REPORT ON PROCEEDINGS BEFORE

PORTFOLIO COMMITTEE NO. 5 - JUSTICE AND COMMUNITIES

INQUIRY INTO THE JURY AMENDMENT BILL 2023

CORRECTED

At Macquarie Room, Parliament House, Sydney on Wednesday 31 January 2024

The Committee met at 9:00 am

PRESENT

The Hon. Robert Borsak (Chair)

The Hon. Susan Carter (Deputy Chair)
The Hon. Greg Donnelly
The Hon. Wes Fang
Ms Sue Higginson
The Hon. Stephen Lawrence
The Hon. Cameron Murphy

The CHAIR: Welcome to the first hearing of the Committee's inquiry into the Jury Amendment Bill 2023. I acknowledge the Gadigal people of the Eora nation, the traditional custodians of the lands on which we are meeting today. I pay my respects to Elders past and present and celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of New South Wales. I also acknowledge and pay my respects to any Aboriginal and Torres Strait Islander people joining us today.

I ask everyone in this room to turn off their mobile phones or turn them to silent. Parliamentary privilege applies to witnesses in relation to the evidence they may give today. However, it does not apply to what witnesses say outside of the hearing. I urge witnesses to be careful about making comments to the media or to others after completing their evidence. In addition, the Legislative Council has adopted rules to provide procedural fairness for inquiry participants. I encourage Committee members and witnesses to be mindful of these procedures.

Ms DIANE ELSTON, Senior Solicitor, Indictable Crime Team 1, Legal Aid NSW, and The Law Society of New South Wales, affirmed and examined

Ms JANE SANDERS, Principal Solicitor, The Shopfront Youth Legal Centre, and The Law Society of New South Wales, affirmed and examined

Mr RICHARD WILSON, SC, Member, Criminal Law Committee, New South Wales Bar Association, sworn and examined

Mr JOHN STRATTON, SC, Member, Criminal Law Committee, New South Wales Bar Association, affirmed and examined

The CHAIR: I welcome our witnesses today. Thank you very much for coming to give evidence. Starting with Mr Wilson, are we going to get a short opening statement?

RICHARD WILSON: No. Mr Stratton will give an opening statement on behalf of the Bar Association.

JOHN STRATTON: I have been asked to appear before this Committee by the Bar Association. I have been a barrister for over 30 years. Most of my practice has always been as an advocate in jury trials. I was a public defender for 16 years. The Bar Association opposes the proposed amendment to the Jury Act to reduce the time the jury needs to consider their verdict before they are directed they can return a majority verdict. One of the fundamental principles of our system of justice is the right of a person charged with a serious offence to trial by jury. That principle has been part of the common law for over six centuries. That principle was regarded as so fundamental by the drafters of the Australian Constitution that it was one of the few rights embedded in the Constitution in section 80. The fundamental aspect of the right to trial by jury is a requirement that the jury's verdict must be unanimous. It was regarded as so fundamental that the High Court has held that in Commonwealth criminal trials on indictment, jury verdicts must be unanimous. That was the decision in *Cheatle v The Queen*.

The proposed amendment would represent the further watering down of the right to trial by jury. The Bar Association believes that the arguments for the proposal are unpersuasive. The chief justification for the proposal seems to be the suggestion that the amendment will make the system more efficient and save money. There is very little evidence to support this claim. About 90 per cent of all defendants plead guilty to at least one charge. For some years only about 2 per cent of trials in the District Court have resulted in hung juries, and there is a significantly lower rate of hung juries in the Supreme Court. Those figures are taken from the statutory review at page 11. The argument about cost saving seems to assume that while juries are considering their verdicts judges are doing nothing. In fact, the almost invariable practice is that when a jury goes out to consider its verdict judges will start another trial or preside over appeals or sentence hearings.

The second justification for the change is—I am quoting from the statement of public interest at page 1—to increase juror safety and wellbeing. Again, there is very little or no evidence suggesting that this amendment will have that effect. There is a particular situation in which even the Bar Association does require statutory reform. In the case of *Villis v R*, the New South Wales Court of Criminal Appeal said that there was no power to discharge the jury until it had been deliberating for eight hours, even if there was evidence that the jurors would remain unable to reach a unanimous or even a majority verdict. Some judges have been prepared to discharge the jury earlier in these circumstances, on the basis that to do otherwise would risk a miscarriage of justice. There's a District Court decision of The Queen and BC to that effect. The Bar Association believes that the Jury Act should be amended to make it clear that judges have the power to discharge juries in these circumstances.

While I'm speaking of amendments to the Jury Act that the Bar Association supports, the Bar Association would also support amendments to the Jury Act to make it clear what periods of time should be taken into account in determining the length of time that a jury has been deliberating. For example, at the moment there is some division amongst judges about whether or not the jury lunchtime can be taken into account. The statutory review argues that reducing the statutory amendment time period to four hours would bring New South Wales into line with most other Australian jurisdictions. That's the statutory review at page 12. In fact, only one other jurisdiction—South Australia—has a four-hour minimum period. The position of the Bar Association is that the case for reducing the statutory amendment period has not been made out. Thank you, ladies and gentlemen.

The CHAIR: Ms Sanders?

JANE SANDERS: My name is Jane Sanders and I appear today as a representative of the Law Society, together with my colleague Diane Elston. I am the chair of the Law Society Criminal Law Committee. I am a criminal lawyer of now some 30 years experience, running a mix of summary and indictable matters, working largely for young and extremely vulnerable clients. Diane Elston is a member of the Criminal Law Committee and has practised criminal law for over 10 years. In recent years, particularly, she has practised in exclusively indictable cases. She has instructed counsel in a large number of criminal trials in the supreme and district courts.

The Law Society, of course, appreciate the opportunity to participate in this inquiry. The jury system is fundamental to our criminal justice system. It's an important inquiry, so we do appreciate the opportunity. We echo much of what's already been said by John Stratton on behalf of the Bar Association, so I won't repeat word for word what he's just said. But the Law Society does emphasise that the integrity of a jury trial is fundamental to public confidence in the criminal justice system. We also emphasise the High Court's support, as John has said, expressed in the case of Cheatle—the proposition that a unanimous jury reflects an essential constitutional requirement to an offence of such seriousness it must proceed on indictment. We note, of course, that in Commonwealth trials the Constitution requires that verdicts be unanimous. The existence of majority verdicts in New South Wales and other jurisdictions around Australia does represent somewhat of a watering down of this important principle. We don't want to see it further watered down, if I could put it in those colloquial terms.

The eight-hour rule in the present system that we have for bringing in majority verdicts was introduced by the Jury Amendment (Verdicts) Act 2006. We would emphasise that there doesn't appear to have been any change in circumstances since that was introduced. There is no compelling evidence, in our view, for the reduction of that eight-hour period. As we understand it, the eight-hour period was introduced to give the jury more than a full court day for deliberation and, to put it in colloquial terms, to give them time to sleep on it, which is fundamentally important, if a jury cannot reach a unanimous verdict, for them to have the fullest possible opportunity to reflect on that. Human nature is of course that people may have an initial gut reaction or may come to a preliminary view, and it may take some time, including some reflection overnight, to be certain about that view or to perhaps shift that view.

We do acknowledge that the submissions are, for example, from the District Court and from the Office of the Director of Public Prosecutions, both of whom express support for reducing that minimum period from eight hours down to four hours. We do acknowledge that of course there are some trials, mostly in the District Court, which are not lengthy and not complex where it's very clear, maybe within the first two, three or four hours, that the jury is not going to come to a unanimous verdict. We do acknowledge that. We acknowledge that there are some judges, therefore, that express frustration that they have to send the jury out to, as it were, twiddle their thumbs for eight hours knowing that the situation is not going to change and they then have to give them the Black direction about bringing in a majority verdict. We do acknowledge those concerns. My understanding is they are held by some judges, not all, but we do acknowledge that there are those concerns.

However, if anything, the nature of criminal trials in this State has become more complex. With the increasing amount of electronic evidence—CCTV, electronic surveillance of telecommunications and the like—trials are becoming lengthier and more complex rather than the other way around. Given also the increased jurisdiction of the Local Court over the years, things like your break-and-enters and robberies and those kinds of offences are now more likely to be dealt with summarily by the Local Court rather than invariably going to trial in the District Court. In summary, while there are some concerns, we are not convinced there is a strong case for reducing that period from eight hours. The perceived efficiency that it would achieve is, we would suggest, a minuscule improvement in efficiency.

The CHAIR: Thank you very much. We will go to questions from the Opposition.

The Hon. WES FANG: Thank you very much for appearing today. Obviously we're reviewing the bill that's been brought forward to the Parliament by the Parliamentary Secretary on behalf of the Attorney General. The bill itself is seeking to implement the finding or the recommendation from a statutory review that occurred in relation to the Jury Amendment (Verdicts) Act 2006. Are you aware of that statutory review?

JOHN STRATTON: Yes.

The Hon. WES FANG: Were you invited at all—not individually but as the Bar Association and the Law Society—to provide some input into that review?

JOHN STRATTON: My understanding is yes, and the Bar Association has consistently maintained the position that I've put to the Committee—that is that the Bar Association, on three or four occasions, I think, when this issue has been raised, has consistently opposed the reduction in the time.

JANE SANDERS: My understanding is it's the same with the Law Society. I wasn't personally involved in that submission, but my understanding is that's always been our position.

The Hon. WES FANG: So when the review itself was underway there was a consistent view from both, I'll say, the two pre-eminent bodies that represent the practitioners of the law in New South Wales against a reduction of the eight-hour time frame for jury deliberations where there's a deadlock? Is that effectively a correct assumption?

JOHN STRATTON: Your understanding is correct.

The Hon. WES FANG: Does it surprise you at all that the Attorney General would then seek to bring a bill to the Parliament, given that you've been very strongly opposed to the amendment of the eight-hour rule for a deadlocked deliberation of a jury, without any consultation with either of your organisations?

JOHN STRATTON: Well, there was consultation, but the Bar Association has consistently opposed it. But it's really not for us to be surprised or otherwise, if I can put it that way.

The Hon. WES FANG: So is it fair to assume that the consultation that the Attorney General is relying upon to indicate that he has consulted with the two pre-eminent bodies that represent the legal practitioners of the State is the consultation that was done around this review—that the bill itself was never discussed or presented to either organisation prior to its tabling in the Parliament?

JANE SANDERS: My understanding is that it was. The consultation period—if I may say, on the part of the Law Society, we get consulted on a number of proposals. The consultation time frames are often very short. We were consulted on this late last year. I have in my hands a letter dated 4 October 2023 from the Law Society to the Policy Reform and Legislation branch at the department, so we were given the opportunity to comment on the bill.

The Hon. WES FANG: And at that time you opposed it?

JANE SANDERS: And at that time we opposed it. Again, we enclosed our previous submission that we made in 2021 to the statutory review, which was relatively detailed when it came to the issue of majority verdicts.

The Hon. WES FANG: In that instance, then, are we effectively seeing the Attorney General disregard the views of the two pre-eminent bodies that represent legal practitioners of the State by bringing this bill forward, trying to ram it through and present it to the Parliament two days after the actual review itself is tabled?

JOHN STRATTON: This isn't strictly answering your question, but could I just say, in the bundle which I've been provided with and which I think you have, there are submissions made by the Bar Association on different dates—that's at tabs 5, 6, 7 and 8—from essentially 2021 to 2023, and the Bar Association consistently opposed the proposal. I think it's fair to say that the Bar Association was consulted, as were other organisations. My understanding is that the proposal is opposed by the Bar Association, the Law Society, the Council for Civil Liberties, the Legal Aid Commission and the Aboriginal Legal Service. On the other hand, I understand other bodies consulted were the DPP, the police and the judges, who supported the proposal.

The Hon. WES FANG: We have the circumstance, though, that the Attorney General has put before the Parliament this bill that is, as you've rightly indicated, lacking in support from just about every single legal body. It is unfathomable to me that an Attorney General would act in such a way. Can you recall a circumstance where a bill has been attempted to be rammed through a Parliament in such a manner before?

JANE SANDERS: All the time.

RICHARD WILSON: By both parties over the years, in our experience.

JANE SANDERS: Yes.

The Hon. WES FANG: No, fair call.

The Hon. STEPHEN LAWRENCE: If you don't want the answer, don't ask the question.

The Hon. WES FANG: No, I'm happy to accept it. I'm just curious in this circumstance, where the Attorney General has effectively taken the review position and sought to create a bill where there is absolute opposition, how there was an absolute lack of consultation or offer to genuinely seek to find a compromise position. We've got these organisations coming forward today to actually indicate their opposition yet again. That indicates that the Attorney General and the staff have not consulted. Do you feel as if the bill itself represents the views that have been put forward in the consultation that was done by the Attorney General?

JOHN STRATTON: To be frank, I see our role is to provide a legal perspective on the question, not a political one. The Bar Association was consulted. We've consistently given our opinion. That opinion hasn't been adopted. That's really as far as, I think, we can go.

The Hon. WES FANG: I appreciate the kindness.

Ms SUE HIGGINSON: Thank you very much for your submissions. They're incredibly helpful and go to the issues that we have to consider as a committee. I just want to ask you, and whoever you think can answer this best or in turn, but the submissions talk about the evidence that not much has changed in circumstances from 2006 when we did—and I think, let's face it, it was a big step at the time—move away from the requirement for a

unanimous verdict. I think you very helpfully provided us the then Attorney General Debus's words about how important the sleep test is that Ms Sanders referred to. If we are suggesting that not—circumstances haven't changed, although I would like to hear more about what I think has changed, and that is that jury trials have become more complex and evidence has become more complex. In that sense I think there has been a change of circumstances but not presenting the case to move away from the majority verdict we have in the eight hours.

Would it be possible to speak to that proposition that you've put forward that we haven't seen a case to change, and go to, if you could, what we have seen in the submissions? Again, Ms Sanders spoke to it. There is this reality, apparently, that some trials can be dealt with early and this idea that really nothing has changed but we stand to lose a lot. Would you just be able to just elaborate on that, please?

DIANE ELSTON: Picking up on the point that Ms Sanders raised, in my experience as a relatively—as the least experienced of the members on this panel right now, I've observed in the last few years trials of significant complexity because of the nature of the evidence being comprised of multimedia material, and that material can take hours to be played in a courtroom. It can require various summaries to be prepared in order to assist the jury and sometimes jurors would like the opportunity to re-review that material during their deliberations. It's not just the type of material that Ms Sanders referred to in the form of CCTV footage and telecommunications material. Now we have greater protections for vulnerable witnesses. For example, in sexual assault trials and in trials involving children, especially children where evidence has been given at a police station and then is also prerecorded in a courtroom, that material can be reviewed and that also adds to the time which juries might require to deliberate, and we may see changes in that regard as a result of the rollout of the statewide sexual assault evidence program that is designed to protect those vulnerable witnesses.

Ms SUE HIGGINSON: And we've got the new coercive control regime that's about to be rolled out as well. Just on that, have any of you had direct experience where you've got jurors sitting around saying, "Gee, I wish I didn't have to do this and sit around for these hours."? Is that a common theme in jury trials?

JOHN STRATTON: I don't think it is. The submissions in support of the proposal really make a lot of assumptions about what goes into the jury room, but the truth is that we really don't know. There's no evidence. The sum total of the information that the lawyers—and, indeed, the judge—has is the jury notes. Juries are not encouraged to put in, for example, the numbers who are supporting a guilty verdict or supporting a not guilty verdict. Can I just say, adding to what's just been said, I completely agree—trials are getting more and more complex and there's more material which the jury is required to take in. In particular, it's become more and more frequent for juries to be provided with transcripts of the trial.

There's a lot more evidence which is electronic, which the jurors may want to watch while they're deliberating. That's not only records of interview, which are electronically recorded; there are surveillance tapes and tape recordings of telephone conversations and so on. So, if anything, the increasing complexity of trials really is in favour of leaving the minimum time for consideration as it is rather than the other way around. We say that this is a proposition which is really a solution in search of a problem, because there's not a problem. At the moment, the rate of hung juries is only about 2 per cent. Really, to think that there could be any savings of cost and time by making a reduction in that very extremely low figure is illusory.

Ms SUE HIGGINSON: On the hung jury, it seems to me, from my little understanding, that this idea that we have a hung jury is a failure of process. My understanding, just from a brief look at the submission—I can't remember which one it was—is that's perhaps a very false assumption, that a hung jury is some kind of failure of system.

JOHN STRATTON: Yes.

JANE SANDERS: Yes. I think that may have been the Council for Civil Liberties submission. I know I read that in the submission also. That is a good point. A hung jury clearly is unfortunate, not only in the time that's been taken for a trial which does not resolve but, obviously, if the accused is going to be retried—if there is going to be a retrial—clearly the inconvenience and, in many cases, trauma occasioned to witnesses is real. Also the anxiety for the accused as well, the expenditure of time and money—of course, those factors are all very real. So, yes, it's unfortunate, but it is not a failure. It is actually an illustration of the fact that these matters are often complex and difficult. The matter is going to trial because there are very real factual issues in dispute which are not easily resolved. If they were, we may have had a plea of guilty or, at the other end of the spectrum, we may have had a no bill—DPP not proceeding with the case. It is an illustration of how seriously jurors take their obligations that they genuinely stick to their guns, as it were, and are not going to be persuaded to go against their views just for the sake of resolving the matter and getting away. So it is not a failure. It's perhaps a cost, but it is a very important part of the system functioning.

Ms SUE HIGGINSON: Can I ask finally, have you been presented any economic analysis of the system in that sense, so that we could then better understand this idea that we might be saving money? Has anybody been presented with that through your legal bodies?

JOHN STRATTON: Absolutely not. There's a lack of evidence. In particular, we tried to obtain figures on the number of trials which end with majority verdicts and we haven't been able to get any. I don't think there are any figures, as I understand it, about that which have been provided to this Committee. I would've thought, before making a decision to make a significant change like this, that the sort of figures that you're talking about should have been obtained and provided to the Committee.

Ms SUE HIGGINSON: Finally, in terms of that, I think the submission that goes to "This is such an important part of the entire criminal process"—I suppose if we're trying to get and understand that economic analysis, we would need to also understand the cost of imprisonment, wrongful imprisonment, literally getting to the right answer. Is that how you would understand the costs of the criminal justice system?

JOHN STRATTON: Yes, absolutely. Could I add, in relation to what Ms Sanders said, that the fact that there are a small number of hung juries is not a sign of system failure; it's a sign of system success. In fact, it shows that juries are doing what they're directed to do, which is—the directions include a direction that they should listen to other jurors but, at the end of the day, each of them has to be individually satisfied beyond reasonable doubt before returning a verdict of guilty. That's incorporated into the Black direction, which the jury are given, as it were, to encourage them to try to reach a unanimous verdict if they can but, nevertheless, to stay true to their oaths or affirmations as jurors.

The Hon. SUSAN CARTER: Could I ask a quick follow-up question? If there were economic efficiencies to be gained by the introduction of this measure but, as your submissions have indicated, if it raised significant risks for the security of the jury trial process, in our system of justice do we opt for a secure jury trial process or do we opt for economic efficiencies?

RICHARD WILSON: Perhaps I could answer that by reference to the initial introduction of majority verdicts. When majority verdicts were introduced by the initial legislation, it was acknowledged that this was a fundamental change to a 600-year-old system, a change that cannot be made under our Commonwealth Constitution—that the Commonwealth Parliament cannot make and that the High Court has commented on. It has not just decided that section 80 has a certain meaning but has said and made comments like those quoted in our submissions:

> … 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.

That's a unanimous decision of the High Court of Australia about the fundamental importance of a unanimous verdict. So what happened when majority verdicts were brought in—State Parliament does have the constitutional power to undermine fundamental rights or even get rid of them, but eight hours was a part of that; it was a safeguard that was incorporated into that process. So acknowledging that this was a fundamental encroach—a fundamental undermining of a common law right, 600 years old—this was a safeguard built into it. And like lots of dangerous undermining of civil rights and fundamental rights, it can happen incrementally. So we get the wedge—we've got majority verdicts—and now we're just incrementally undermining it further for the sake of money. That's basically our position: that it's just not justified. The evidence isn't even there to say that there is any great saving of money. In fact, as I understand it, what BOCSAR found was that even the introduction of majority verdicts—the legislation—didn't actually have a fundamental impact on reducing hung juries anyway.

