (1) more time to choose a foreperson to effectively lead the deliberation process, (2) more information about the role of the foreperson and in the form of additional guidance of deliberation, and (3) the application of directions and strategies to resolve conflict if they arise during deliberations.<sup>9</sup> The length of jury deliberations did not appear to be an important aspect.

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<sup>4</sup> Erin York Cornwell and Valerie Hans, "Representation through Participation: A Multilevel Analysis of Jury Deliberations," 45 Law & Society Review (2011)

<sup>5</sup> *Black v The Queen* (1993) 179 CLR 44

<sup>6</sup> *KE v R* [2021] NSWCCA 119 [82]

<sup>7</sup> *R v Hunt* [2011] NSWCCA 152; *Villis v R* [2014] NSWCCA 74; *R v BC* [2018] NSWDC 124

<sup>8</sup> Hon. Mark Buttigieg, Second Reading, NSW Legislative Assembly Hansard, 19 October 2023 – Jury Amendment Bill 2023, <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-93846>

<sup>9</sup> Goodman-Delahunty J et al. 2009. Practices, policies and procedures that influence juror satisfaction in Australia. Research and public policy series no. 87. Canberra: Australian Institute of Criminology. <https://www.aic.gov.au/publications/rpp/rpp87>, paragraph 175.

The reduction of the minimum time provided for juries to consider evidence, directions, and closing addresses, may risk the integrity of a verdict

15. The NSWCCCL is concerned that 4 hours may be insufficient time for a jury to consider the evidence, directions and closing addresses in most criminal trials because evidence is more complex and voluminous and trials are often longer than ever before. The NSWCCCL understands this to be an anecdotally accepted fact within the criminal jurisdiction. Some examples of this type of evidence include:
- (a) in respect of documentary evidence; social media chat logs, text messages, phone records, bank records, Cellebrite downloads, and phone application records;
  - (b) in respect of electronic evidence; CCTV, phone video recordings, and cell tower geolocation records;
  - (c) in respect of expert evidence; DNA, counter-intuitive behaviours of sexual assault complainants, and ballistics;
  - (d) in respect of tendency evidence; section 97A of the *Evidence Act 1995 (NSW)* (this section has made the admission of tendency evidence in sexual assault trials much more prevalent. Tendency evidence can be difficult to immediately appreciate for a juror unfamiliar with the concept particularly where a different standard of proof may apply)
16. We believe that the reliance on complex or voluminous evidence will inevitably require juries to consider evidence for longer periods than ever before. This conclusion was reached by several studies in the United States<sup>10</sup> and consistent with common understandings of criminal trials in NSW.
17. We also note that jury directions in sexual assault criminal trials and the reforms into consent laws are more complex than ever before and will likely see an increase in the time required by a jury to properly consider the evidence.<sup>11</sup> We note these reforms will make sexual assault trials in NSW more complex than in other jurisdictions, and if deliberation times were reduced, it may promote the undesired verdict-driven deliberations (see paragraph 11).
18. We also consider there to be an increased risk that the discretion to take a majority verdict by a judge may become informed by matters other than relevant trial circumstances. In particular, case management considerations (particularly in regional and circuit courts), the availability of counsel where a trial has exceeded its estimate, whether the next day is a weekend or public

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<sup>10</sup> Brunell, Thomas, et al. (2009) "Factors Affecting the Length of Time a Jury Deliberates: Case Characteristics and Jury Composition," 5 Rev. of Law & Economics 55578 – [chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.researchgate.net/profile/Thomas-Brunell/publication/46556298\\_Factors\\_Affecting\\_the\\_Length\\_of\\_Time\\_a\\_Jury\\_Deliberates\\_Case\\_Characteristics\\_and\\_Jury\\_Composition/links/09e4150e18892d1e76000000/Factors-Affecting-the-Length-of-Time-a-Jury-Deliberates-Case-Characteristics-and-Jury-Composition.pdf](https://www.researchgate.net/profile/Thomas-Brunell/publication/46556298_Factors_Affecting_the_Length_of_Time_a_Jury_Deliberates_Case_Characteristics_and_Jury_Composition/links/09e4150e18892d1e76000000/Factors-Affecting-the-Length-of-Time-a-Jury-Deliberates-Case-Characteristics-and-Jury-Composition.pdf); Maass, Anne, et al. (1985) "Testifying on Eye witness Reliability: Expert Advice is Not Always Persuasive," 15 J. of Applied Social Psychology 207–29.