The Hon. SUSAN CARTER: If I could summarise, what I'm hearing is you're suggesting that this is risking a fundamental undermining of a 600-year-old common law right for the sake of money?

RICHARD WILSON: Yes.

The Hon. WES FANG: Well done, Daley.

Ms SUE HIGGINSON: But we're not even sure about the money yet.

The Hon. SUSAN CARTER: But we're not sure about the money.

RICHARD WILSON: Basically.

The CHAIR: Mr Stratton, in your opening—

The Hon. STEPHEN LAWRENCE: I think it's time for some Government questions.

The Hon. WES FANG: Come on! Give it your best shot. Back him in. Back in the AG.

The CHAIR: Order! You were going quite well, Wes. Let's just stick to that. Mr Stratton, in your opening statement you said something about South Australia being the only other jurisdiction in Australia—and, I suppose, also including the Commonwealth—that has gone to four hours deliberation before the cut in to a majority decision comes. Is that true? That's actually true. I'm sure I read somewhere in the Government submissions that it was in line with the majority of other States.

JOHN STRATTON: The Government submission says that it's in line with a reduced audit, but in fact there's a table set out, I think, at page 12 of the statutory review and true it is that other States have lower minimum periods of consideration, but there's only one other State that has four. There are some States that have less than four.

JANE SANDERS: They vary. I'm reading from the footnote in the Bar Association submission: Tasmania, two hours; Western Australia, three hours; South Australia, four hours; Northern Territory, six hours. And the ACT—there is a bill being introduced to introduce majority verdict. So there is quite a clear—a range of periods. How those periods of time have been arrived at is beyond our knowledge.

The CHAIR: I just wanted to clarify that. That was all.

JOHN STRATTON: So there's no uniformity. More importantly, in New South Wales the same court operates—because New South Wales State courts deal with both State criminal offences and Commonwealth criminal offences. So the same courts, for some trials, there's a unanimous verdict requirement; for some trials, there's a majority verdict allowable.

The Hon. CAMERON MURPHY: Thank you for coming along and for your submissions today. They provide an excellent insight into the issues that are raised. I want to ask a follow-up question from the one the Chair just asked. My understanding is that in Victoria there's no minimum time, and that it's simply up to the trial judge to be satisfied that the jury's deliberated for a reasonable time before they can go to a majority verdict. Firstly, is that correct? And then, what's the difference, really, in terms of the way that they deal with it? If New South Wales was to move to a four-hour minimum, why is New South Wales any different to Victoria? Can you elaborate on why you think the minimum eight hours should be maintained here rather than moving to what Victoria have in place already?

RICHARD WILSON: There's a risk, in comparing jurisdictions around Australia where decisions have been made other than on evidence, of a race to the bottom—the blind leading the blind, because "We better do what they're doing". The way that the systems work around the States is not consistent either. There are carve-outs for certain types of offences and so on. The New South Wales legislation applies across the board to all offences. So we don't know what—

The Hon. CAMERON MURPHY: You're saying in Victoria it's not all offences? It only applies for some?

RICHARD WILSON: I'm sorry, I can't remember whether Victoria it's not all offences, but certainly some of the other jurisdictions have carve-outs for at least murder and treason. But the point is just because some other State government decided to undermine a fundamental right in an even grosser way than the previous New South Wales Government did by introducing majority verdicts doesn't mean that we should follow suit just because they're doing it, especially if there's no evidence to support what's proposed. The evidence base to support what was done in Victoria, I would suggest, is probably thin as well. It's a political decision, but we oppose any further undermining of that fundamental right.

The Hon. CAMERON MURPHY: I note that there was no evidence in New South Wales—no publicly available evidence—in terms of an analysis of this. Do you know whether any other jurisdictions have analysed it, whether there is any publicly available evidence from other jurisdictions that might assist? Are you aware of any?

JOHN STRATTON: We're not aware of any.

DIANE ELSTON: I'm not aware of a comparable study having been undertaken of the kind that would address the questions that have been asked this morning in a comparative manner, especially one that would compare cost savings and efficiency, or even look at case examples where the shortened time has been effective or ineffective and produced injustices in that way, potentially. But I would say this about any reduction in the time, that the Law Society's consistent position in relation to law reform has been to ensure judicial discretion and we attach the utmost importance to judicial discretion in presiding over a trial.

If there are those reductions in time in other jurisdictions, I think we would be especially interested in research about the safeguards that are introduced. As Mr Wilson pointed out, in Victoria there may be carve-outs for murder and treason—that's based on the type of offence—but drawing on the submissions of the District Court,

yes, there may be certain circumstances where a trial is of less complexity and the jury have given indications about how they're travelling, so to speak. There has to be some safeguards, and we'd be particularly interested in what safeguards have been introduced in other jurisdictions where the time limit has been reduced.

The Hon. CAMERON MURPHY: So in summary what you're saying is if you were to move to a four-hour time period then there should some statutory test that the trial judge has to go through before moving to a majority verdict in a shorter space of time. Is that what you're saying?

DIANE ELSTON: I would emphasise "if". The primary position is, as has been articulated and adopted by the Law Society, we do not support a reduction in the time but we do support any safeguards if that was to be the position.

The Hon. WES FANG: Are you going to bring some amendments?

The Hon. STEPHEN LAWRENCE: Just a few questions for the Bar Association first. I was wondering if you could give us a sense of how common it is in criminal jury trials for the circumstances for a majority verdict to be given or the direction to be given to actually arrive within eight hours? Is that a common situation or is that uncommon?

JOHN STRATTON: My experience is it's reasonably uncommon. More common is the situation where there's a jury note that says, for example, "We cannot agree and we're never going to be able to agree." A difficulty with the current legislation is that, because of the decision of the Court of Criminal Appeal that I referred to, jurors have to wait around for the eight-hour period until they can be discharged even though it's absolutely clear to everyone this jury is never going to return either a unanimous verdict or a majority verdict. That's why the Bar Association proposes that it would be a good idea to amend the legislation to give a judge discretion to discharge the jury during the eight-hour period.

The Hon. STEPHEN LAWRENCE: So it's normally the case, is it, that at least eight hours passes prior to any indication being given to the jury of intractable disagreement?

JOHN STRATTON: That's my experience, yes.

The Hon. STEPHEN LAWRENCE: I was wondering if you could explain to members what the test is that the judge has to consider when the circumstances do arise. Because it's, of course, not the case, is it, that as soon as eight hours passes that the judge gives the majority verdict direction, the judge still has to be satisfied of certain matters? Is that correct?

JOHN STRATTON: Yes.

The Hon. STEPHEN LAWRENCE: And that, speaking generally, is that it's reasonable in the circumstances of the case to give the direction.

JOHN STRATTON: Yes.

The Hon. STEPHEN LAWRENCE: I was wondering if you could explain what you think are the relevant considerations that a judge does or should consider in determining whether it's reasonable in the circumstances of the case.

JOHN STRATTON: That's a bit of a mysterious process. The information that the judge has, of course, is a knowledge of the evidence and the degree of complexity of it. As I said earlier, the only information that the judge or, indeed, the parties have about what's going on in the jury room is the contents of the jury notes. So that's really the only material that the judge has to make that decision. Normally there's not a judgement given about the decision to take a majority verdict. In effect the judge will say, "Look, I think they've had long enough."

The Hon. STEPHEN LAWRENCE: Is there normally then an elucidation of what circumstances the judge has taken into account in deciding to give the direction in terms of what is reasonable?

JOHN STRATTON: Yes, but normally it is simply a decision is made. It is not normal for judges to go into reasons let alone provide a judgement about it.

The Hon. STEPHEN LAWRENCE: And how common is it for eight hours to have passed, an indication being given by the jury that intractable disagreement is there, and for a judge then not to give a direction to say, "I am of the view that it is not reasonable in the circumstances of this case yet"? Is that something that actually occurs? It is clearly envisaged by the legislation, but I am curious whether it is something that actually occurs.

JOHN STRATTON: In my experience, once there's a note to the effect, "We can't come to a resolution and we're stuck," that's sufficient. It is not normal for a judge to ask them to continue on after that stage.

The Hon. STEPHEN LAWRENCE: What then is the practical operation and significance of the eight-hour period? Is it operating as a default? Is it operating as a true minimum? Or is it operating in some other way that you could explain?

JOHN STRATTON: In effect, in my experience, it simply acts as a minimum period.

The Hon. STEPHEN LAWRENCE: There was some evidence from Ms Sanders earlier about the eight-hour rule allowing, in effect, for an overnight period.

JOHN STRATTON: Yes.

The Hon. STEPHEN LAWRENCE: I want to get your view about whether a four- or even six-hour period would allow for an overnight period in circumstances where a jury is sent out some way into the day and where the judge has to be satisfied that it is reasonable to give the direction in the circumstances. Would you agree that a four- or even six-hour period would probably lead to an overnight adjournment anyway?

JOHN STRATTON: Certainly not always. I've often seen trials where a judge will finish the summing up late in the afternoon or even at four o'clock and tell the jury, "I will send you out tomorrow at 10 o'clock." The other thing is that—this operates to my opening—there's no uniformity amongst judges about what to do about the lunch hour. A court day is normally 10 to four. If you carve out an hour for lunch, that's five hours. But I have heard judges say, "Obviously they're going to be talking about it over lunch, so we'll count that." So that's six hours. But that's not always the case. Some judges say—there is legislation in some other States that has that carve-out for that lunchtime, so that's not counted. So that gives you five hours. A five-hour period would not necessarily mean that there's a consideration of the verdict overnight.

The Hon. STEPHEN LAWRENCE: If you had a four-hour rule in the legislation, in a case where the occasion arises to consider giving a direction—obviously after the four hours—and that would be a direction given on the same day that the jury started to deliberate, do you agree that it would be incumbent upon a judge applying the reasonableness test to consider at least adjourning overnight?

JOHN STRATTON: Yes. But from the point of view of the defence, we think that there needs to be, in effect, a guarantee of overnight consideration of the verdict. The other thing is that the process—the jury goes out and if there's an indication that they're not agreeing, then the jury is brought back in for a Black direction. And it's only after the jury has given some further consideration after the Black direction that a question of the majority verdict comes into play. I should just make it clear that a Black direction is a direction to the jury in terms of a High Court decision called *Black v The Queen*, which says to a jury, "You need to listen to each other and consider other people's views but, at the end of the day, stay true to your personal affirmations as jurors." So it's rare that you would get to the stage of a majority verdict, with taking into account both the Black direction and the current minimum time of consideration—it's not going to happen, if I can put it this way, immediately in eight hours in a day.

The Hon. STEPHEN LAWRENCE: This is a question for the Law Society or for the Bar Association. How common is it for jurors or juries to give visible signs or expressions of some unpleasant emotional experience having occurred in the jury room?

DIANE ELSTON: I think that we could only give anecdotal evidence about our observations, and they would largely be speculative because without a note we don't know. If your concern is about juror wellbeing and the potential for an earlier majority direction to respond to that, my suggestion is that legislative reform is not the appropriate way to support juror wellbeing. More could be done to provide jurors with more autonomy over the process in terms of selecting a foreperson—as was referred to in the submission by the Council for Civil Liberties—and provide more opportunities for them to communicate, for example, with the Sheriff if there is an issue that requires some more careful consideration and encourage jurors, if they do feel like there are members of the jury who are not participating fully, to have the confidence to raise that without reprisal from other juror members. If more could be done to provide them with that support, then I don't think we would necessarily need to be speculating about whether there is division or concern about the behaviour of the jurors toward each other.

The Hon. STEPHEN LAWRENCE: How common is it for jurors, for example, to present in the court room in tears or red-faced?

The Hon. SUSAN CARTER: Point of order: I think that question has been asked already and it's been answered that anything that could be given is speculative.

The Hon. STEPHEN LAWRENCE: I was directing the question to the Bar Association people, which I probably should have said because I was looking at them, rather than to the same witness. But I don't concede there was a point of order. I might ask the Bar Association. I'm interested in the physical manifestations of distress that jurors sometimes demonstrate.

RICHARD WILSON: I think in nearly every trial that I've been in, from the moment they are sent out, you can see the stress because now it's on them; they've got to make one of the hardest decisions of their life about, often, a really important matter and there are tensions and stressors in every single case. Some of them manifest more profoundly than others. I've seen cases where there has been a unanimous verdict one way or the other where there's been incredible tension obvious on the way through because it's just such a stressful experience and a heavy burden that they take on behalf of the community. I think also different people manifest stress in different ways. There might be somebody in tears, but somebody else is really in turmoil but they are stony-faced. So I just don't think it really says anything about what's going on in the jury room and what the numbers are or what's going on. It's just pure speculation, just as much as it's speculation for me to try to work out whether they are going my way or not. It's just pure speculation and there is no science to it and it's a waste of time.

Ms SUE HIGGINSON: You would know at the end, though.

RICHARD WILSON: We know at the end.

The Hon. STEPHEN LAWRENCE: It's a waste of time but all lawyers do it. Would you agree with that?

RICHARD WILSON: You do it knowing that you've really got no idea.

The Hon. STEPHEN LAWRENCE: I suppose what I'm saying is that it's unavoidably an incredibly difficult task. Because you are dealing with a randomly selected collection of humanity, there's a whole range of people in the room. I'm interested in your view on how we should deal with a situation like this, where a jury in a very streamlined case where the issues are well defined and fairly straightforward indicates very quickly that they are intractably locked. Perhaps only an hour or two has passed, which seems very short but it might not be in any particular circumstance that arises. How can we deal with the suggestion that the jury should simply be sent back for another six hours or so? I think that's the issue that I'd like everyone to squarely confront.

JOHN STRATTON: That's what I attempted to address in my opening. That's precisely the situation where I think the Legislature should give the judge the discretion, if it's clear that the jury haven't reached a verdict and are unlikely to reach even a majority verdict, that the judge would have the power to discharge the jury and save everyone the stress of having to wait around for eight hours for that, to be able to be sent home.

Ms SUE HIGGINSON: On that, is it your suggestion, though, that if that was to be the case there would be—going to the point, we very much value judicial discretion. Because we're talking about safeguards, should there be something that qualifies or objectifies the exercise of that discretion in those rare circumstances, whether it be, again, another kind of a guide or some anchor points?

JOHN STRATTON: I think it's really an issue where the judge needs to have the widest possible discretion, because there are a lot of possible factors, depending on—I wouldn't want the judge's discretion in relation to that to be confined.

Ms SUE HIGGINSON: But if measures such as efficiencies—because then aren't we going around in a circle? Isn't that kind of what we're talking about?

JOHN STRATTON: Well, it would be an efficiency, in that if it's clear to the judge that this jury is unlikely to reach a verdict at any stage then it's a waste of the time and money for everyone to keep them hanging around, as Mr Lawrence has pointed out.

Ms SUE HIGGINSON: In your view—and I know this is difficult, because we're talking about the entire State—are we talking about an unbelievably small amount of circumstances?

JOHN STRATTON: It's not uncommon to get a note from jurors to say, almost in these precise terms, "We can't agree and we're never going to agree." It doesn't happen in every trial, but it happens regularly.

The Hon. SUSAN CARTER: When that note is received, what is the likely outcome of that trial? Does that always result in a hung jury, or what happens next?

JOHN STRATTON: Usually it will end up in a hung jury. Sometimes there ends up being a verdict, but you're left to speculate whether or not it was the pressure of the jury being kept in a jury room—from their point of view, it must seem like for an indefinite time—unless they come up with a verdict.

The Hon. STEPHEN LAWRENCE: I'm just curious, Mr Stratton, why should a jury in a simple case, perhaps, if I can use that phrase—I know that it's a bit deceptive—that expresses to a judge very quickly the view that they're deadlocked then automatically be discharged, as opposed to a jury who takes longer to reach that view? For example, if a jury note is received in a straightforward case—it might even say, "We're 11-1"—why would you discharge that jury just because they've reached that view promptly as opposed to a jury that takes

longer? I ask that question noting that a unanimous guilty verdict can be reached with no minimum time period at all.

JOHN STRATTON: If a note comes from a jury saying, "We're 11-1," on no view would that be a circumstance for the jury to be discharged. The note, for example, which I think came in the case of BC before Judge Haesler was to the effect of the one I've just posed as a hypothetical; that is, "We can't agree and we're never going to agree." In that situation, the decision to discharge the jury should be left to the discretion of the judge. It should be left wide enough for the judge to take into account any consideration, including the strength of the Crown case—or, for that matter, the defence case—and the judge—

The Hon. STEPHEN LAWRENCE: But if the note comes at 11-1 straightaway, in our current system, the judge is unable to give the majority verdict direction until eight hours has passed.

JOHN STRATTON: Yes, correct.

The Hon. STEPHEN LAWRENCE: I'm just querying whether that's reasonable in a simple case where that emphatic indication has been given so quickly, and also, just finally, whether it's an appropriate balancing of expense in the administration of justice and the interests of the parties to discharge in that circumstance, rather than proceed more quickly.

JOHN STRATTON: I would suggest to you that if it's left to the discretion of a judge, a judge would not in that situation discharge the jury if given that power.

The Hon. STEPHEN LAWRENCE: Is that ultimately an argument for no time period? Is that your view—that it should just be at their discretion?

JOHN STRATTON: No, it's an argument for there being an eight-hour period plus the judge's discretion.

The Hon. STEPHEN LAWRENCE: Right, so an additional discretion that can override the eight hours?

JOHN STRATTON: No, I think there needs to be the eight hours.

Ms SUE HIGGINSON: Does that go into the point that then the judge goes and does other things, and the jury—

JOHN STRATTON: Yes.

Ms SUE HIGGINSON: Yes, so there's actually no efficiency or cost argument that buys into any of that.

JOHN STRATTON: Exactly, yes.

Ms SUE HIGGINSON: I understand.

The Hon. SUSAN CARTER: I have a follow-up, if I may. In a system where we have universal rules for everybody in a universal justice system, can we have a rule for a simple case and a complex case, or do we not need one rule for every case and we accept that it sometimes imperfectly fits the simple cases?

The Hon. WES FANG: That's why she's a law professor.

RICHARD WILSON: There's a false assumption that a short, apparently simple case is going to be something that can be quickly resolved by a jury. I've had numerous colleagues in the last few years who've had juries out and came back with a verdict after spending twice the amount of time in the jury room that they spent in the courtroom.

The Hon. STEPHEN LAWRENCE: Sadly, I've had cases that they've found very simple.

RICHARD WILSON: Yes, well, that's—

Ms SUE HIGGINSON: And that is a reflection.

RICHARD WILSON: But you don't know. You just can't speculate about what's going on with them unless you get into numbers in jury notes, which are strongly discouraged and relatively rare for that reason. We at the bar table would never hear that it's 11-1. The judge might but they shouldn't.

The Hon. STEPHEN LAWRENCE: Lastly, Ms Sanders, you were awarded an OAM on Australia Day, is that correct?

JANE SANDERS: I think that's irrelevant to the business of this inquiry, but I could have AM after my name, yes. Thank you.

Ms SUE HIGGINSON: Congratulations.

The Hon. WES FANG: Congratulations.

The Hon. STEPHEN LAWRENCE: That's all from the Government.

The CHAIR: Thank you very much for your evidence today. It is much appreciated.

(The witnesses withdrew.)

(Short adjournment)

Ms BELINDA RIGG, SC, Senior Public Defender, The Public Defenders, affirmed and examined

Ms RHIANNON McMILLAN, Senior Legal Project Officer, Crime, Legal Aid NSW, affirmed and examined

Mr SHAUN MORTIMER, Principal Solicitor, Criminal Law Practice, Aboriginal Legal Service (NSW/ACT), sworn and examined

Ms HARRIET SKINNER, Trial Advocate, Aboriginal Legal Service (NSW/ACT), affirmed and examined

The CHAIR: Welcome, and thank you for making time to come and give evidence today. Ms Rigg, would you like to make a short opening statement?

BELINDA RIGG: I don't have an opening statement to make, no.

The CHAIR: Ms McMillan?

RHIANNON McMILLAN: I don't propose to make a statement.

The CHAIR: And on behalf of the Aboriginal Legal Service?