<sup>11</sup> Since the commencement of the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2001 No 43* on 1 June 2022, juries are now directed to consider consent, complainant evidence and complaint evidence differently and more carefully than before.

holiday, a particular juror's availability, or whether the trial judge is available to preside (particularly in circuit courts). This may operate contrary to the principles of a fair trial.

19. As a practical consideration, we also understand that juries are frequently provided trial transcript for their deliberations, but only upon request<sup>12</sup>. We understand that a request for trial transcript by a jury is not always immediate nor provided immediately. We understand that once a request is made, which could be hours into the deliberations, a solicitor from the Office of the Director of Public Prosecutions is tasked with preparing a copy while the jury continue with their deliberations. The time from when a request is made to when the transcript is finally settled by the parties and provided to the jury could be hours, at which time it could be speculated that the jury have not been able to properly deliberate.
20. The NSWCCCL believes that reforming s55C of the *Jury Act 1997* to ensure that all juries are provided a settled copy of the trial transcript at the commencement of their deliberations will have a greater impact on reducing jury deliberation times and ultimately the backlog of trials.

### **Proposed Amendment to Section 73A(1) of the Act**

21. The NSWCCCL is concerned that the proposed amendment to include 'another person in relation to a juror' within section 73A(1) of the Act unnecessarily broadens the investigative powers of the Sheriff.
22. The proposed amendment provides for the Supreme and District Court of NSW to implicitly direct (by request or consent) the Sheriff to investigate ordinary persons of the community even where those persons may be unrelated to the trial proper, such as family members of jurors, associates of an accused person, or journalists. There is potential for the proposed amendment to erode civil liberties. Innocent persons, perhaps wrongly accused by disgruntled stakeholders, may be the target of misguided investigations by the Sheriff.
23. The powers of the Sheriff are derived from the *Court Security Act 2005* (NSW), *Civil Procedure Act 2005* (NSW), *Sheriff Act 2005* (NSW) and the *Jury Act 1977* (NSW), and do not include safeguard provisions in respect of investigations by the Sheriff acting outside court premises.<sup>13</sup> We believe that the developed common law safeguards relating to ss 7A and 7B of the *Sheriff Act 2005* (NSW), and Sheriff's as 'peace officers'<sup>14</sup>, do not sufficiently protect civil liberties from the new proposed investigative functions of the Sheriff, particularly where an individual may be exposed to criminal liability. This may have real consequences on a person's right to silence<sup>15</sup>, the admissibility of admissions<sup>16</sup>, and the collection of evidence by law enforcement in subsequent investigations.

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<sup>12</sup> S55C of the *Jury Act 1977*; also see *R v Sukkar* [2005] NSWCCA 54 at [84]. See generally *R v Fowler* [2000] NSWCCA 142 at [91]; *R v Bartle* [2003] NSWCCA 329 at [687]

<sup>13</sup> Definition of 'court premises', S4 of the *Court Security Act 2005* (NSW)

<sup>14</sup> See Watson, R Blackmore, AM Hosking, *GS Criminal Law* (NSW) LBC Information Services 1996

<sup>15</sup> Cautions used by police during official question do not appear to apply to Sheriff Officers

<sup>16</sup> see s281 of the *Criminal Procedure Act 1986* (NSW)