SHAUN MORTIMER: Chair, we don't propose to make an opening statement, but there are just two preliminary observations. The first is that the ALS has presented a written submission in relation to this matter and that represents the view of the Aboriginal Legal Service. We are very happy, of course—myself and Ms Skinner—to answer any questions today. The second observation simply is in relation to Mr Lawrence, who is on the Committee. Just so that the Committee is aware, he was my former boss at the Aboriginal Legal Service at a previous time and then a barrister who I briefed.

The Hon. STEPHEN LAWRENCE: Was I a good one?

The Hon. WES FANG: I'll come and get some notes from you later, Mr Mortimer.

The CHAIR: Order!

Ms SUE HIGGINSON: And here he is—he thinks he's everyone's boss.

The CHAIR: So you're saying there's a potential conflict of interest there, are you?

SHAUN MORTIMER: Not necessarily. I don't believe that there is, but I thought it's better that I should raise that so the Committee is aware.

The CHAIR: No, no, I'm only—

The Hon. WES FANG: Now's your chance to sink the boot in on him.

The CHAIR: Questions?

The Hon. SUSAN CARTER: Thank you very much for being here today. I think the principal issue that we're exploring, and the principal issue raised by the submissions, is the suggested reduction of the eight-hour period. But before we go to that I just wondered if we could quickly talk about the other issues raised in your submissions. I wonder if, Ms McMillan, you could talk to us briefly about the opposition to the statutory right for a juror to remove themselves and the concerns about that.

RHIANNON McMILLAN: Thank you for the opportunity to elaborate on that. I think the issue that we have is that when there was earlier consultation through the Indictable Process Review about various changes to the way in which juries were managed, this was an issue that was raised. In the briefing material it was suggested that, in effect, the existing provision wasn't required because essentially it flowed originally from the days when juries were sequestered. It was also noted that no other Australian jurisdiction requires courts to make such an order. We accept that that's the case. That's not the language which is used in other States and Territories, but the assertion that removing the requirement to make an order would increase trial efficiency and bring the State into line with other Australian jurisdictions is not one that we agree with.

The other States and Territories that we've looked at include South Australia, Victoria, Tasmania and Queensland, and all of them provide something in these terms: 'that the court may permit a jury to separate'. Usually that is then accompanied by some other requirement, such as if it thinks there are proper reasons to do so, and also an express provision that allows the court to make specific conditions that would bind the jury, such as a requirement that they return the following day or that they not talk with other members other than the jury about their deliberations. So in each case the way in which those provisions are framed couples with it effectively a statutory presumption, or a default position if you like, that the jury is not to separate after they're out on a verdict unless the court orders otherwise. In contrast to that, what the current amendment proposes, just in terms of its

wording as we read it, effectively reverses the current position and provides that, effectively, a jury in criminal proceedings is permitted to separate at any time. It doesn't specify that it's the judge that must permit them. So, for practical reasons, it raises questions for us about how that would operate in practice—for example, if a jury says at three o'clock, "We want to go home and we don't intend on coming back until midday", what the process would then be. If there is no requirement for a judge to sanction that effectively by an order or some other permissive provision in the Act, then it leaves open that question.

For our purposes, one of the main considerations is deliberation time is arguably the most important time in a trial. Our view is that it's very important that not only the judge controls the movement of the jury at that point in time but also that the parties are aware of when they're out deliberating and when they're not. Because, for example, it would be very unfortunate if legal representatives and an accused, say, were outside a court complex and the jury had been permitted to leave without them being made aware of that. So our preference would be, if there is to be a change to the Act as proposed, that it should perhaps specify that it is the judge that may permit the jury to separate and perhaps specifically refer to the fact that that can be on conditions. That would be, in our view, more consistent with the position that's taken in other jurisdictions.

The Hon. SUSAN CARTER: I wonder, Mr Mortimer and Ms Skinner, could you perhaps elaborate on some of the concerns you have about provisions that perhaps don't properly take into account some of the disadvantage that your clients face?

SHAUN MORTIMER: Sorry, was that in relation to our observation of schedule 12?

The Hon. SUSAN CARTER: I was thinking in particular about issues with email communication and things like that, but feel free to discuss it more generally.

SHAUN MORTIMER: Thank you very much. There are three primary concerns in my submission that arise in relation to email service, and we rely upon what we've put in our written submission more broadly. Those three concerns are, firstly, that many disadvantaged people, and Aboriginal people in particular, in rural and regional areas don't have access to smartphone technology. Having access to the appropriate IT in order to navigate the system electronically is problematic when there are those disadvantages. The second issue, which is related, is access, especially in remote and regional areas, to internet and reliable internet. In places such as rural communities—Wilcannia, western New South Wales, areas around Bourke and Walgett—email access is not great in those parts of New South Wales compared to other areas, so that could create a potential disadvantage for Aboriginal people in particular accessing the system, if everything is reduced to electronic service.

The third issue is in terms of then navigating the system. If there is a transition across to electronic service of jury notices, that will create a problem, in particular for people who have lower levels of literacy. That's a common problem encountered by many Aboriginal people, especially those that do reside in regional and remote areas of New South Wales. They're the three practical concerns, as we see it, that would create problems in relation to an expansion of electronic service of jury notices et cetera. I can see that there is a productivity objective there that's sought to be achieved by moving things across to the electronic mode. That could possibly be diminished when Aboriginal people come to the ALS to then need legal advice and need to go through a process to seek redress of any fines that might arise from that. So we would submit that there is a danger that those productivity benefits may not be as clear cut.

The Hon. SUSAN CARTER: Do you have any suggested amendments or just more generally that this legislation needs to be reconsidered through the lens of people who are less advantaged and reconsidered in the light of your particular clients?

SHAUN MORTIMER: Certainly the second option, and to reconsider legislation through that lens, would be our submission.

The Hon. SUSAN CARTER: Turning now to the question of the reduction of the eight-hour minimum time, do you have particular concerns in relation your clients that they would be disadvantaged by this change?

SHAUN MORTIMER: We do, and the essence of that is outlined in our written submission. In particular, our concern relates more so to the complexity of a lot of the matters that ALS clients have that go to trial in the District Court and the Supreme Court. Across the board at the ALS, we find that the most common types of offences that our clients receive that go to trial are matters that involve an element of acting in company. A couple of common examples of aggravated break and enter under section 112 (2) of the Crimes Act, robbery in company under section 97 of the Crimes Act—those offences involve complicity, often, as an aspect of the allegations: the issues of whether or not a person is allegedly acting within a joint criminal enterprise or whether or not they are an accessory. In those sorts of trial matters, frequently the jury directions that need to be provided are complicated directions. In addition, in many trials of that nature, circumstantial evidence is relied upon by the prosecution that, in itself, involves complicated directions.

Jury directions—they are the types of topic areas that lawyers go to law school to learn about, but we expect jurors to be able to absorb that information very quickly in the judge's summing up at the end of the trial and then properly think about that and arrive at a decision as to whether they think that person is guilty beyond reasonable doubt. So that's complicated. Our concern is, if the bar is lowered in relation to the pathway towards majority verdicts, that jurors may see that as a way of taking a more cursory examination or approach to the evidence, not looking at things through the lens of those complex directions and appreciating those complexities of the law that they have to, and that could result in decisions being made by jurors on a lower standard of proof, that would disadvantage Aboriginal clients, in particular. That's our fundamental concern about how that may play out. If I might just stop there and ask my colleague, Ms Skinner.

HARRIET SKINNER: I agree. Certainly, in my trial practice, joint criminal enterprise, extended joint criminal enterprise and directions on circumstantial evidence are so common, and I do think that such directions are complex and that they should be properly considered by juries—like, deeply considered, rather than just kind of skimming the surface, which is the ALS's concern. If the eight hours is reduced to four hours, it may be a path that leads to more convictions. That's the ALS concern, and I agree with my colleague's observations.

The Hon. SUSAN CARTER: Could I ask a question about efficiencies, perhaps, if anybody would like to comment on this? I think what I'm hearing is that there is a general concern that jury verdicts could be less safe, if we could put it that way, if the time for consideration is seen to be foreshortened. We've heard arguments that there are efficiencies associated with this foreshortening. Do you have a view as to whether, if we see a high rate of conviction, perhaps from less safe verdicts or verdict process, this might actually lead to more appeals and therefore a greater demand on court time?

SHAUN MORTIMER: Yes.

HARRIET SKINNER: Yes.

SHAUN MORTIMER: Absolutely. The productivity benefits on the one hand versus matters going to the Court of Criminal Appeal and the resources involved in having three justices decide a matter, and then also the risk of retrials following from that, could be vast. I think that's a major concern that needs to be looked at very closely.

Ms SUE HIGGINSON: Just on that, your submission—which is consistent in other legal experts, frontliners, experts and submissions—is that you just haven't actually seen the case for the efficiency argument. Is that something you confirm here? Because I haven't, and I've looked, and there's others. Have you seen anywhere the sort of economic analysis, which would include factors like the cost of getting it wrong, Court of Appeal, the cost of wrongfuls and sentences and prison terms—have you seen any of that economic analysis presented anywhere or in any form that you've been able to assess, any potential efficiencies?

SHAUN MORTIMER: No.

HARRIET SKINNER: No.

RHIANNON McMILLAN: On behalf of Legal Aid, we have not seen any of that evidence either. That was a principal concern of ours—that whilst it was asserted that there would be potentially significant savings in terms of time and resources, that does not appear to be borne out, certainly on any evidence that we have been provided with to date.

Ms SUE HIGGINSON: I know you all seem far too young to have been practising since 2006, but one of the consistent claims is that, since we first introduced the idea of majority verdicts versus unanimous verdicts and the departure from that very important common law principle, not a lot has changed in circumstances except for the complexity of criminal trials. Is that your experience in your day-to-day practice as far as you can ascertain?

RHIANNON McMILLAN: Anecdotally it's certainly my experience and the experience of other colleagues that I've spoken to in preparation for this. Certainly over time there's been an increase, for example, in reliance on CCTV and other forms of telecommunications evidence. There's a lot of focus lately on AI and the impact that that will have on criminal trials and the type of evidence that we might expect to see. So, from our perspective, it would appear that, if anything, trials are becoming more complex. But more than that, even where it is a case where say, for example, the issue in dispute is actually quite narrow and quite confined—for example, the identification of who the offender is as opposed to whether or not an offence took place—the jury's consideration of that narrow issue may actually involve consideration of a range of different types of evidence—competing views of different witnesses, weighing up alibi—in addition to evidence like telecommunications or cell tower records that would tend to suggest where a person was. So even though the issue itself may be quite straightforward at a cursory glance, that does not necessarily mean that the evidence the jury is required to consider to determine that issue will itself be simple as well.

Ms SUE HIGGINSON: In terms of the advocates, in your experience do you see jurors unbelievably frustrated and angry that they're sitting around wasting time or that they have to do things? We did touch on this a little bit with the Bar Association, and I get that it's a very difficult thing. We learnt that you often don't really know, and nor should you know, what a jury's going through. But is there anything in your frontline practice that tells you jurors want to see a change to the circumstances of the job they have to do?

HARRIET SKINNER: In my practice, I think probably similar to the evidence that was given previously, it's hard to know what is going on in a juror's mind. I think I would be speculating by kind of looking at a juror, if they're flushed in the face, thinking that they're frustrated, for example. So I think it is very hard to tell. I think either Mr Stratton or Mr Wilson referred to other than trying to guess whose side they're on and if they're going to find your client guilty or not guilty, it's very hard to know. I have seen one juror in all the trials that I've been involved in, which I accept I haven't been practising since 2006, cry. But, other than that, I haven't ever seen anything massively obvious that shows that a juror is in distress. Whether they are or not, I don't know and I'd be speculating.

Ms SUE HIGGINSON: In terms of First Nations accused people in these complex matters and particularly as you and Mr Mortimer both talk about—the idea of it's in company, joint enterprise, and the complexity around that—is there a view from accused persons that the fact that a jury is required to take this time is part of the fairness that they experience? Is that a real and tangible aspect from an accused person's perspective of the fair trial?

HARRIET SKINNER: Again probably generalising, but, yes, in my experience. I think that is the concern that, firstly, there's no real data or evidence to suggest that the reduction from eight hours to four hours will improve the current situation in terms of efficiency, but also it is a safeguard for accused persons. You do explain to clients that the verdict must be unanimous—and if the verdict/verdicts are not unanimous, that the jury has to deliberate for a period of a further eight hours before they can get a majority verdict direction. That is a safeguard in the ALS's opinion, in my opinion, that protects rights of the accused. That's certainly something you explain to clients. It's an important right, in my opinion, for accused persons at the ALS—or all accused persons.

SHAUN MORTIMER: One other very important point, just to elaborate on what Ms Skinner has said, is that many, many—if not all—Aboriginal people charged with criminal offences have an inherent distrust of the criminal justice system. Their families over generations have been incarcerated, and that is why it is so important to have those safeguards with Aboriginal people and to reassure them that there will be fairness in the system they're going through here now with their current criminal charge because of that context of seeing their own mob disadvantaged and sent into custody on, in the past, probably a lower standard of proof than what's required at law.

BELINDA RIGG: Perhaps I should add, I have been appearing in trials since well prior to 2006, and just so everyone is aware I have always supported the reduction to four hours. That has been my position as Senior Public Defender.

Ms SUE HIGGINSON: In terms of that, what do you see as the real benefit to the trial process and holding on to that fundamental concept of the right to a fair trial?

BELINDA RIGG: I see the rationale that justifies the reduction being the fact that in a significant number of trials it's just too long. Keeping the test there that the judge has to decide on the complexity of the evidence and the issues in the trial that the time is reasonable is a sufficient safeguard to protect in relation to all those scenarios where the evidence is complex or the directions are complex, where joint criminal enterprise and so on is involved. But there is a significant portion of trials, particularly District Court trials where something like 60 per cent of the trials now are child sexual assault trials, where it really does come down to a fundamental issue of whether the jury is satisfied beyond reasonable doubt that the complainant is telling the truth. And that's an issue which, in my experience, jurors can come to strong opinions about reasonably quickly.

In my view, it's very problematic for a jury who has taken its task seriously and has indicated a firm inability to agree to be repeatedly told they need to keep going back out to reach a unanimous verdict. There just needs to be something there well short of the eight hours for those types of trials, keeping the protection there for the more complex trials. But there just needs to be that ability there to alleviate that pressure and that risk of miscarriage of justice in those trials, which is a significant portion of District Court trials where it's one issue.

Ms SUE HIGGINSON: What you're suggesting there is that idea of the judge having that discretion to be able to deal with that kind of stream or tranche of cases in that particular way?

BELINDA RIGG: Yes. It probably won't happen in the majority of cases. My experience is both District Court and Supreme Court trials, both at first instance and a significant appellate practice—so reviewing transcripts of many trials. Obviously I don't read transcripts where there has been a hung jury because that then doesn't come

to be considered for appellate purposes, but certainly first instance experience district and supreme court trials with hung juries or juries indicating inability to reach verdict, as well as the collective experience of the Public Defenders. So I'm responsible not only for my own trial and appellate practice but overseeing the work of all of the Public Defenders throughout the State. My experience is that that mix of cases and the current eight hours just doesn't accommodate for those cases where the issue is very straightforward and the jury forms a firm view that it's not able to reach unanimity.

Ms SUE HIGGINSON: Just finally on that, what is the disadvantage to the jury? What is that that we're talking about?

BELINDA RIGG: That they're not being taken seriously in their statement that they can't reach unanimity. The Black direction has a number of important components to it and it is designed to, as far as possible, alleviate pressure. An important part of that is the judge telling the jury as part of the Black direction that he or she does have power to discharge them but they should go and consider one another's opinions more. But if a jury has come to a view, say within an hour or two of being sent out to consider their verdicts in a two-day trial where they know that the real issue is whether the Crown has proved beyond reasonable doubt the complainant is telling the truth, to be told again and again that despite saying that they're not able to reach a verdict they must go out and consider it again, gives rise to a miscarriage of justice in relation to the accused so far as the verdict is concerned if there's a guilty verdict returned after that point in time. But it is also, in my view, damaging to the experience of those jurors who are not being taken seriously when they've all taken an oath or sworn an affirmation. To be told to keep going out and considering it further is counterproductive, in my view, for that very long period of time.

The Hon. SUSAN CARTER: I think we are hearing two different ideas, and I wonder how we best balance them to achieve the best justice outcome. It is clearly very important that the accused feels that they are being dealt with by a just system where their rights will be protected, so the idea that a jury has to really seriously consider the case against them and, if it's to not be a majority, that there be a serious length of time taken to consider it goes to confidence in the justice system. How do we balance that really important need for confidence against a reduction in the eight-hour period?

BELINDA RIGG: By maintaining the requirement that it be reasonable in all of the circumstances of the case. For example, in the majority of trials in which I appear, which are Supreme Court trials, this just wouldn't come up as a possibility. It would be opposed, obviously, if there was. I wouldn't think there would be a situation where a jury, within eight hours—unless the case was overwhelmingly strong. I've never seen such a case where a jury would come back within eight hours saying that they can't reach a unanimous verdict. In light of the complexity of most of those cases, such a direction, earlier than that type of time, would be opposed. In a large amount of District Court trials it would be successfully opposed as well if it was sought at an early time. I just think that if that safeguard remains—but for the purposes of those very simple and straightforward cases where the jury is polarised very quickly, it just seems that four hours is a more realistic time than the eight hours.

The Hon. SUSAN CARTER: So you are saying, in your experience, it is a very small number of cases where the eight-hour period is oppressive to jurors?

BELINDA RIGG: I'm not talking about it being oppressive to jurors. It's all a little bit hypothetical because of the absence of data. I'm saying, in complex cases, I don't really see, either from conducting trials or reading transcripts of trials, jurors usually indicating an inability to agree within a time frame of less than eight hours. But in District Court trials where it's a very limited issue—such as is the complainant telling the truth?—I have seen from my own experience and my understanding of others' practices and reading transcripts that jurors can come to quick views. Jurors often acquit very quickly in those matters. For example, acquittals are common in those limited issue cases within an hour or within two hours. That happens very frequently in the District Court. Similarly, it is common—or it's not uncommon, in any event—for jurors to indicate far earlier than eight hours in those types of cases that they can't reach agreement with one another.

The Hon. SUSAN CARTER: I wonder if other witnesses have a view. If we moved to a system where there was a different time period but an overriding requirement of judicial reasonableness, what would the accused's experience of justice be if they thought that everything rested on what a judge thought was reasonable as opposed to an objective standard?

SHAUN MORTIMER: In my experience, a lot of clients at the ALS and also lawyers like consistency, objectivity and predictability, and to know where things are going to go. Across the board, in terms of the principles and things like equality before the law—equal justice—having some benchmark where there is consistency, at a bare minimum, is important. In 2006 when the legislation was first introduced, I think the observation was made in the second reading speech that it was the idea of sending a jury home overnight to the following day which had merit—which to me has a ring of utility to it. How many times in our lives have we been

told to go home and sleep on it and come back in the morning when we're refreshed? From what I can see, there's no evidence to say that that logic is now worthy of review and that it's wrong. For me, that's where I would say that the eight-hour cap is important because, in effect, if it ain't broke, don't fix it, you might say.

Ms SUE HIGGINSON: We heard some evidence previously that if we are concerned about juries—and obviously we are and we've heard how difficult that task is—then there are numerous things we could be doing in terms of improving outcomes for juries and jury wellness and their experience as jurors. Would you agree with that proposition?

SHAUN MORTIMER: Yes.

RHIANNON McMILLAN: Yes, definitely. I think that it has been some time, as far as I'm aware, since there were any comprehensive studies done about juries and their experiences. There are any number of ways that I imagine they would be better assisted to fulfil their role and better supported to fulfil their role. That may include providing them with better education and support to prepare them for what it may be like when they go into a jury room and, perhaps for the first time in their lives, are required to adjudicate on a very serious issue with a group of their peers—people who they've only just recently been introduced to. I think there are a range of other measures that could be put in place beyond simply reducing the minimum time for deliberation.

BELINDA RIGG: Section 56 of the Act could be amended as well to make it more clear that a trial judge can discharge a jury in that time period prior to the eight hours. A problem, potentially, is that, on its face, a judge isn't allowed to discharge the jury even if they come back at two hours and say that they're not able to reach a unanimous verdict, because the time hasn't yet come for provision of a majority verdict direction and so the judge isn't able to be satisfied that they're not likely to reach a majority verdict.

I'm aware anecdotally that a number of judges discharge anyway. I think one of the sets of submissions has referred to a decision of His Honour Judge Haesler where an overriding requirement to prevent miscarriage of justice has allowed discharge. So judges do do it. But that could be clarified to make it clearer that juries can simply be discharged rather than making them go around in circles of being mandated to keep discussing the matter with one another if they've already firmly formed a view and they are not able to reach a verdict.

RHIANNON McMILLAN: I might just add, I think that was a proposal of the New South Wales Bar Association, and Legal Aid would support an amendment of that kind. It's the sort of amendment that is far more directly aimed at addressing what the perceived issue is, which is the potential pressure for jurors to come to a verdict that may not be a true verdict according to their own assessment of the evidence because of the requirement to wait for eight hours. I think that course would be preferable than to reduce the minimum time across the board when you're talking about accepting that we don't have any reliable evidence, only really anecdotal evidence, that this is a problem in a number of District Court trials. What that means in terms of actual time and resource savings is still unknown. What it means as far as juries and whether or not it was the eight hours as opposed to some other issue in the jury room that led to that deadlock is unclear on the evidence that we've seen so far.

The Hon. STEPHEN LAWRENCE: If you amended that section in that way to give the judge a power to discharge prior to the circumstances for the majority verdict being arrived at, wouldn't that have the effect that you would deprive that jury of that pathway of majority verdict? If so, what would be the rationale for depriving a particular jury of that path simply because intractable disagreement has been reached quite early?

RHIANNON McMILLAN: I think it goes back to the original rationale of having a unanimous verdict or requiring a unanimous verdict, and that is that it is consistent with the burden of proof and the standard of proof—that is, that an offence has been established beyond a reasonable doubt. Moving to majority verdict in and of itself was somewhat controversial and, arguably, does tend to suggest that there may have been a reasonable doubt. If we are considering this potentially small number of cases where the jury has become deadlocked very early on and, notwithstanding a Black direction, still can't come to a unanimous verdict, there may be other avenues which could be explored.

There is the option for a judge to question the jurors to see what their position is, in terms of whether they are likely to come to any verdict at all, whether it be unanimous or majority, and perhaps confine the circumstances in which the discharge could be made and if the discharge could be made short of that eight hours. But I think that kind of option—accepting that in some cases it will mean that a jury who has probably engaged in their task faithfully and to the best of their ability does not get to bring forth a majority verdict, I think that is less of a concern than the prospect that we will have rushed majority verdicts and that there will be an impression, perhaps, left on some accused that the option to get to majority verdict was arrived at prematurely because of that halving of the time.

The Hon. STEPHEN LAWRENCE: Do you conceive of that option as a way of ameliorating this issue of the jury having to continue to consider the matter perhaps for five or six hours? Is that the rationale?

Ms SUE HIGGINSON: Only in select matters, though.

The Hon. STEPHEN LAWRENCE: Sure.

RHIANNON McMILLAN: In those cases, which I think the DPP had referred to in their submissions and Ms Rigg has referred to, where very early on the jury has indicated that they are absolutely deadlocked, the concern as I understand it is for their safety and wellbeing. At the moment they are required nevertheless to go out for eight hours and are not told that majority verdict is going to become available at some stage. That untenable situation, which has been referred to, we accept is a problem. The issue is that there's no data to indicate how frequently that arises and what the outcomes are in those cases where Black direction has been given. How many juries do, following that, somehow manage to come to a unanimous verdict? How many result in discharges immediately after the eight hours? We don't have that evidence. I think before a policy decision is made to make that reduction, there would need to be further investigation about what is actually happening with juries and to try and quantify that.

The Hon. STEPHEN LAWRENCE: But it's your policy preference, Ms Rigg, to reduce it to four hours rather than introduce that new power to discharge?

BELINDA RIGG: Yes, it is.

The Hon. STEPHEN LAWRENCE: Ms Rigg, could you talk us through, in a very practical sense, the stages of a criminal trial that have to occur prior to the delivery of a majority verdict by a jury—so everything from the point the jury gets sent out to the delivery of the verdict?

BELINDA RIGG: Yes, certainly. I don't have all of the Act in front of me, but I'll do it as practically as possible. The jury has heard all of the evidence, the closing addresses of counsel and a summing-up from the judge. They are sent out at that point in time. They are generally encouraged to contact the judge by writing with any queries they have about the directions and with any requests for transcript of evidence, if that hasn't already been provided. Communications from that point on come via the Sheriff and notes to the judge, so the parties will be called back into court to answer any questions.

There is a different practice, as has been referred to in some of the submissions, between courts as to how well time is kept for the purposes of the jury deliberating—whether lunch, for example, should be included, whether trips to the bathroom should be included and so on. But generally speaking, unless the jury's been told otherwise, the judge will often bring the jury back into court at the end of the day at four o'clock if they haven't reached a verdict, or if they have not indicated they would like to go home.

The indication of an inability to agree generally comes in a note. The jury sometimes discloses numbers to the judge, but the judge is required at common law to not disclose those voting numbers to the parties. I think that that does raise an issue in relation to one aspect of Ms McMillan's last response, which was the extent to which a judge can question a juror where there is inability. I don't think a judge can question a juror as to what the numbers are—as to how many are on each side, for example. If it comes prior to eight hours, or a time that's reasonable, a judge can't introduce the concept of majority verdicts in the questioning of a juror.

There'll generally be a note. The judge will generally raise any note with counsel, and counsel will generally support a Black direction being provided. Some judges improvise the terms of a Black direction, but there are some aspects of it which are fundamental. I've had appeals, for example, where people have been convicted where an incomplete or altered Black direction has been given, which has been found to put undue pressure on a jury. So the judge is very careful and will have the input of counsel in directing the jury to go out and consider one another's views again, indicating that, if given more time, experience has shown that jurors may come to a unanimous verdict. The judge is repeating, ideally, all the time the importance of a unanimous verdict.

There's a different practice in judges' summings-up as to whether they mention majority verdicts at all. Something that's common is that a judge might say, "You may well have heard of majority verdicts. I can tell you now you must strive for a unanimous verdict. The circumstances have not arisen and may never arise as to whether you're entitled to deliver a majority verdict, so you must put that out of your minds." Some judges just say nothing about it at all and wait until such time, if at all, that it arises.

The jury, given a Black direction, will sometimes have that supplemented by judges. Some judges will squarely tell the jury, "There are three options you can come to: You can come to a guilty verdict unanimously, you can come to a not guilty verdict unanimously, or you can indicate that you can't reach a decision in this case and I have the power to discharge you." Not all judges say that, but I have seen that said by judges in trials I've appeared in or transcripts that I have read.

Juries then will go out again and will endeavour to keep discussing the evidence. They may or may not have questions about the evidence. If they continue to indicate an inability to agree and it's getting close to an

eight-hour period, parties' representatives will generally try to work out whether there's agreement as to whether the time has been reached at which a majority verdict direction can be provided to the jury and whether it's reasonable in all the circumstances. If there's agreement, the judge will then examine at least one person—it's usually the foreperson and another—and find out whether, if given more time, there is a prospect of reaching unanimity. It's only when the judge is satisfied, after that examination on oath, that there is no such prospect that a majority verdict direction will be provided. The judge will even, in providing that direction, encourage the jury to continue to strive for unanimity, because that is what is ideally to be achieved. I think that that's roughly the steps that are gone through.

The Hon. STEPHEN LAWRENCE: That's really helpful. In terms of this cohort of cases, in the District Court mainly, where the fundamental issue is whether the complainant is believed beyond a reasonable doubt, can you give the members a sense of what the evidence is typically in those cases? You've obviously got the complainant; you might have a complaint witness. Are you able to give us a sense of what the evidentiary picture is like, generally?

BELINDA RIGG: Yes. Sometimes that's all that there is, and I don't mean "all" in any qualitative or pejorative way. But in some cases, because these acts, where they occur, are committed in private, there is only the evidence of the complainant and sometimes a complaint witness. Sometimes the matters are of an age where there is not even contemporaneous complaint—no documents, records, that type of thing. There's a great variety in the age of allegations that come before the District Court in relation to child sexual assault proceedings, but it is often the evidence of the complainant and added to briefly by generally non-controversial complaint witnesses as to a complaint having been made.

If they're still a child at the time the allegation is made, their evidence-in-chief will have been played by a JIRT interview. Generally their cross-examination will now have been prerecorded, so that's played. So the parties are well aware in advance of the trial as to what the issues are, and the closing addresses will generally focus then, in those types of cases, on whether the complainant can be believed to that very high standard of proof beyond reasonable doubt.

The Hon. STEPHEN LAWRENCE: It's not uncommon in those cases, is it, to very quickly or quite quickly get a guilty or a not guilty verdict? Would you agree with that?

BELINDA RIGG: It's very common for a not guilty verdict to be reasonably quick. In my experience, unless the case is absolutely overwhelming it is unusual for there to be a very quick guilty verdict. So it would be uncommon, in my view, for there to be a unanimous guilty verdict in, say, an hour or two hours or three hours. It doesn't often happen. I'm sure it does happen sometimes, in extremely strong Crown cases, but not generally.

The Hon. SUSAN CARTER: If I could just jump in, Ms Rigg, the fact that guilty verdicts take longer than not guilty verdicts, that would be an indicator of the time that juries feel they need to consider these matters very seriously?

BELINDA RIGG: Yes. In my experience jurors take their obligations very seriously and do act very carefully before convicting.

The Hon. SUSAN CARTER: So time is an important factor for jurors to be able to really weigh the evidence that might seem simple to solicitors and barristers but still raises very complex human issues for jurors, and so that time is very important.

BELINDA RIGG: Yes. I agree with that, yes.

The Hon. STEPHEN LAWRENCE: In terms of the requirement for the trial judge to be of the view that it's reasonable to give the direction for a majority verdict, are you able, Ms Rigg, to give us a sense of what the relevant considerations are for a judge in reaching that view?

BELINDA RIGG: Yes. It will vary from case to case, but it would include consideration of all the types of issues that have been raised in the submissions that have been put forward. For example, it will include consideration of the complexity of the legal directions that have been provided—especially concepts of joint criminal enterprise, extended joint criminal enterprise and so on—are more complicated. It will depend on whether there's CCTV evidence, complex phone records and that type of thing. So if the trial has been long or the issues or evidence has been complicated, that will, in the judge's consideration, err on the side of a longer time being required before a majority verdict direction would be provided because the judge is in a position to simply see if the jury hasn't had long enough to sift through all that evidence and those issues in light of the directions that have been provided.

The Hon. STEPHEN LAWRENCE: Is that requirement—that the judge has to be satisfied that it's reasonable in the circumstances of the case—a protection for the parties that exists independently of this eight-hour rule at the moment?

BELINDA RIGG: Yes, that's right. At the moment the judge isn't entitled to simply give the direction because eight hours has been reached, although it's the case in many of these cases where the issues are more simple the parties wouldn't argue against that. They wouldn't argue that the time has not been reasonable. But, certainly, even currently in more complex and longer trials parties would argue against eight hours being sufficient. It's just not sufficient in many more complex trials.

The Hon. STEPHEN LAWRENCE: In terms of dealing in a proper way with this cohort of cases where the issues are streamlined, if I can put it that way, and the jury has early on indicated intractable disagreement, are you able to think of any other way of properly dealing with that cohort of cases apart from the amendment to give the early discharge power, or this decreased four hours? Can you think of any other way of dealing appropriately with that cohort of cases?

BELINDA RIGG: No. The issue of juror training has been raised, but I'm not sure that that would necessarily fix some of the ways in which people have very strong views in relation to some types of cases from an early point in time.

The Hon. STEPHEN LAWRENCE: If the law stays unchanged and we have cases in the future, which you may think that we will, where there's a streamlined case or with streamlined issues and the jury comes back, say, within an hour and it's clear from the note that they're in a state of intractable disagreement, there's nothing for a judge to do apart from tell them to go back and keep talking to each other about it. Is that right?

BELINDA RIGG: Or discharge, as some judges do at the moment.

The Hon. STEPHEN LAWRENCE: Which arguably is not lawful. Is that right?

BELINDA RIGG: That is correct, yes. There are good reasons as to how it can be found to be lawful, but it doesn't appear on the face of the section itself at the moment as an option. If the reduction to four hours isn't made, and this is an alternative, it would really require the ability to discharge—where it's been less than eight hours or a reasonable amount of time such as would allow a majority verdict direction—and the judge's satisfaction that they're not likely to reach a unanimous verdict.

The Hon. STEPHEN LAWRENCE: In terms of those cases where that indication is given early on, there's no reason to think that the quality of the decision-making process in that jury is less than any other jury, is there? It's just the fact that intractable disagreement has been reached earlier in time.

BELINDA RIGG: It may or may not be the case that the quality is less, because sometimes people have fixed views. I have historically not supported majority verdicts in relation to convictions because I think when one is looking at the onus and standard of proof, the fact of even one juror not being satisfied beyond reasonable doubt is something which goes almost fundamentally to whether there is a reasonable doubt as to guilt. But working within the system as it is, since the introduction of this legislation I think it should be remembered that majority verdicts frequently result in acquittals. Personally, I've only had acquittals as a result of majority verdict directions.

I was never a supporter of the rogue juror theory necessarily, but it can occur that there's a person on a jury who, for example, just will not acquit someone who is charged with a child sexual assault offence. If someone has an intractable view like that, that is irrational and not open to consideration of others' views and a rational interpretation of the evidence in light of the directions, that is something, obviously, that affects the quality of deliberation. That is something that can be, to some extent, ameliorated by judicial encouragement of other jurors to inform the judge if a juror is, for example, just not engaging with the process at all.

Anecdotally, it is sometimes the case that extraneous issues can come into the jury room, such as personal grievances and the like. These things can occur and they can sometimes be the cause of a stated intractable disagreement at an early point in time, but that's often not the case. It's just differences of opinion. We're having a representative group from the community; there will be people who validly and diligently hold different points of view from one another.

The Hon. STEPHEN LAWRENCE: What's your view about the policy merits of a situation where there's a four-hour rule, as proposed, compared to a situation where there's a pure judicial discretion as to the time that needs to pass before the direction can be given?

BELINDA RIGG: In the written submission that I put in in 2021—I think it was—I supported simply a judicial discretion. However, I accept that a time period is a suitable safeguard as well. So I'm certainly not opposed to a safeguard of four hours, for example, as distinct from leaving it completely to judicial discretion.

The Hon. SUSAN CARTER: We seem to be focusing on a small group of cases that I think have been labelled "streamlined", where it's been suggested that a period of less than eight hours may be appropriate. Looking at this from the point of view of those approaching the justice system and those in the community who we want to trust in the justice system rather than those who work within the justice system, if we start classifying cases into streamlined and mainlined, for want of a better term, and we say, "We can accept a faster decision in a streamlined case," what impact does that have on the perception of justice that the accused may have, especially if the accused finds themselves in a streamlined category? Does anybody have any comments about that?

RHIANNON McMILLAN: If you're talking about varying fairly fundamental procedural safeguards, such as what the minimum period is depending on an assessment about how complex a case is or how complex a jury should find a case, that may be a difficult thing to achieve. I appreciate the point that there are different types of cases, and in some instances it will be fairly straightforward and the jury may indicate deadlock very, very early on, and that there is that cohort of cases that I appreciate there is some concern about. But how you would legislate to distinguish between them is a difficult question, I think.

HARRIET SKINNER: I agree. Do you agree?

SHAUN MORTIMER: I agree, just with one other observation. From the perspective of an accused person, a streamlined or mainline case really doesn't explain very much to that person. For that person, their appreciation of the consequences and the outcome is what's significant to them—whether they will go to jail, how long that will be for. A streamlined case might hypothetically be something simple, such as a robbery in company, which attracts a guideline judgement if found guilty. A person may go to jail and serve a three-year non-parole period for that. A more complicated matter may receive, hypothetically—it probably doesn't assist us to go into hypotheticals, but the ultimate outcome is for the effect on the accused person. That's what they appreciate. I think that it will make no difference in terms of their appreciation of the procedure. It's the consequences which is what is significant for them.

BELINDA RIGG: I think one potential qualification to that, though, is that if the accused person has explained to him or her by the judge and by their own representative that this is only being done because it is a time that's reasonable in the circumstances of the case, then that is the framework from which they should be encouraged to view it, rather than some dichotomy between this being a streamlined or not a streamlined case.

Ms SUE HIGGINSON: On that, Ms Rigg, is that not the same for jurors, though? If the process and the procedure and the safeguard is the eight hours, as the Attorney General said when we introduced the 2006 change and digression away from that fundamental principle of unanimous decisions, that we need this sleep test and we need this safeguard and that it's fundamental, is it not the same then to just absolutely make that clear to a jury that whilst this may be frustrating, whilst it may be—isn't this the same principle, that it's all in the explanation of these very, very important, longstanding real safeguards?

BELINDA RIGG: Yes, I think that explanation can ameliorate that to some extent, but I don't see that it's capable of explaining it to a jury who has repeatedly come back and said they can't agree. The jury isn't told anything at the start either way on the proposal, or without it, that this is going to be a shortcut process. They are given no information other than that they need to go out earnestly and strive for unanimity. It's only when, on their initiative, they come back with an inability to agree that then something alternatively to that might arise. They will be encouraged to go back and strive for unanimity—at least, to some extent, to begin with.

The Hon. SUSAN CARTER: If we have accepted that we need a common standard across all cases so that people have an experience of justice and a confidence in justice, then, in policy terms, is it appropriate to reduce the current standard because there appears to be a minority of streamlined cases where a smaller period may be appropriate?

RHIANNON McMILLAN: No. I think, in our submission, Legal Aid had strongly opposed the reduction but accepted that, in the event that it was inevitable that there would be a reduction, six hours would be more appropriate than four because of that overnight test, effectively. It is entirely possible with four hours that you will have a jury reaching majority verdict on the same day that they are sent out. It is not likely to occur in a case where there is eight hours, absent some unusual way of keeping time during the day. Six hours is effectively a middle ground that, based on our calculation about what a standard day may be, would mean in most cases that they would be out overnight. But our position is still that there is no basis to move from the current standard of eight.

HARRIET SKINNER: Could I just jump in with that as well. I think there is a risk, though, for six hours if a judge finishes summing up at 4.00 p.m. the day before and doesn't send the jury out until 9.00 or 9.30 the following day. Depending on time keeping, it could mean that a jury could come back on the same day with six hours. So I think that eight hours is the safeguard where you are going to have juries overnight having a think about it, sleeping on it, coming back with a fresh mind.

The Hon. STEPHEN LAWRENCE: In terms of this issue of four, six or eight and the sleep test, bearing in mind the requirement for the court to be satisfied that it's reasonable in the circumstances and bearing in mind everything that Ms Rigg said about the various things that have to happen first—even on a four-hour test, how practically likely would it be, Ms Rigg, that a jury could deliver a majority verdict on the same day that they were sent out?

BELINDA RIGG: It's possible but there would be reasons for opposing it. So even if four hours had been reached but just at the end of the day, the history of notes and any discussions that have gone on would be taken into account as part of what can inform what's reasonable in the circumstances. Counsel may well say in those circumstances that the jury should come back and be required further in the morning to deliberate.

The Hon. STEPHEN LAWRENCE: Putting aside the reasonableness test, how likely is it that the jury could be sent out, could give their indication of disagreement, could receive the Black direction, could then be sent out, could come back—how likely is that all within four hours, practically?

BELINDA RIGG: It's possible. It's difficult to say how likely it is. But juries often will take a significant period of time after the provision of a Black direction, often to the point of reaching unanimous verdict. You could not hear from a jury for days after the provision of a Black direction, but sometimes they can come back within 15 minutes. It really depends upon the dynamics of the particular jury, which will in turn depend upon what the issues in the trial were.

The CHAIR: We might bring questioning to an end there. Thanks very much for coming today and giving us your evidence.

(The witnesses withdrew.)

Assistant Commissioner SCOTT COOK, Commander, State Intelligence Command, NSW Police Force, sworn and examined

Mr BRETT HATFIELD, SC, Acting Deputy Director, Office of the Director of Public Prosecutions, affirmed and examined

The CHAIR: Welcome to you both. Thanks very much for coming today. Mr Hatfield, would you like to make a short opening statement?