24. We note that the Sheriff is not subject to or constrained by the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) or overseen by the Law Enforcement Conduct Commission.<sup>17</sup> This a matter of considerable concern to the NSWCCCL.
25. Further, the Act already provides for criminal conduct relating to a juror to be investigated and prosecuted by law enforcement bodies such as the NSW Police Force.<sup>18</sup> The ‘improper conduct’ of another person as it relates to a juror is likely to overlap with this criminal conduct (i.e. soliciting of information from or harassing juror or former jurors contrary to s68A of the Act). We therefore consider the proposed amendment to be unnecessary and potentially problematic for criminal investigations conducted by the NSW Police Force.
26. It is also not clear how the power to investigate ‘another person in relation to a juror’ can prevent or deter improper conduct of a ‘rouge’ juror, or further protect the wellbeing of a juror. The operative nature of the provision provides that the improper conduct must be occurring or may have occurred before the Supreme and District Court of NSW can implicitly direct (by request or consent) the Sheriff to investigate. It is a retrospective remedy that is unlikely to have a direct causal effect on a rogue juror or juror wellbeing in real-time.

### **Recommendation**

27. In *RJS*<sup>19</sup>, Spigelman CJ said that the implementation of the majority verdict system should develop in accordance with experience over time. As stated in the paragraphs above, our experience has shown that only 1.9% of trials in NSW have resulted in hung juries, that other reforms are likely to have a greater impact in achieving the stated objectives, and that juries may require longer periods of time to deliberate than ever before. Accordingly, the NSWCCCL does not support the proposed amendment to s 55F of the Act.
28. The NSWCCCL suggests that research should be undertaken in respect to the impact of the proposed amendments on the reduction of expenditure of resources on trials and hung juries. We recommend there should be:
- (a) a review into the type and nature of criminal offences that result in hung juries. If there were to be a large proportion of hung juries resulting from sexual assault trials or specific sexual assault offences, for example, then specific reform into sexual assault trials or offences may have a greater impact on the reduction of hung juries;
  - (b) a review into the duration of a criminal trial that results in hung juries. If there were a large proportion of hung juries that had resulted from trials with a duration of over 3 weeks, then specific reform into the case management of trials with a view to reducing their length may have a greater impact on the reduction of hung juries;
  - (c) a review into the average time of a jury to return a verdict in NSW. If there were a majority of juries having returned a unanimous verdict after 4 hours, then it would provide evidence

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<sup>17</sup> We note that the *Sheriff and Court Security Amendment Bill 2023* proposes to further expand Sheriff powers by introducing a new protective services function to judicial officers outside the court premises.

<sup>18</sup> S68A(4)(g) *Jury Act 1977*

<sup>19</sup> *RJS v Regina* [2007] NSWCCA 241

that 4 hours or less is unlikely to be sufficient time for a jury to properly consider the evidence and directions.<sup>20</sup>

29. The NSWCCCL further recommends improved jury induction processes and education to prevent and deter harassment of other jurors by a juror within the jury rooms.

30. For the reasons stated in paragraphs [20] to [25] above, the NSWCCCL does not support the proposed amendment to s73A(1) of the Act.

31. As an unrelated observation, the NSWCCCL notes that section 53D of the Act uses the term 'oral directions'. Oral directions are given to juries throughout the duration of a criminal trial, and we believe there may be some confusion or uncertainty as to which oral directions the provision refers. We recommend the provision be amended to refer to the initial oral directions at the commencement of the trial to avoid doubt.

32. The NSWCCCL would welcome further commentary by stakeholders on the matters raised above.

This submission was prepared by William Logan on behalf of the New South Wales Council for Civil Liberties.

Yours sincerely,

**Lydia Shelly**  
**President**  
**NSW Council for Civil Liberties**

Contact in relation to this submission: Anne Charlton

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<sup>20</sup> The NSWCCCL is anecdotally aware that a many juries in trials in the District Court of NSW return unanimous verdicts after 4 hours.