BRETT HATFIELD: There's the most recent submission on behalf of the Office of the DPP that is signed by Deputy Director Veltro, dated 17 January 2024, so I can speak to that and some additional issues. In basic terms, in terms of this issue about the reduction of the minimum period from eight hours to four hours in section 55F (2) (a) of the Jury Act, the office supports that reduction. The eight-hour period can and has given rise to practical difficulties in shorter trials or trials where there are limited or a fairly straightforward issue where the jury has become deadlocked at an early stage of their deliberations. There are some examples of that that I can take the Committee to by reference to a number of cases which show how that has played out in some circumstances. The reduction should assist in avoiding those types of problems.

Retaining the requirement that, notwithstanding the minimum time which is currently in the wording of the provision 55F (2) (a), the court must be satisfied that the time for which the jury has deliberated is reasonable having regard to the nature and complexity of the issues in the trial, is an important safeguard which allays any concern about the impacts on the quality of justice on longer or more complex trials. I understand the Committee may also be interested in some of the steps in the process and the impact on victims. I can address those. Ms Rigg has done that. I was present for what she said and in fact I agree with all of what she said about the reasons for the reduction and support that. I hope that assists.

The Hon. SUSAN CARTER: I wonder, Assistant Commissioner Cook, could you indicate what the view of the New South Wales police is in relation to the reduction in the eight-hour rule?

SCOTT COOK: The Police Force doesn't have a position either way on that. Police are witnesses in most jury trials and don't interact with a jury, and we would say that's a matter for the Public Defender and the DPP in terms of a view on that. We don't have a view either way.

The Hon. SUSAN CARTER: Mr Hatfield, in your opening statement you indicated that the reduction in four hours should assist with the resolution of practical difficulties which you see currently arising. On the basis of what evidence are you making that claim?

BRETT HATFIELD: On the basis—there is a number of examples in the case law.

The Hon. SUSAN CARTER: Of evidence of the four-hour rule assisting reduction of difficulties?

BRETT HATFIELD: Perhaps I need to go to the examples so the Committee can see what happened in these particular cases.

The Hon. SUSAN CARTER: Perhaps I can reframe my question. On the basis of what evidence are you supporting the fact that a reduction to four hours would improve the jury process?

BRETT HATFIELD: The evidence is from the example from some case law and also the reports, as I understand it, from judges of the District Court, as reflected in their submission, and reports from Crown prosecutors. This is not correlated in any systematic way, but it's—

The Hon. SUSAN CARTER: Sorry, I think we're at cross-purposes. I think you're giving examples of problems you currently see.

BRETT HATFIELD: Yes.

The Hon. SUSAN CARTER: What I'm asking for is evidence of why a reduction to four hours would address those problems.

The Hon. STEPHEN LAWRENCE: Point of order: He's trying to tell us about the examples from which he has formed the view that the reform would assist. I think he should be allowed to do that.

Ms SUE HIGGINSON: To the point of order: I think the question is quite specific, and I think with respect to the whole process we've heard that there isn't a lot of evidence. Perhaps that is the answer, but the question might be the next question—"Well, tell us about the problems you are witnessing." I think there is a real question.

The Hon. WES FANG: The question is specific and it's appropriate.

The Hon. STEPHEN LAWRENCE: It's the same thing, though. It's an artificial distinction.

The CHAIR: Order! I'll allow the question and then let's see where we go.

BRETT HATFIELD: In terms of evidence, there's no affidavit, there are no statistics; I don't have anything of that nature to provide to you. The statistics that are attached to the DPP's submission deal only with the percentages of trials resulting in hung juries over the period and postdating 2006 and afterwards, so it's a slightly different issue. I think they showed generally that there was some reduction on a broad view of the total number of hung juries post-2006. But beyond that, they don't tell us anything about the four hours.

The Hon. SUSAN CARTER: I don't see any statistics attached to the submission. Is it perhaps a submission to the statutory review? We do not have access to those submissions.

The Hon. WES FANG: A cover-up by Daley.

Ms SUE HIGGINSON: No, there was a link in the final Government submission.

The Hon. SUSAN CARTER: Not the DPP submission?

BRETT HATFIELD: It was a 2021 DPP submission that had the statistics attached to it. My apologies.

The Hon. SUSAN CARTER: I wonder if it is appropriate that that be forwarded to the Committee. It is just that we do not have access to that.

BRETT HATFIELD: Yes, we can attend to that.

The Hon. WES FANG: In relation to the four-hour amendment, why four and not three, five or two hours? We have heard already that other jurisdictions have different time frames, and obviously we would be better able to have examples in evidence if we were to draw parallels with other jurisdictions. What is it about the four hours? Is it just because it is half of eight?

BRETT HATFIELD: It's a good question. It highlights the arbitrariness of eight, for example. And four—the same thing. I could say about four—I mean, a standard court day is the court will sit from 10 until one and then there is a half-hour break, so that's 2½ hours. And then in the afternoon from two to four is the standard hours. So the standard one day of court time is 4½—

The Hon. WES FANG: And you guys left that to come here. Crazy!

The Hon. STEPHEN LAWRENCE: It's not as easy as it sounds.

The Hon. WES FANG: In relation to that, then, the statutory review obviously took a view, and it's the Attorney General's position that that recommendation be adopted, and that is happening by way of the bill that is currently before the House. But we have heard already this morning from groups such as the Law Society and the Bar Association that they see this as an egregious and dangerous, I would think, amendment to the law. Is four hours, in your opinion, going to safeguard the protections that—

The Hon. CAMERON MURPHY: I think that's a mischaracterisation.

The Hon. STEPHEN LAWRENCE: Point of order: It has been put that the previous witnesses said that it was egregious and dangerous. I do not think that should stand, because it is not correct.

The CHAIR: I accept the point of order.

The Hon. WES FANG: I was paraphrasing. The Attorney General has made a decision here—I'd say it's a captain's pick—to take it to four hours. Can you cite any evidence that the Attorney General has made this decision to put the bill before the Parliament based on concrete statistics or concrete evidence that it is not going to in any way produce adverse outcomes for members who are appearing before courts?

BRETT HATFIELD: I don't know what the Attorney has had access to or reference to in formulating this. I know the office's position based on the examples that I raised initially, but I can't answer for what the Attorney had regard to specifically.

The Hon. WES FANG: There are advocate groups such as the Council for Civil Liberties—they are certainly a very well-respected organisation—and they are opposing it. Surely that must help influence the Office of the Director of Public Prosecutions' view on these things?

BRETT HATFIELD: I agree with everything the senior public defender just said to this Committee recently, and usually we are on opposite sides or we're disagreeing with each other. All the reasons she gave I agree with, and I think they are supported by the ODPP.

The Hon. CAMERON MURPHY: One of the issues facing the Committee is that this is an area where no evidence, in terms of statistics, has been kept. Can you provide us with specific examples from your experience where the change to a four-hour period would assist? Do you have concrete examples where you have been in court and that change would have assisted the court and the jury to arrive at a verdict?

BRETT HATFIELD: Yes, okay. Well, there is a matter of—

The Hon. WES FANG: That's a false negative, isn't it? How do you—

The Hon. STEPHEN LAWRENCE: Point of order: That's just an interruption. That's what that is.

Ms SUE HIGGINSON: Point of order: Can we let the witness carry on?

The CHAIR: I will allow the answer.

BRETT HATFIELD: If the examples from the cases would assist the Committee—

The Hon. CAMERON MURPHY: Absolutely.

BRETT HATFIELD: I think they would and I am happy to go through them.

The Hon. CAMERON MURPHY: Can you take us through those, please?

BRETT HATFIELD: I am happy to do that. The first decision I refer the Committee to is *Hunt v The Queen* [2011] NSWCCA 152. That trial involved an indecent assault of a person under 16 years of age. There were two counts. I think the child was 11 or 12 years old. It was a short trial. The evidence itself was heard over two days. The description is in paragraph 2 of the judgement. The circumstances in relation to the jury are that—and this is in paragraph 9 of the judgement—after just two hours of deliberations they provided a note saying, "We cannot reach a verdict." They were then given the Black direction, which the Committee has heard about, which is to persevere notwithstanding disagreement, minds may change et cetera.

The foreperson wanted to say something to the judge but the judge stopped him and asked him to send a note and directed the jury to continue to deliberate as per the Black direction. The note came back, which quite emphatically indicated that the jury were deadlocked and there was no prospect of agreement. The jury were then directed to continue as per the Black direction. About another hour and a half later the note came back, "We cannot reach a unanimous verdict." It was about four and a half hours by this stage and there was discussion between the judge and counsel about whether the jury should be discharged, and this problem arose under section 56.

And then the judge asked some questions and examined the foreperson with a view to finding out what was happening or whether they could come back. In addressing the section 56 questions, the judge asked—he shouldn't have, the Court of Criminal Appeal held—whether they could come to a unanimous decision. He said no. He raised the majority decision and the foreperson said that was a possibility. So they are five hours in, they are deadlocked, they have got the possibility of a majority verdict—and, as Ms Rigg said, this can be sometimes a person that's intractable one way or the other for quite irrational reasons—and the judge then said, because the eight hours hadn't passed, "The circumstances haven't arisen where I can take that yet." So he sent them back to deliberate in accordance with Black.

They sent then a further note saying that they are not unanimous but they are 11-1 and there is no prospect of any change and they don't require more time. And then His Honour got them back and told them that he couldn't take the majority verdict until eight hours in and, effectively, they sat it out, waited and came back and gave the majority verdict after the eight hours. The Court of Criminal Appeal held that His Honour shouldn't have done that. There was an established authority already—*RJS v The Queen* [2007] NSWCCA 241—which says that the jury shouldn't be told about the timing for the majority because that undermines them deliberating for the eight hours. It's an invitation just to sit it out and wait.

So you had the jury very quickly, after at least five hours or perhaps earlier, reaching a position where they could have given a majority verdict. It wasn't available. They had to wait it out. The way the trial judge dealt with it was problematic but he was in a very difficult position because of the way the legislation works at present. That's one example where after the four hours the verdict could have been taken. For whatever reason, the one juror held out. It was only a two-day trial. It was a reasonable period of time. That's a situation where we had a retrial of that matter—

The Hon. SUSAN CARTER: Mr Hatfield, was the retrial because of the judge's improper direction to the jury in terms of the—

BRETT HATFIELD: Yes.

The Hon. SUSAN CARTER: So it wasn't in terms of the four- or the eight-hour limit, it was in terms of the improper jury direction?

BRETT HATFIELD: That's the reason why it was upheld. But this is an example of how a four-hour—

The Hon. SUSAN CARTER: Based on that example that you've been giving, I think—if I've got your time correct—there could have been a majority verdict potentially after 2½ hours. Why aren't we looking at a 2½-hour change?

BRETT HATFIELD: Whatever number is chosen, there is an arbitrariness to it. I acknowledge that.

The Hon. SUSAN CARTER: So why is four better than eight?

BRETT HATFIELD: Because eight is a long time.

The Hon. WES FANG: Eight allows people to think about it overnight, though.

BRETT HATFIELD: These problems do manifest in a really problematic way. For the jury to be told—I'll come back to the further example. What can happen when they've reached this position early and then they've got to—firstly, they're not told it's just eight. They don't know how long it is because they're not allowed to be told how long it is. They're just told, "Go back and deliberate further." The risk is that then they just say, "We've got to decide one way or the other" and people won't give a true verdict. They'll give a verdict just to get out of there. That's problematic.

The Hon. SUSAN CARTER: The example you've given us is very interesting. What examples can you give us of juries which have successfully reached a unanimous verdict after the Black direction has been given?

BRETT HATFIELD: I had one myself. I had a murder trial, Kilincer, last year or the year before, before Justice Wilson. The trial went for about two months. It was a cold case murder. The jury deliberated for about, from memory, two weeks, said nothing and then indicated they had difficulty. They were given a Black direction with a majority direction. They then took a further two days. They didn't come back immediately with 11-1 or 10-1—I forget what it was—and they came back shortly afterwards.

The Hon. SUSAN CARTER: From your practice, or from your discussion with colleagues, what would you say is more common: that after a Black direction a verdict is reached or that there are still issues?

BRETT HATFIELD: Frequently, after a Black direction a verdict can be reached.

The Hon. SUSAN CARTER: Which indicates the current system works well.

BRETT HATFIELD: There are problematic examples, particularly in short or straightforward trials of the type I'm endeavouring to illustrate.

The Hon. SUSAN CARTER: What would you say is the best basis for legal policy: based on the one problematic example or the experience of the majority of the cases?

BRETT HATFIELD: I think it's a principled approach looking at where problems have arisen, looking at why.

The Hon. SUSAN CARTER: And what principle underlines four hours?

BRETT HATFIELD: The principle underlying four hours?

The Hon. SUSAN CARTER: As opposed to eight hours—take sufficient time to deliberate and sleep on it?

BRETT HATFIELD: As I said earlier, I acknowledge that whatever figure is chosen there is a degree of arbitrariness to it. But experience is showing, and there are indications from the District Court—and Ms Rigg made reference to the issue in BC, which I was going to come to, where the judge felt, contrary to authority, that he had to discharge the jury because otherwise there would be a miscarriage of justice—that there are a number of examples of this happening with judges that are being reported back anecdotally through officers of the DPP, as referred to in our submission. Of course, we don't see these matters—similar to Ms Rigg, I have a Supreme Court trial practice; I also have an appellate practice. We don't see these matters in the appellate court because when there's a discharge of a jury and a retrial, there is no appeal.

The Hon. CAMERON MURPHY: Mr Hatfield, just as a follow-up to that, we heard from Ms Rigg earlier that it's quite common, I think she put it, in child sexual assault matters to have a narrowing of the issues to maybe one matter of fact for the jury to decide, or a couple, and it can be quite quick. If the only option is to wait eight hours, the jury don't know how long they have to wait and they've decided they are in a situation where it's intractable at the beginning then the option, really, as you've put it, is just to discharge the jury. What sort of

an effect will that have on the complainant, for example, in a case like that? They'll have to go through a whole new trial, potentially.

BRETT HATFIELD: Yes.

The Hon. CAMERON MURPHY: Can you talk about that a little bit?

BRETT HATFIELD: Any trial that doesn't reach finality, any trial that has to be retried, is problematic, and all lawyers in the criminal justice system on both sides work hard to avoid that happening. Of course, there are measures in the legislation which seek to alleviate the trauma to victims, in terms of their evidence in sexual assault cases generally now is recorded, and where either the Court of Criminal Appeal has set aside a conviction and ordered a retrial or the jury was hung, their evidence can be replayed in the next trial. That's a good measure, but there's still the stress to the accused. Their position is unresolved. The substance of the matter is unresolved, so far as the complainant is concerned, and litigation weighs heavily on individuals. There's also the fact that their family members and friends are often going to be witnesses in the trial. Their evidence is not recorded to be replayed; there's no provision for that. So there's a considerable human toll for any trial that has to be re-run a second time, a third time.

The Hon. CAMERON MURPHY: Is it fair to say that reducing it from eight hours to four, even if it is a minority of cases, will alleviate some of those issues for complainants in those sexual assault cases?

BRETT HATFIELD: Yes, it should lead to less discharged juries because of the section 56 problem, if I can call it that. It may result in, as Ms Rigg said, sometimes acquittals and sometimes convictions. Bearing in mind that majority verdicts were brought in to deal with this rogue juror—to use that term, problem persons—there need to be 11 or 10 jurors who are persuaded beyond reasonable doubt of guilty or not guilty, and this one person, for whatever reason, has a contrary view. It's only in those circumstances: 9-2 or 10-2.

The Hon. SUSAN CARTER: The evidence we've heard today is that just under 2 per cent—1.9 per cent—of cases in the District Court result in hung juries. In Victoria, for example, where they have below the eight-hour period, what's the hung jury rate there? Are you aware?

BRETT HATFIELD: I'm not aware. I understand Victoria is—they don't have a period; they have just the overall reasonable period depending on the case, as I understand it.

The Hon. SUSAN CARTER: Because it would assist the Committee if we thought we could get under 2 per cent. But it has also been put to us that 2 per cent of cases resulting in a hung jury is actually a sign that the system works, rather than a sign that there is a problem with the system, and that, while it is an issue for witnesses, 2 per cent of cases is not a significant issue.

The Hon. WES FANG: Noting the arbitrariness of the figure, whether it be four or eight hours, Mr Hatfield, would you agree that for jury members the consideration of the issues overnight—which I believe the eight-hour figure provides for—enables jury members to consider the matter fresh the next day, having slept? Do you believe that that's important?

BRETT HATFIELD: Not necessarily, no, because sometimes the eight-hour period can be longer than there was evidence in the trial, so it can seem quite a long period. The views may well have been formed or this position reached quite early, and the examples we're seeing—even in Black itself, the jury sent the note after three hours in that case. In two hours they can send these notes that they're deadlocked. They don't know that there's this eight-hour point they're going to reach, so the jury is just told, "More, more, more, go back", without knowing when the end is in sight. The problem is that that position within itself is problematic and leads to frustration and can lead to unjust outcomes.

The Hon. WES FANG: But you appreciate that this morning the evidence from your colleagues was counter to that view, that there was an importance to the overnight—reconsideration the next morning of the matter and that they were steadfast in their defence of at least that component of it.

BRETT HATFIELD: I don't—there is the safeguard that the period is reasonable having regard to the length, complexity and the nature of the issues in the trial. In my view, that's the appropriate safeguard and that's the measure that's of reasonableness and that both parties can have input into. In my experience, that's not the sort of issue that prosecutors and defence lawyers are likely to disagree about.

The Hon. CAMERON MURPHY: On that point—

Ms SUE HIGGINSON: Mr Hatfield, can I just ask—respectfully, you seem more, I'm hearing, to be advocating for more discretion and a reasonableness approach to it rather than an arbitrary time approach to these specific classes of small matters that may be dealt with, in the interests of justice, more efficiently or in a more timely manner for the benefit of the jury. That's what I'm hearing.

BRETT HATFIELD: Look, the argument in terms of having some time period, as I understand it, is that it prevents this position of the jurors just going back to the jury room, "Put up your hands. 11-1. Okay, let's just get a majority and come back in 10 minutes." Having some period requires that there's at least some discussion so gives some minimum to that. That's the argument as I understand it in favour of having some time period. The other States have between two, four and six, but here eight seems—and Victoria has the reasonableness test.

Ms SUE HIGGINSON: The reasonableness test.

BRETT HATFIELD: Yes.

Ms SUE HIGGINSON: So how do you reconcile with the fact that your—this heavy focus on the majority verdict and how far that moves from the actual principle that we are still seeking to achieve, apparently, which is unanimous verdicts?

BRETT HATFIELD: Sorry, can you just restate that question?

Ms SUE HIGGINSON: Yes. I am hearing this: We've focused so significantly on the majority verdict. How do you reconcile that with this sort of creep away, perhaps, from what we—sorry, legal practitioners and particularly criminal practitioners—subscribe to the notion that the unanimous verdict is still an unbelievably important fundamental principle. It's enshrined in our Constitution. The Federal Court system is still compelled to it. We've moved away from it very, very cautiously, but it seems that the focus—I'm just asking how do you reconcile the creep away from that with this very, very strong focus on the majority verdict?

BRETT HATFIELD: Well, the move to majority verdicts was made in 2006. As Ms Rigg indicated, she was against it at the time, but it's not being seen as inherently problematic or giving rise particularly of itself to matters in the appellate courts that are indicating there's any problem with the majority system, per se, so far as it's working. The problems that are arising are with respect to timing and pressures on juries. They're particularly manifesting in shorter or more straightforward trials. The position is that the eight hours as the hard minimum is too long and leads to problems in some examples in these shorter trials.

Ms SUE HIGGINSON: So just to confirm then, it is your view—and you're suggesting it was Ms Rigg's view—that the principle of a unanimous verdict is no longer really that relevant.

BRETT HATFIELD: It is. Juries are told—they're exhorted by the judge in the summing up to reach a unanimous verdict. And, as Ms Rigg said, some judges will mention the possibility of majority verdicts; some do not. So there's not a fixed practice. My experience personally is that, generally, judges do not mention it, and it only—

Ms SUE HIGGINSON: Sorry to interrupt; I'm just looking at the time. Just on that, a question I was going to ask you a bit earlier is about the focus on the direction. Do you think that there is a way of improving the entire system, rather than arbitrary times through directions and through the conversation that we have, perhaps more openly and honestly, with a jury? Should we be looking at reforms around the system with a more substantive justice lens as opposed to an arbitrary time frame lens?

BRETT HATFIELD: There's an interesting point there that I did wish to make. In this situation, where the court has said the jury cannot be told about the time for majority verdicts, some jurors will know about it and have this information.

Ms SUE HIGGINSON: Of course they do.

BRETT HATFIELD: So there can be an unreality about it, and not mentioning it may leave a lot to what jurors themselves know. Some of them may know "Well, if we wait we'll have a majority, and let's do it."

Ms SUE HIGGINSON: In your view, and your expertise and experience, do you think that is a justice reform lens that, as a body politic, we should be exploring, rather than just this idea of arbitrary time frames?

BRETT HATFIELD: Possibly. But, generally, the problems, after a couple of hours, they're arising. They get the Black direction, then maybe they go for an hour more and then you're getting close to the four-hour period, if there's still a problem at that time. You can move to the majority verdict then. Four hours seems a good amount of time. The problem is if, in the example I just gave, they come back and say, "We've got a problem", they get the Black, "We've still got a problem", another Black and then there's no end in sight for them. That's the problematic circumstance.

The Hon. CAMERON MURPHY: Can I follow up on something from earlier, Mr Hatfield? We had an example from Ms Rigg, and I think you've touched on it as well—this question about waiting overnight and the importance of that. If you've got a single irrational juror—I think the example Ms Rigg gave was somebody who because they've been charged with child sexual assault offences just refuses to engage with the evidence and

won't rationally consider anything in the trial—telling the jury to consider it overnight isn't going to change anything, is it? If you've got an irrational juror, you're stuck with them. All they're going to do is have to persist through that for eight hours, and that may result in the judge discharging the jury because of that situation. Is that fair to say?

BRETT HATFIELD: Yes. And then there's the controversy about whether the judge actually can or whether they're just forced to sit in the room together and see if—

The Hon. CAMERON MURPHY: One other thing. We're running short of time. Those other case examples you mentioned—would you be able to provide a summary of those to the Committee on notice?

BRETT HATFIELD: Yes. I can give the references now, if that would assist.

The Hon. CAMERON MURPHY: That would be great. My colleague has a couple of quick questions as well.

Ms SUE HIGGINSON: I've got a question for Assistant Commissioner Cook as well.

BRETT HATFIELD: The citations are *Villis v R* [2014] NSWCCA 74 and the other decision is *R v BC* [2018] NSWDC 124. That's the decision of Judge Haesler, which really highlights the predicament—the conundrum—his Honour was in in that case.

The Hon. STEPHEN LAWRENCE: Just a couple from me, Mr Hatfield. Are you able to tell us when is the first time, normally in the run of cases, that the jury is told that the possibility of majority verdict exists?

BRETT HATFIELD: When the eight hours expires, they're not told. They're told when section 55F (2) is triggered—so, usually, when there's indication of deadlock and that period has expired. Often they will still be given the standard Black direction at that time, even, for example, one week into deliberation. That might be the first time that they say, "We are having difficulty." They'd generally be given the standard Black direction at that time. After further deliberation, then they may be given the Black with majority after the trial judge goes through the steps in section 55F (2), including examining the juror on oath, making the assessment about the complexity of the case and the like.

The Hon. STEPHEN LAWRENCE: In terms of this issue of overnights, is it possible that a jury could come back within half an hour or 40 minutes and say, "We are deadlocked." Given that there is 4½ hours of court time in a day, and there is obviously varying practice about what periods juries deliberate for outside of the courtroom, is it possible you could have a jury that comes back in 40 minutes and says, "We're deadlocked," on a Monday and isn't told about majority verdict until the Wednesday?

BRETT HATFIELD: Yes. At the present time they would be told to persevere, to persevere. They wouldn't get that till—depending on how the time was calculated, but they might not be told till—if they were deliberating 4½ hours, 4½ hours, maybe last thing at the end of Tuesday they might be told.

The Hon. STEPHEN LAWRENCE: It is possible, would you agree, because there are so many moving parts in jury trials—there are simply a million things that can limit the time the jury has, in terms of bringing 12 people together?

BRETT HATFIELD: Yes. Frequently, appeal matters often involve some time pressure. Particularly on circuits, jurors are often told, "This trial will last five days."; it ends up taking eight. Then there are commitments, and the trial judge is trying to juggle a juror with a medical appointment and keep it all together. So these pressures can really—the time can become quite important.

The Hon. STEPHEN LAWRENCE: You're not talking about eight hours, literally, in terms of the passage of time, are you? You are often talking about a much greater period of time?

BRETT HATFIELD: Yes, eight hours deliberating.

The Hon. SUSAN CARTER: Mr Hatfield, what's more important: Time pressures that courts may face or the liberty of the accused?

BRETT HATFIELD: The most important thing is just outcomes in criminal trials—

The Hon. SUSAN CARTER: Yes.

BRETT HATFIELD: —and they can be related. The timing pressures can give rise to problematic situations, as Judge Hasler pointed out very clearly in that judgement.

The Hon. SUSAN CARTER: But are timing pressures a reason to risk a rushed verdict which doesn't properly take into account all of the evidence and perhaps risks improperly imprisoning the accused and loss of liberty?

BRETT HATFIELD: Time pressures can give rise to unjust verdicts within themselves.

The Hon. SUSAN CARTER: And four hours will reduce all those time pressures that we have just heard about?

BRETT HATFIELD: In a number of circumstances, it would alleviate the pressures that were on juries by way of those examples.

The Hon. SUSAN CARTER: But it's not the magic bullet?

BRETT HATFIELD: That's a matter for the Committee.

The Hon. STEPHEN LAWRENCE: It's often said that criminal trials are getting more complex and so forth, and I suspect you might agree that's true as a general proposition. Is it also the case that since 2006, for example, we are seeing a higher incidence of trials involving child sexual assault complainants where there is effectively a single substantive witness? So while it might be true that trials are getting more complex, there is also a contrary factor occurring as well.

BRETT HATFIELD: Yes, child sexual assault and adult sexual assault matters or indecent assault matters. Those trials are often much shorter. For example, you can have a trial with a complainant, perhaps two complaint witnesses; a police officer with photographs of the premises or scene; the forensic evidence may or may not be of significance; if consent is the issue, facts can be agreed. A sexual assault trial can be over in a day or two days, depending on what the issues are. So you can have the jury being required to deliberate for longer than they actually sat in court hearing evidence, under the current system. There is an increasing number of both of the types of matters that the member has indicated.

Ms SUE HIGGINSON: Assistant Commissioner Cook, could you just quickly state whether—in general, the culture in approaching jury trials, because police are witnesses and part of that process—there is any complaint amongst police around the current system and the way jury trials progress through the system, in terms of timeliness, efficiencies, effectiveness?

SCOTT COOK: I don't think so. I don't think I could properly address you on that other than to say the shorter the trial period, the shorter matters take to come to court, the better for everyone involved, whether it's the accused, whether it's the police, whether it's victims. From a police perspective, we would rather our police are out on the street doing their job than sitting around at trials, waiting. We would rather victims didn't have to go through multiple trials. Whatever is the most efficient way of dealing with criminal matters in the justice system, we would say that's something that we would want. However, I don't know that there's a sentiment beyond that, and I don't know that I could accurately reflect it properly to you. I apologise.

Ms SUE HIGGINSON: Based on what you're saying, there's no culture of complete complaint that the system's not working the way it should. There's a respect that the system is what it is, jury trials are jury trials and you start and you end where you end.

SCOTT COOK: Yes, we have no control over that. That's a matter for the legal profession, the judges and the justice system. There's a clear separation there. Ideally we wouldn't have any trials. But in a real world—

The Hon. WES FANG: I agree.

SCOTT COOK: In a real world—

The Hon. STEPHEN LAWRENCE: Is it common, Mr Cook, that the officer in charge stays at the court until the conclusion of the jury's deliberations? Is that your experience?

SCOTT COOK: That's standard practice, yes.

The CHAIR: The questioning has come to an end. Mr Hatfield, were you going to provide us with something?

BRETT HATFIELD: Yes, the summary of the two further cases. I think I gave the citation.

The Hon. SUSAN CARTER: And the earlier submission, I believe.

The Hon. WES FANG: The DPP 2021 submission.

BRETT HATFIELD: Yes. And the statistics, yes.

The CHAIR: I think that's it. Thank you very much.

(The witnesses withdrew.)

(Luncheon adjournment)

The Hon. Justice DEREK PRICE, AO, Chief Judge of the District Court of New South Wales, sworn and examined

The CHAIR: Would you like to make a short opening statement?

DEREK PRICE: I'll rely on my very short written submissions by the letter of 7 December 2023, but just add this: I wish to make it clear from the outset that my support for the reduction of the minimum time for jury deliberation has nothing to do with savings in judge time or cost savings. Any such savings would be minuscule. What the concern of District Court judges has been, and is, is for the wellbeing of jurors and the integrity of juries' verdicts.

The Hon. SUSAN CARTER: I wonder if, looking at your submission, we could talk first, very quickly, about a jury's permission to separate in criminal trials?

DEREK PRICE: Yes.

The Hon. SUSAN CARTER: I wonder, have you had an opportunity to read submissions from other witnesses?

DEREK PRICE: I must say I haven't.

The Hon. SUSAN CARTER: If I could just raise with you, Legal Aid had concerns about that amendment. In fact, I think their concerns were that the way the amendment was framed it could be read as a statutory right of jurors to separate unsupervised by a judicial officer. Do you have any comments or any thoughts about that?

DEREK PRICE: I think we've got to look at the way the current system works. Under the current system, at the end of each day the trial judge will bring in the jury whilst they're deliberating and will say that the jury's on verdict and will bring the jury in and disturb them rather than being able to send a note to the jury that they can separate. This breaks down the formality of that, and, of course, it's subject to an order any trial judge can make. What I would anticipate, it really encapsulates what's happening at the present time without the necessary formality. I as a trial judge over many years have found that you can really disturb the jury by requiring them to come in and to say, "You can now go home." That's the intention to do it, but it's subject to orders made by the trial judge.

The Hon. SUSAN CARTER: As I understand the concerns raised by Legal Aid, they didn't believe the drafting sufficiently expressed that it was subject to orders made by the trial judge.

DEREK PRICE: That could well be a valid criticism and that could be tidied up, but I'm behind the spirit of that particular piece of legislation.

The Hon. SUSAN CARTER: Turning now to the reduction in the eight-hour minimum time, one of the issues that we've seen is that the arguments for seem to be based largely on anecdotal evidence or almost the vibe. Is there any evidence which supports why we would get better outcomes with a four-hour time period and why it's four, why it's not six, why it's not 10?

DEREK PRICE: I can say in the first instance, it's my view—and I made the original submission to the inquiry which is being conducted—it should be left to the discretion of the trial judge. However, having read the paper, it seemed to me to be a compromise of four hours, and so I'm prepared to support the compromise. But my preferred position is the Victorian position, where you leave it to the discretion of the trial judge.

The Hon. SUSAN CARTER: Justice Price, what evidence is there that the current eight-hour minimum creates problems, and for whom are those problems created?

DEREK PRICE: Yes. It's my experience and the District Court judges' experience, on a few occasions—it doesn't happen very often—jurors, after a short period of time, can say that they can't reach a unanimous verdict. Maybe two hours. It does happen. I've had a judge ring me on one particular occasion to say, "What do I do with this jury? They've told me they can't reach a unanimous verdict. I've given them the Black direction, the forbearance direction. I've given them another one, and I can't leave them in the jury room for another six hours." You can tell from the actual notes themselves from juries how tied up they are. Of course, it is a very difficult job being in a room with 11 other people, and people do get very emotional about it. So what does a judge do for the next six hours? Because section 56, from recollection, is a two-step process. There is a particular case, which I don't know if you've been referred to, but it does encapsulate it. It's by one of my District Court judges. Have you been referred to *R v BC*?

The Hon. SUSAN CARTER: Yes, we had that discussed with us this morning.

DEREK PRICE: *R v BC* shows what the difficulty is in that particular case.

The Hon. SUSAN CARTER: I accept that there are examples where individual judges in individual cases have encountered difficulties. Is that occasional or systemic?

DEREK PRICE: No, it's occasional.

The Hon. SUSAN CARTER: Occasional could be 10 per cent, 25 per cent, 5 per cent or 2 per cent.

DEREK PRICE: I can't give you that figure. It doesn't happen often. But in those circumstances where it does happen there's a real question about what you do for the wellbeing of the jurors who you've got and also the integrity of verdict down the track. This amendment is not intended to embrace a systemic problem in the system. It relates to a small number of cases. That's always been my view, and that's been brought to my attention by District Court judges over periods of time, because as a trial judge you get notes from jurors telling you what their problems are. You may get a note saying, "We're absolutely deadlocked." I know one judge told me the other day he got a note that one of the jurors was curled up in the corner of the jury room. And I know another one who told me that a particular juror got stabbed by another with a pen.

The Hon. SUSAN CARTER: In these unusual, non-systemic circumstances, why is it preferable to have a four-hour window rather than discharge the jury?

DEREK PRICE: Because in those circumstances you're giving the ability to the jury to not be held there for—if they've been out for two hours, you can hold them for a little longer. And it's a minimum period, of course. To have a shorter period of time gives you that ability for the jury to consider—if they are, on oath, resolved that they can't reach a unanimous verdict, they can consider majority verdict.

The Hon. SUSAN CARTER: But if they are really deadlocked, what is the benefit of holding that jury at all? Why not discharge that jury?

DEREK PRICE: You can say that in respect of any jury that's deadlocked. That's why we have the majority verdict ability at currently under eight hours if that's considered a reasonable period of time. You don't know what the jury will do when they say that they can't reach a unanimous verdict until you give them a majority verdict direction. You don't know.

The Hon. SUSAN CARTER: If we don't know, how can we know that four hours is a safer time than eight hours?

DEREK PRICE: In the circumstances which I've indicated, where a jury are completely deadlocked and they're being required to remain—

The Hon. SUSAN CARTER: Which you've indicated as rare circumstances. In policy terms, is it a strong policy footing to be changing legal policy on rare, non-systemic occurrences?

DEREK PRICE: I think it overcomes a particular problem, which is real. It is there.

The Hon. SUSAN CARTER: Does it create other problems?

DEREK PRICE: I don't think so. I don't think it creates other problems.

Ms SUE HIGGINSON: Justice Price, can I just ask, with the notion that people can get very emotional, we now understand that the only possible way of knowing that is through a note that a judge may receive. Nobody else would be aware of that.

DEREK PRICE: That's right.

Ms SUE HIGGINSON: In terms of reforming a system, if that's our concern, is there not perhaps a better justice lens to approach reform that would be about jury wellbeing and effectiveness and the assistance juries can be provided rather than an arbitrary time? In these very rare circumstances that are non-systemic, as my colleague suggests, could a judge receive a note that there are problems in a jury room after one hour, after 20 minutes or after 30 minutes?

DEREK PRICE: Yes.

Ms SUE HIGGINSON: At that point, would we not, as lawmakers, be seeking to improve these circumstances through a different type of reform lens?

DEREK PRICE: That's why I don't prefer a time limit. It should be left to the discretion of the trial judge to determine what's appropriate, having regard to the circumstances that the judge is aware of and depending on the complexities in the case. The way we can assist the jury is to have communication with the trial judge and the trial judge bring them in and try and work through the particular problems. If you don't have a time limit at

all, then you're far better off because there's no magic in time. It really depends upon the circumstances of each particular trial.

That's why I prefer that it should be left to the wide discretion of the trial judge to determine when it's appropriate to go down to a majority verdict. That may occur after an hour of giving Black directions and all the rest of it. It may give a further forbearance direction and it comes back from the jury in very strong terms, "We can't agree", and then the judge—it might be after an hour or two hours—determines that it's appropriate to have a majority verdict and then take the majority verdict. If the jury can't agree on the majority verdict, the judge takes the foreperson's evidence on oath or if another jury can't reach a majority verdict, then the jury can be discharged.

Ms SUE HIGGINSON: Justice Price, as practitioners and as court administrators, have we moved too far away from the idea that a unanimous decision is the ultimate bastion of justice and a fair trial? With that, in terms of time, noting that in 2006 when we moved from that in New South Wales, the then Attorney General—

DEREK PRICE: Mr Debus.

Ms SUE HIGGINSON: Mr Debus talked about how fundamental that sleep test overnight was. What is your view around that?

DEREK PRICE: We haven't moved away from the fundamental requirement for a unanimous verdict. That's the first thing. Judges will not move to majority verdict until they are absolutely satisfied—and the evidence has to be taken on oath—that the jury cannot reach unanimous verdict. Majority verdict was brought in because of the possibility of one hold-out, as we know, and that could be either for guilty or not guilty; you don't know which way it's going to go. By looking at reducing the eight hours or leaving it as a matter of discretion, we are not moving away from the fundamental first step, which is a unanimous verdict.

Ms SUE HIGGINSON: What is your view, in your incredible experience, of having a more honest conversation with the jury about the possibility of majority verdicts? Is that a potential reform angle?

DEREK PRICE: The problem with that is that it's been thought to undermine the unanimous verdict and that we quickly move to majority verdict. That would, in my opinion, undermine the fundamental principle of the unanimous verdict. We can't move to that too quickly because that gives an out for a jury, possibly. So we need to keep the unanimous verdict absolutely sacrosanct.

Ms SUE HIGGINSON: Your evidence is, though, that the Victorian model or the discretion is better—no limits, the discretion?

DEREK PRICE: Yes, I'm very much in favour of judicial discretion because it's a trial judge who knows. When you're a trial judge and you've been with a jury for weeks or days or whatever, you get a real feel for the jury. A relationship develops between a trial judge and the members of the jury. The jury communicate with you. You understand—and you can tell from the demeanour of the jurors—what's happening, in many instances. Rather than having an artificial time limit of eight hours or four hours, it should be left to the trial judge's discretion and understanding.

Ms SUE HIGGINSON: Do you think there's scope for the maintenance of the original conceptualised and implemented safeguard of the eight hours and a discretion in certain circumstances?

DEREK PRICE: In some of the States of Australia, from my understanding, they limit the ability to go less than whatever their standard—six hours or eight hours—in crimes which involve life imprisonment. There is a real ability, I think, to deal with various offences in different ways. I don't think you can categorise it down to other than life imprisonment. I would not be so keen to involve a drop down to less than eight hours in offences involving life imprisonment. I don't think you'd ever get juries for murder, for example—or, as the District Court, we deal with major drug offences, importation offences and whatever else, which involve life imprisonment, and it would be very unusual to get a jury, after two hours or so, saying they're deadlocked. It's the lesser trials where you tend to get deadlock, on very rare occasions, at earlier times.

There is scope to look at what the other States have done and to limit it in respect of life imprisonment. But even then I would still prefer, whatever the trial is, to leave it to the discretion of the trial judge. There'd be no trial judge who would discharge a jury in a murder after two hours, for example, or a big importation or whatever else. I shouldn't refer to the importation cases—major drug cases. Importation cases are usually Commonwealth offences and we don't have majority verdicts for Commonwealth offences.

The Hon. SUSAN CARTER: I think you've very beautifully, if I can say, made the case for the fundamental importance of trial by jury and how important that is, and the necessity for unanimity to be seen as the standard that we are seeking. Could I have your views about the perception of justice, especially among communities who may have had an experience that was not happy with the justice system, who have come from

other cultures and other systems with a justice system which operates quite differently to ours. If we move away from the "sleep on it" rule—the eight-hour rule—do we risk a perception that justice is perhaps expedient rather than setting these important standards, or that it is too discretionary and not objective, and therefore we risk confidence in the justice system itself?

DEREK PRICE: I don't think so, if it's left to the discretion of the trial judge in particular, because the trial judge would give reasons and make it clear as to why the trial judge was dropping down, to use that terminology, to a majority verdict.

The Hon. SUSAN CARTER: With respect, I think you are saying that coming from a perspective of somebody who understands, knows, loves and respects the law.

DEREK PRICE: Sure.

The Hon. SUSAN CARTER: Unhappily, not everybody in our society has that same background.

DEREK PRICE: I understand that. But there's one way a court can speak, and that's through the judge. Judges try to explain to people what is happening. I don't think there'd be any less a perception where it's left to judicial discretion than requiring a jury to stay for, say, an additional three or four hours when they really want to go home. That's when you get the real possibility—and people in the courtroom could perceive this—that in order to get out of the place they've reached a verdict, whether it be guilty or not guilty.

The Hon. SUSAN CARTER: We had evidence this morning from the Aboriginal Legal Service that members of that community really appreciated having an understanding, when they were facing a court matter, that the jury would operate in this way and would deliberate for at least this amount of time. In other words, their matter would be taken really seriously and given some time to consider. What impact do you think it might have on communities like that if we moved to a completely discretionary model?

DEREK PRICE: I think if it was explained, what occurs, and the discretion was only exercised after the judge, first of all, had taken evidence from the jury that they couldn't reach a unanimous verdict, and it was then left to the judge and explained by the Aboriginal Legal Service to the particular client that it depended upon the circumstances of the case and what the messaging was from the jury—and the trial judge does say to counsel what is in the jury's note, except for the numbers. Sometimes we get from the jury what their voting patterns are, which you cannot disclose to the parties, but they would also hear what the jury is saying because a judge does read that out to counsel. So I don't think that there would be that perception, particularly when it's explained to them that judges take this particularly seriously.

The Hon. SUSAN CARTER: But is that moving the burden of respect for the justice system away from the system itself to the advocates having to explain it to their individual clients, which risks a more individualised view of justice that is ultimately harmful to the rule of law?

DEREK PRICE: No, I don't think so, because so many matters are discretionary in our justice system. It's always been the responsibility of the lawyers representing parties to explain to them what the law involves.

The Hon. CAMERON MURPHY: Judge, I've just got a couple of questions following on from what was raised earlier. Is it fair to say that it's your view that the most important thing is the requirement for reasonable deliberation, rather than a time period?

DEREK PRICE: Yes.

The Hon. CAMERON MURPHY: In that sense, your preferred view would be to go to that Victorian model where you have no time period but it's left to the discretion of the judge. Is that right?

DEREK PRICE: Yes, it certainly is. It's my view. The judge can determine, because the judge knows what the issues in the trial have been and the complexity of them, whether or not the period of time the jury has been deliberating is a reasonable, appropriate period of time.

The Hon. CAMERON MURPHY: Is the court's support for the four-hour time period a reflection of a majority of judges, or is that your personal view?

DEREK PRICE: No, it's my—I'll make clear what my support for the four hours is. It seemed to me that—I'll take a step back. My personal view is it should be left to judicial discretion, and that was my submission, from recollection, to the review. However, having read the review, it seemed to be a compromise of four hours and so I was prepared to go along with the compromise.

The Hon. CAMERON MURPHY: But it's not your first position.

DEREK PRICE: No, I prefer to have it as a matter of judicial discretion.

The Hon. CAMERON MURPHY: Judge, on another matter, is it right to say that requiring juries to deliberate for the full eight hours and going through the exercise of the Black and other directions could result in juries being discharged that would otherwise have arrived at a majority verdict? Is it fair to say that?

DEREK PRICE: I don't just understand the question—my apologies—Mr Murphy.

The Hon. CAMERON MURPHY: A judge may have discharged the jury because they've reached an intractable dispute early on. They're sent out for further deliberation and they're miles apart. An example that was used earlier today was if you have a single rogue juror who's not prepared to engage with the evidence at all and has a fixed position. I understand the legislative problem around this, but are there circumstances where judges may have then discharged the jury, whereas they may have arrived at a majority verdict, if that was available, within the four hours?

DEREK PRICE: That certainly could arise because the jury, rather than being required to say they've deadlocked after three hours, rather than being required to sit around for another five hours and they're not told anything more about the situation other than, "Please continue to deliberate and think it through in order to reach a unanimous verdict," then have that problem of having to wait all those additional hours. Whereas, if they'd been brought in at an earlier period of time when it's become very clear to the trial judge that they're deadlocked, it may well be that a majority verdict can be reached. But one of the problems that we have that concerns the court is that where jurors have been given forbearance directions and they continue to be sent out—keep thinking about it, keep talking about it—that it may then impact upon the integrity of the verdict because people are sick of it and they want to get the hell out of it.

The Hon. CAMERON MURPHY: So you could have a miscarriage where—

DEREK PRICE: And that case of BC was one where Judge Haesler took the view that the jury had been deliberating for five hours and they'd sent in a note saying, "We can't do anything more. We've had it." He took the view—and whether that's the correct view or not is debatable—that he had to discharge the jury before eight hours in the interests of justice because whatever verdict—

The Hon. CAMERON MURPHY: So, in your experience, sending a jury out again and again and again to reconsider while you're waiting for that eight-hour period to elapse is something that could put undue pressure on the jury and you could result in that miscarriage.

DEREK PRICE: Just put yourself in that position. You're in a jury room and you've been with your fellow 11 jurors for the last four hours and you've told the judge twice already that you can't reach a verdict, and the judge asks you for a third time to go out and think about it—how you'd feel about it all. And if you had to hang around for another four hours you wouldn't be terribly happy.

The Hon. SUSAN CARTER: If that jury was discharged, so it ends in a hung jury, if the current rate of hung juries in the District Court is 1.9 per cent, what impact do you think that would have on the rate of hung juries in the District Court?

DEREK PRICE: I don't think it'd have much impact at all.

The Hon. SUSAN CARTER: Right. So another alternative would be for that jury to be able to be discharged if there was concern about integrity of the verdict.

DEREK PRICE: Well, that means the question of when it's appropriate to discharge a jury under the current law is debatable, because the Court of Criminal Appeal in Villis, which has probably been brought up to you on a number of occasions, has said it's a two-step process and you can't consider the majority verdict until at least eight hours. But one or two District Court judges has said, "I'm not going to keep the jury here for eight hours. They're absolutely deadlocked, so I'll discharge them in the interests of justice." Whether or not that's a—it hasn't been challenged in the Court of Criminal Appeal yet, so that needs to be tidied up.

The Hon. SUSAN CARTER: But we could look to reform that area and it would functionally address the problem that you are flagging.

DEREK PRICE: I would hope so, depending upon how the legislation is drafted.

The Hon. SUSAN CARTER: Right. Thank you.

The Hon. CAMERON MURPHY: Judge, if we did that, there still would be consequences for the other people: complainants in sexual assault trials—

DEREK PRICE: Yes.

The Hon. CAMERON MURPHY: —and other people that may still have—you know, the accused as well, who would have the prospect of a further trial hanging over their head for the intervening period.

DEREK PRICE: That's right. That's the difficulty, of course, with the discharge of juries. It may mean that somebody doesn't get a retrial for another nine months or 10 months. Depending upon the nature of the trial, that would cause problems for complainants, particularly if they have to give evidence again. In sexual assault trials evidence is recorded, so they usually don't have to come back, but they still do not know what the outcome is and that's a real pressure on them.

The Hon. STEPHEN LAWRENCE: Judge, is there a particular type of offences or types of trials that this issue is coming up in, or is it coming across a range of cases?

DEREK PRICE: I just want to again reiterate that it is not a common problem.

The Hon. STEPHEN LAWRENCE: Yes. I understand that.

DEREK PRICE: I want to make that very clear. The answer to that is no. There's no particular category of trial that this is raising its head in.

The Hon. STEPHEN LAWRENCE: There was some evidence earlier from Ms Rigg about a type of case—maybe involving either a child or an adult complainant in a sexual offence matter—where there's limited evidence apart from the complainant's account, that such a trial is generally a quick trial and such a trial might lend itself to jury division because it turns inherently on an assessment of credibility. Is this issue of an early indication of intractable disagreement from juries more of an issue in those sorts of cases, in your estimation?

DEREK PRICE: Unfortunately, I cannot agree that those sexual assault trials are usually quick trials. In this day and age they have become quite lengthy, for all sorts of different reasons: lots of legal argument, questions about tendency evidence—a whole lot of things. So the answer to your question I think is sexual assault trials, even though one complainant, oath on oath, would not be the particular type of trial that this would pop up in quickly. You've just got to look at some of the more notorious trials involving rugby league players and all the rest of it. You see how complicated that sort of trial becomes.

The Hon. STEPHEN LAWRENCE: There's been a tendency in some of the deliberations here maybe to assume that if a jury comes back after two hours and says that they're divided, the jury would then have to wait another six hours of real time until the majority verdict can be given.

DEREK PRICE: Yes.

The Hon. STEPHEN LAWRENCE: Can you give us a sense of what six hours might mean in real time, because there's only normally 4½ hours of court time a day?

DEREK PRICE: Yes.

The Hon. STEPHEN LAWRENCE: Can you give us a sense of what five, six hours of deliberation time might actually mean?

DEREK PRICE: Let's assume the jury has gone out at 11 o'clock in the morning after the judge has finished his summing-up and they come back to you at one o'clock. They would be sent out, be told to have their lunch and that lunch time is not counted as deliberating time. Say they started again at two, they would then go through to four o'clock and be told to come back the next day, and then the clock starts ticking again.

The Hon. STEPHEN LAWRENCE: A jury, in those circumstances, is not allowed to be told of the possibility of a majority verdict resolution, are they?

DEREK PRICE: That's right. That's the current state of the law, so far as the Court of Criminal Appeal of this State is concerned.

The Hon. STEPHEN LAWRENCE: Are the juries told prior to empanelment, after empanelment—at any particular time—that there is ultimately a way of dealing with disagreement or are they simply left hanging and not knowing and thinking, "Perhaps we've got to stay here until we get old"?

DEREK PRICE: In the judge's opening address to the jury at the commencement of trial, there is a vague reference to it but no clarification in respect to that. The reason behind that, of course, is not to undermine the unanimous verdicts. We do our best not to undermine the integrity of the jury reaching a unanimous verdict.

The Hon. STEPHEN LAWRENCE: Is your concern a risk to the administration of justice, a risk that could be posed by a jury, for example, who's indicated intractable disagreement after an hour or so simply sitting there not for six or seven hours more but, in fact, maybe 24 hours or more, not knowing that there's actually a way to resolve this, even though they've already told the judge that they're intractably divided?

DEREK PRICE: It's not only the risk to the administration of justice, it's respect for your jurors. You're putting them under very great pressure. When they've told you, "We just can't reach agreement," and they get told to go back and keep thinking about it, it puts a real burden on them. I think it's very unfair to the citizens in our community, who have been good enough to be jurors in a particular trial, that despite the fact of telling the judge, "We can't agree," the judge keeps saying, "Go back. Think about it again." It is unfair to them.

The Hon. STEPHEN LAWRENCE: Do you think that, as a burden on jurors, it might be reasonable to assume that it's even more of a burden in cases of a type where the subject matter is distressing?

DEREK PRICE: Undoubtedly that would be the case because trials vary in their nature. Child sexual assault, the issues involved in child sexual assault—which is a very common trial these days, unfortunately, in the District Court of New South Wales. The difficulties with having to deal with those sorts of issues would be far harder for members of the jury than, for example, a break and enter or a robbery which didn't involve any particular violence. So there are certain trials where the burden on juries, as members of the public, is very great.

The Hon. STEPHEN LAWRENCE: It has been suggested earlier in this hearing that a way of dealing with this as a policy response would be to create a power to discharge the jury as soon as they indicate well prior to the eight-hour period being reached that they're intractably divided. Can you see any sound policy reason why a jury who's intractably divided at an earlier point of time should be discharged, as opposed to a jury who's divided later in time and ultimately receives a majority verdict direction?

DEREK PRICE: That's why I'm keen on judicial discretion, because the trial judge can make that determination, and where the judge finds they're intractably tied up at a particular time, the judge can then discharge them. That will vary upon the complexity of the case and whatever else. That's why I'm not keen on time limits. Time limits are artificial. There's really no magic in eight hours; there's no magic in four hours or six hours, as can be seen from the various different opinions through the States of Australia.

Ms SUE HIGGINSON: Judge, do you, however, see that the intention of the eight hours was not about time in and of itself? It was a safeguard. It was actually using time as a mechanism to produce and provide that safeguard. Your suggestion is that judicial discretion can take that role and be that safeguard.

DEREK PRICE: Very, very much so. And I do appreciate when the eight hours originally came in in 2006, from recollection, that it was there as a safeguard. There was a degree of controversy back in that time as to whether or not the majority verdict should come in, and so eight hours was regarded as the safeguard. But I think our experience now—we're almost 18 years or so into experience with majority verdicts that I think we could be confident, like they are in Victoria, to leave it to trial judges' discretion.

Ms SUE HIGGINSON: I know that legislative agendas have a kind of life of their own, but in terms of the way this reform has been proposed, perhaps it's fair to say that, whilst we make submissions with our best view of what reform would look like, perhaps this has not been the best opportunity to be presenting reform in the way that—or perhaps we could have presented it in a better way to really flesh out what the issue is, rather than just presenting it through this "Let's just reduce the time frame and it'll be more efficient"?

DEREK PRICE: That's why the statutory review was undertaken by the Attorney General's department, the department of justice. They consulted widely and submissions were made, and that was the opinion of the authors of that report—that four hours would be a reasonable compromise.

The Hon. SUSAN CARTER: It's interesting, with respect to that report, because there appears to have been 10 stakeholders—three of whom expressed the view that the eight-hour time period should remain; four of whom expressed the view, if you do the maths on the other stakeholders, for the four-hour period. When you've got three saying eight and three saying four, do you have any understanding of why the authors would have gone for the three stakeholders saying four as opposed to the three stakeholders saying eight?

DEREK PRICE: I think it shows that there's no magic in eight and four and whatever; it's all guesstimates. I think those that supported four could see the difficulties which occur infrequently with the eight hours. That's why I'd like to get rid of those magic numbers and leave it to judicial discretion.

The Hon. STEPHEN LAWRENCE: Judge, how common is juror distress as a manifest thing that judges observe?

DEREK PRICE: I don't think we have got any. I don't have any statistical analysis on that because it is not reported on by trial judges. We are great believers in the privacy and sanctity of the jury's deliberation. But it varies from trial to trial. It's not infrequent that juries have difficulty deciding. Juries are often confronted these days with a very difficult task: not just one verdict but multiple counts. Particularly with the sexual assault trials, these days there are multiple counts on the indictments. They have to go through a very lengthy process of

considering each count because each count is a trial within a trial, so they have to work through all that. That creates stress. It is a difficult task being a juror.

The Hon. STEPHEN LAWRENCE: Are you able to give us a sense of what the relevant considerations are for a judge when the statutory time threshold is reached—so currently eight hours—and the judge has that discretion, effectively, as to whether a majority verdict direction is given? What are the relevant considerations that will determine that?

DEREK PRICE: The first consideration is the nature of the offence and also the complexity of the evidence. If you've been in a trial for three months, for example, heaps of witnesses being called, and the jury comes back after two hours and said, "We can't reach agreement," you'd say, "Hang on, this trial has gone on for three months. Go back out there and work hard." It would also be the number of counts on the indictment, how many counts there are, what the real issues in dispute are. That's what the trial judge does with his summing up—points out the issues in dispute. There may be multiple issues in dispute or there may be only one. So it just depends on all the—what we say are all the circumstances. That means the complexity of the proceedings, the nature of the charge, the length of the trial, the various different arguments.

The Hon. STEPHEN LAWRENCE: There's been a spectre raised in the hearing of, if the statutory threshold is reduced to four, that will have circumstances where a jury's deliberations will commence, then be interrupted by a majority verdict direction and a guilty verdict or a not guilty verdict be reached; all on the same day, effectively.

DEREK PRICE: No.

The Hon. STEPHEN LAWRENCE: So there is this spectre of a rushed process.

DEREK PRICE: No.

The Hon. STEPHEN LAWRENCE: I'm curious about your response, whether that's a realistic spectre.

DEREK PRICE: No. I totally disagree with that. The fact that you've got eight hours or four hours doesn't mean that at the expiration of the eight hours, for example, the judge says, "Right, time's just hit eight hours so I'll call you all in." No, you let the jury deliberate as long as they wish to deliberate. It's only when you get a note from them saying, "We can't reach a verdict," if that be the case, that you then will bring them back in and ask them what the problem is and then probably give them the Black direction. That could occur within six hours. It could occur after two or three days. It just depends on all the issues in the case. But the eight hours is not a stopwatch whereby you suddenly say, "Great, I'll call them in for a majority verdict." And it's the same with four hours. It will have no impact upon jury deliberation from that point of view.

The Hon. STEPHEN LAWRENCE: It's the case, isn't it, in Australia that in indictable matters people have a right to be legally represented, generally speaking, apart from a choice that might be made?

DEREK PRICE: We do absolutely our best to ensure that in serious crimes the accused is legally represented.

The Hon. STEPHEN LAWRENCE: That lawyer who represents each party obviously has the opportunity to be heard on directions at each critical procedural point of the trial.

DEREK PRICE: Absolutely, yes. Before a trial judge sums up, you usually go through with both counsel what the directions should be and if they have any submissions to make as to what direction should be given to the jury. In addition to that, the trial judge also recounts to the jury the various cases that the parties made in their closing addresses.

The Hon. STEPHEN LAWRENCE: So, in your view, this is a measure to deal with a problem that presents in a very small number of cases—

DEREK PRICE: Yes.

The Hon. STEPHEN LAWRENCE: —in a context where there's a discretionary application of the rules such as would avoid any injustice being wreaked in other cases?

DEREK PRICE: Yes.

The Hon. WES FANG: That was very insightful, thank you.

Ms SUE HIGGINSON: Yes, thank you very much.

The Hon. STEPHEN LAWRENCE: Thanks, Judge.

The CHAIR: Thank you very much, Justice Price.

DEREK PRICE: Can I stick my neck out and say something more?

Ms SUE HIGGINSON: Yes, please do.

DEREK PRICE: There is a provision, I think, which relates to Sheriff's investigations. I see the sheriffs behind me. I support the particular amendment, and the Sheriff is the most appropriate body to deal with matters relating to juries. I understand on occasions it has been suggested the police should be involved. I don't think the police are appropriate bodies to investigate these matters in the first instance. The request comes from the District Court or the Supreme Court for investigation. The problem with police being involved is that very often the matter before the court is the police are involved—it's a police offence. The courts deal very closely with the Sheriff of New South Wales.

I've been in charge of the District Court now for about 10 years and a trial judge of 20-odd years. I have the greatest respect for the Sheriff of New South Wales and the quality of the Sheriff. I've sat on the Court of Criminal Appeal when we have reviewed the report of the Sheriff in respect of various issues relating to juries and considered the report of the Sheriff from time to time. The reports have been of high quality, and the extension of the power of the Sheriff to investigate matters outside the verdict I think is important before a verdict is delivered because there can be all sorts of interference with juries in this day and age, particularly with the spread of that dreadful word "artificial intelligence" and the rest of it. So that's my two bob's worth.

The CHAIR: Thanks for that added bit of information, Justice Price. Thank you very much for coming today. We'll finish your evidence right there.

(The witness withdrew.)

Ms TRACEY HALL, PSM, Sheriff of NSW, NSW Sheriff's Office, sworn and examined

Mr DANIEL GORDON, Deputy Sheriff, Director Operational Capability and Performance, NSW Sheriff's Office, sworn and examined

Mr MARK FOLLETT, Executive Director, Policy Reform and Legislation, NSW Department of Communities and Justice, affirmed and examined

The CHAIR: Thanks very much for coming to give evidence today. Ms Hall or Mr Follett, would you like to make a short opening statement?

MARK FOLLETT: No.

TRACEY HALL: No.

The Hon. WES FANG: I draw your attention to the statutory review that was released in May. Mr Follett, would you be aware of the submissions that were taken in relation to the changes? Can you talk me through the number of submissions that you understand were given?

MARK FOLLETT: Yes, certainly. I don't have the precise number in front of me, but I can get that before the end.

The Hon. WES FANG: I believe it is 10. Would that accord with your understanding?

MARK FOLLETT: We have 14 stakeholders.

The Hon. WES FANG: Did 14 stakeholders make submissions to the review?

MARK FOLLETT: That's right.

The Hon. WES FANG: On page 4 of the review it speaks about 10. If you look at the list of submissions from stakeholders, there are 10 listed.

MARK FOLLETT: Yes. There were some individual judicial officers that also provided submissions.

The Hon. SUSAN CARTER: Curiously, it lists a barrister. Why aren't the individual judicial officers also indicated?

MARK FOLLETT: I'm not sure. It talks about here the submissions to the review from the Supreme Court of New South Wales—perhaps that's an all-encompassing term—and the District Court, I believe, as well.

The Hon. SUSAN CARTER: So it was from the Supreme Court, not from individual justices?

MARK FOLLETT: Sorry, there was a submission from both the District Court and the Supreme Court and we got some submissions from individual judicial officers.

The Hon. SUSAN CARTER: But they're not indicated in the report, yet an individual barrister is. What was your thinking there?

MARK FOLLETT: I can't recall what the thinking was. I thought perhaps we had covered the field, remembering that we don't go into the particular submissions because a lot of this is Cabinet in confidence in the sense that—

The Hon. SUSAN CARTER: No, but you do go through the number of stakeholders who support particular views and their assertions made about several, which on the maths of these stakeholders indicated on page 4 don't actually indicate majority support for the recommendation that the review achieved.

MARK FOLLETT: It's not a scientific process, if I may start there.

The Hon. SUSAN CARTER: Is it an evidence-based process?

MARK FOLLETT: Absolutely. In the sense of—

The Hon. SUSAN CARTER: What's the evidence supporting the four-hour rule?

MARK FOLLETT: The evidence supporting the four-hour rule?

The Hon. SUSAN CARTER: Yes.

MARK FOLLETT: Sorry, if I may, it is a process that—

The Hon. SUSAN CARTER: Sorry, it's a simple question. What evidence do you have to support the recommendation that we should move to a four—

MARK FOLLETT: The evidence provided by stakeholders that we've consulted with, on balance. As you would know and as the statutory review—

The Hon. SUSAN CARTER: So we're expected—

MARK FOLLETT: If you would let me finish—

The Hon. SUSAN CARTER: —to legislate on the basis of you telling—

The Hon. STEPHEN LAWRENCE: Point of order: This is the third time that he has been interrupted. He's actually trying to answer the first point, which is what is the evidence. He has been interrupted three times. He should be treated with courtesy.

The Hon. SUSAN CARTER: I acknowledge he should be treated with courtesy. I apologise for any lack of courtesy. But the question is what is the evidence not "stakeholders told us and we can't tell you what they told us" because that's not evidence that we can use to make sensible parliamentary decisions about what is appropriate legislation. "It's in a magic box. Please trust us."

MARK FOLLETT: If I may answer it this way, we don't have scientific evidence because, as you will appreciate, the deliberations of jurors are sacrosanct. So we can't actually—

The Hon. SUSAN CARTER: What evidence do you have that you can tell us so that we can make—

MARK FOLLETT: We have stakeholder submissions and support, and you've heard quite a lot of it today in terms of the judicial safeguards. This is about—

The Hon. SUSAN CARTER: Excuse me, with respect to safeguards, what we're aware of is the speech by Debus in 2006. He indicated that the eight-hour rule was a fundamental safeguard for moving away from unanimous verdicts. Now we have a magic box of, "There are some stakeholders. They told us some good stuff. We can't actually tell you, but they told us stuff and we are going to change the safeguard." As somebody who is interested in the justice system, why should I be believing what's in this magic box if you can't tell us what the basis of the decision-making is?

MARK FOLLETT: I can tell you what the basis of the decision-making is.

The Hon. SUSAN CARTER: Thank you. I look forward to hearing it.

MARK FOLLETT: A lot of the submissions you've heard today and a lot of the submissions from the evidence and from His Honour previously who just appeared here. I think you've heard from the public defenders. I think you've heard—

The Hon. SUSAN CARTER: From the Bar Association and the Law Society.

MARK FOLLETT: —the contrary views from the Bar Association.

The Hon. SUSAN CARTER: And we have a submission from Civil Liberties and we heard from the Aboriginal Legal Service, none of whom support the change.

MARK FOLLETT: I don't think any of the report suggests that it was unanimous support for the change. It is a balance. What the report seeks to do, to your question about evidence, is balance the stakeholder views and the evidence that they are bringing to what is best for the justice system, which is both efficiency, juror wellbeing and—

The Hon. SUSAN CARTER: Can you speak to efficiency? What sort of efficiency are you hoping to achieve?

MARK FOLLETT: It's better for the process if a—

The Hon. SUSAN CARTER: In what way?

MARK FOLLETT: If a jury is completely deadlocked, this will allow, in reasonable and appropriate circumstances, a judicial officer to make a determination that there is no prospect.

The Hon. SUSAN CARTER: How are those reasonable and appropriate circumstances defined in the draft legislation with which we've been presented?

MARK FOLLETT: It makes no change to those circumstances.

The Hon. SUSAN CARTER: It changes the time period.

MARK FOLLETT: It simply changes the minimum floor. It does not change any of a judge's obligation to determine reasonableness and appropriateness—I think there are different terms in the legislation. But it makes no change to that. Judicial discretion, I think as you heard His Honour talk about, is critical to this process. The bill doesn't seek to depart from that in any way, shape or form. It simply lowers the floor with which that judicial discretion is able to commence.

The Hon. SUSAN CARTER: It lowers the floor, and in so doing lowers the safeguard that was instituted in 2006?

MARK FOLLETT: Stakeholders have submitted that, yes.

The Hon. WES FANG: I draw you to the stakeholders' submissions. If you do an analysis of what the stakeholders submitted to the review, you'll see that in fact there was a number of submissions around it being the judge's discretion, there was a number of submissions around it being kept at eight hours and there were other submissions around it being six hours. Then you say there's a number that have recommended four. On our reckoning, if there were the 10 that were listed on page 4 as the sum total of the submissions, and if you've got three for discretion, three for eight hours, one for six hours, that would leave three people or three submissions that supported the four-hour change.

In relation to numbers, you've got an equal number of people supporting discretion. You've got an equal number supporting the retention of eight hours. We certainly heard evidence just previously—I'm sure you would have heard the judge indicate that whilst he supports the four-hour position, ultimately he believes that it's actually a position around discretion. Is it not the case, then, that perhaps the four-hour position that is being supported by some stakeholders who have appeared today ultimately would be—it would be better indicated that there's support more for discretion, and that this bill that's been brought to the House by the Attorney General is, in effect, a lesser and lower standard than what submissions to the review really asked for?

MARK FOLLETT: Perhaps if what you are suggesting is, "Is four hours a compromise position?", I think the answer to that is yes.

The Hon. WES FANG: Do we compromise when we're talking about people's liberty? Are we really going to put forward a compromise position when we're talking about somebody having been deprived of their liberty and a fundamental aspect of the way that we handle jury cases in this country and in this State?

MARK FOLLETT: I would reject the assertion that we're compromising in relation to people's liberty—

The Hon. WES FANG: It was your word, not mine.

MARK FOLLETT: Yes, and I'm talking about the compromise between the stakeholder submissions, clearly. As you say, a number of stakeholders argued for no floor and pure judicial discretion, as is the case in Victoria. You will see when you look across the jurisdictions that there are a number of different minimum—Queensland and New South Wales have the highest, at eight hours currently. The suggestion in the bill is to put that at four. It is a compromise not to go to complete judicial discretion—to maintain a floor.

The Hon. WES FANG: In seeking to examine this bill the Committee today has, and certainly my colleague and I have, sought to better understand what evidence there is to support a number of four hours. Certainly, different people have provided different parts of evidence to us to indicate that four is half-baked, four is a compromise, four is a lower number. But ultimately, when we're making a change to a safeguard such as a legal position that was in itself a change in 2006, I think it's incumbent upon this Committee to be able to point to some evidence to say that a change to four hours is supported by this data, this evidence and these cases.

So far there has been any number of—I'll use the word that was used by the Deputy Director of Public Prosecutions, I think it was, that there was anecdotal evidence, which I didn't pull him up on at the time. But when you're citing anecdotal evidence from the DPP offices—given that I don't think anecdotal evidence would fly in the court, I'm not sure why we have got to accept anecdotal evidence here. I'm yet to see anything that actually points to a scientific evidentiary base that says four hours is going to fix this problem. In 2006 the then Attorney General cited that the overnight safeguard, which is why the eight hours was chosen, was required to provide a safeguard for the people of New South Wales when we're talking about withdrawing liberty. Can you point to evidence that states that four hours is the number—the arbitrary number—that we need to move to when we're talking about removing someone's liberty?

MARK FOLLETT: Characterising this change as solely focused in relation to a person's liberty—obviously that is hugely important and sacrosanct, and really critical as part of the process. One of the motivations behind this bill is about, also, juror wellbeing and the complainant's experience as well. They are factors that go into the consideration. To answer your question directly around scientific and data-driven evidence that four is

the appropriate number, I can't give you that and I don't think any jurisdiction in Australia can give you that. There are a few reasons behind that. It's difficult to get—to dive into the deliberations of a jury and understand at what moment they came to their verdict, or that they came to a majority verdict, because those deliberations are sacrosanct.

Also, I'm not a data scientist, but I would imagine extrapolating hung juries from these types of changes and, for example, majority verdicts is a stretch for data scientists, and we've looked at that. One of the things I think our processes, in terms of policy development, really rely on is data-driven evidence. There's a lack of that, which doesn't necessarily mean—I don't think you can conclude from that that there is a lack of justification for making any policy improvements to the way that the criminal justice system operates. It is just not a rich vein of data from which we can determine. So we really do rely strongly on stakeholder inputs, stakeholder experience—the experts that know the system and look at the world in a number of ways in terms of the efficiency, effectiveness, of the justice system; juror wellbeing; the complainant perspective; as well as, fundamentally, a person's right to a fair trial.

Ms SUE HIGGINSON: Mr Follett, on those things, it seems from the evidence we've heard today that nothing in this reform will drive any better cost outcomes. We are talking about the smallest of smallest amounts of cases. We are talking about important ones but small cases. We're talking about hung juries not necessarily being a reflection of a failure of process or not something we should be striving to avoid at all costs, but absolutely minimise and avoid. Have we considered a different approach to reform? Because the things that seem most important to be looking at are jury wellbeing, victim support and maintaining the sacrosanct principle of unanimous verdicts and getting it right and avoiding wrongful conviction. Given those things, why are we not looking at reforming and helping juries? Why are we not coming from a genuine justice perspective—"How do we do this better?", rather than this on-balance, compromised "It's all about time and let's just do a quick slap to bring down the time"?

MARK FOLLETT: I might just say some of the other aspects of the bill seek to do that—to have a better experience for the jury process. So that's one answer, but I also might ask the Sheriff to comment on juror wellbeing. Because a lot of the Committee's deliberations are focused on, understandably, the eight-hour rule or the proposed change to four hours, but there are a number of non-statutory efforts that are made in terms of juror wellbeing. If the Committee is okay, I might ask the Sheriff.

TRACEY HALL: If I can just provide the Committee with a little bit of information in relation to our jurors and our welfare program for them, during the trial—a jury trial—the welfare of the jurors is monitored by the court officer. Obviously, they can't get involved in anything, but they do monitor the vibe in the room and, if there is an issue, then that issue is referred to the trial judge via a note from the juror directly to the court officer, who doesn't look at it but hands it directly to the judge. So if there is an issue, that is taken straight to the judge. In 2023, there were two reported cases where the jurors could not continue due to their wellbeing. They were referred to the trial judge and in those two cases, all jurors were discharged and the trials were relisted. That was the decision of the trial judge.

In matters where there's very graphic and disturbing evidence, arrangements can be made for counselling to be provided, if required, during the trial, if that's approved by the trial judge and the parties, and there have been occasions when that has been provided. At the conclusion of all trials, whether they're involving graphic details or disturbing evidence or not, we have a support program that offers counselling services to juries from our nominated service provider. Upon discharge of all jurors, they are provided with information on and access to the Juror Support Program, which provides a free counselling service. I can let you know that of those two trials where the jurors were discharged, that was two trials out of 755 last year. That includes all trials in the District Court and the Supreme Court—jury trials—and in 2023, there were 76 referrals out of 9,174 empanelled jurors of people who accessed our jury support system. That equates to 0.8 per cent of all empanelled jurors who sought support from the counselling services.

Ms SUE HIGGINSON: Thank you. They are incredibly helpful statistics. Clearly there's a system of providing those supports for wellbeing. I think one of the things I was perhaps trying to get to is this: Has the department considered more the procedures around juries, about them understanding reforms to what is currently in place around the directions, the timing of directions, and the safeguards or the implementations of the discretion in those certain circumstances? Because clearly the sheriffs are working and the court officers are working very hard to ensure jurors are getting the care they need. But are they working within a system that actually could be more improved in providing that support, and have we looked at that?

MARK FOLLETT: So this statutory review was in relation to the majority verdict so it looks through the statutory provisions, so it is quite limited in terms of that. In the broader question around jury directions and, I suppose, the support in relation to that, I note the Bar Association talked about that in their submission. There's

not a lot of statutory jury directions in our system. I know Victoria has a slightly different system where I think it's the Jury Directions Act in Victoria where they've codified or given statutory effect to a number of their jurors directions. A lot of those decisions are for the judicial officers and the judicial commission in considering those types of directions. There is, I suppose, a limited capacity for the department to really dive into those issues and it wasn't part of the focus of the statutory review. I might just say, though, in addition, some of the other amendments that are in this bill arise from an indictable process review, which His Honour Judge Price and the department worked closely on, which did consider the indictable process. So there are certainly avenues for which those types of measures can be considered. It's not an active consideration that the department is doing at the moment.

The Hon. SUSAN CARTER: Mr Follett, thank you for those comments about the indictable process review. Looking at the legislation, can you give us your comments in relation to the provisions in relation to jury separation? I wonder whether you've had the opportunity to read the submissions from the Legal Aid commission in respect of that change?

MARK FOLLETT: Sorry, I read a number of the submissions last night, so I might misplace the Legal Aid one.

The Hon. SUSAN CARTER: They raise concerns that the new legislation didn't sufficiently seem to recognise any need for judicial direction, so you might find juries separating of their own volition, which could have unfortunate consequences.

MARK FOLLETT: Yes, I take that point. The policy basis for that recommendation is really modernising those provisions in line with most other jurisdictions. It's flipping it, really, in the sense that rather than requiring a sort of machinery direction from the judicial officer around separation, again, it will allow that as the norm and judicial discretion can kick in where that is inappropriate. We would see that more as a machinery amendment that's bringing up to current—

The Hon. SUSAN CARTER: I understand that's the way you see it. They did in their submission, though, raise a very interesting argument, that if it is seen to create a statutory right of jurors to separate, you could have, for example, one juror deciding to separate, which would make further deliberation very difficult. Do you consider that that may have unintended consequences?

MARK FOLLETT: I would hope that that is a situation that the judicial officer could control and make a direction contrary to that.

The Hon. SUSAN CARTER: I believe their issue related to the fact that they didn't think the Act as presently drafted made sufficient reference to judicial oversight.

MARK FOLLETT: Okay. I would disagree.

The Hon. WES FANG: Daley should have fixed that already, but anyway.

MARK FOLLETT: I think it does provide for that.

The Hon. SUSAN CARTER: Are you aware of the comments made by the Aboriginal Legal Service in relation to whether or not, in attempting to modernise the jury process—which I endorse—sufficient consideration has been given to disadvantaged groups in our society in the drafting of this legislation?

MARK FOLLETT: Yes, I read those comments. I guess I would say that consideration is always given, particularly to the most vulnerable people in our community, in relation to any sort of policy recommendations that we might make. I don't have a specific response to the ALS's contention about that in relation to these provisions, as to whether they would detrimentally impact Aboriginal and Torres Strait Islander people more or not. It's not apparent, as we went through the process to stakeholders and to us, that it would.

The Hon. SUSAN CARTER: Well, it was very apparent to the Aboriginal Legal Service.

Ms SUE HIGGINSON: That's their evidence.

The Hon. SUSAN CARTER: And the issues raised for those communities would exist in other communities as well.

MARK FOLLETT: May I ask, was it in particular in relation to the email notification for jurors?

The Hon. SUSAN CARTER: Yes.

MARK FOLLETT: I might just clarify, that's an opt in.

Ms SUE HIGGINSON: There was also the discussion and evidence around the complexity of trials and the consistency of trials that involve First Nations people, and the fact that they were very often trials that are very complex and involve concepts of complicity, and the idea that shortening deliberation times or not having that length or that current deliberation time could impact in a particular way or a disproportionate way. That was the evidence I thought we received.

MARK FOLLETT: Okay, righto.

The Hon. SUSAN CARTER: Yes.

MARK FOLLETT: That's absolutely fair enough. I would just say that that is incumbent upon the judge to determine whether the complexity of the trial makes it inappropriate to exercise or to move forward with the majority verdicts process after four hours, because that is a fundamental part of the legislation that remains—that it's only where it's appropriate, giving regard to the complexity. Perhaps that remains as a safeguard for those matters.

The Hon. SUSAN CARTER: Can I ask a quick follow-up? We also received evidence that Indigenous groups, who have had an unhappy experience with our legal system—the Aboriginal Legal Service indicated that their clients actually found great confidence in the idea that the process was that there would be a minimum time of eight hours, which is a very serious amount of time, that would be devoted to the very serious question of their innocence and guilt. But there are actually important questions to do with public confidence in the administration of justice that are tied up with the eight-hour period.

MARK FOLLETT: Okay. I don't have a response.

The Hon. SUSAN CARTER: Was that considered, the impact on public confidence in the system? Was that considered as part of the statutory review?

MARK FOLLETT: Absolutely.

The Hon. SUSAN CARTER: And the deliberations took the shape of what?

MARK FOLLETT: Maybe it's a little bit like jury deliberations. I mean, we don't really disclose how those—it's an exercise of policy analysis, taking into account the different views and the impacts and weighing them up appropriately and determining, essentially, what weight to give them. I guess it's part of our job as policy advisers to government. These are policy decisions for government. All we can do is relay what best evidence and advice and stakeholder views we have.

The Hon. SUSAN CARTER: I'm just curious—in terms of stakeholders, how many stakeholders from disadvantaged backgrounds were actively consulted as part of the statutory review?

MARK FOLLETT: The statutory review called for public submissions.

The Hon. SUSAN CARTER: How many were actively consulted?

MARK FOLLETT: We didn't actively—we actively consulted legal stakeholders.

The Hon. SUSAN CARTER: So legal stakeholders?

MARK FOLLETT: And we called for public submissions.

The Hon. WES FANG: And you got plenty of public submissions, didn't you?

MARK FOLLETT: No, not many.

The Hon. WES FANG: Would that perhaps have triggered something within the department to say, "We've not received any public submissions. Perhaps we should go out again and revisit this matter. Quite literally, we've had all of the legal minds effectively give us their view but not one single public submission was received. Maybe we should go back out again and seek to get the views of people that aren't legally minded, given they are impacted"? Did that not occur to anybody?

MARK FOLLETT: I'm not sure who you're suggesting.

The Hon. WES FANG: Well, I think my colleague has already suggested that there are a number of disadvantaged and—

MARK FOLLETT: In what aspect—as an accused or as a juror?

The Hon. SUSAN CARTER: As people who use the legal system. As the accused. As people who need to have confidence in the administration of justice so that our system continues to work.

MARK FOLLETT: Absolutely. I mean, I guess the call for public submissions was the hope that those interested people would come forward.

The Hon. CAMERON MURPHY: Mr Follett, I just want to go back to this point that has been much raised this afternoon about evidence. When you run a statutory review, you call for public submissions and you invite interested parties to submit. There is an expectation of confidentiality for those in that process, isn't there?

MARK FOLLETT: Yes, generally there is. There will be different processes for different projects, depending on the will of the government. But, yes, there is.

The Hon. CAMERON MURPHY: But in a review like this, for example, you may well have had individual judges that put in submissions with their points of view about actual trials that they have conducted, where they're putting forward a position based on their experience—their actual experience and knowledge of matters. Is that right?

MARK FOLLETT: Yes, that's right.

The Hon. CAMERON MURPHY: So when people say that there's no evidence to point to, that's really just talking about statistical evidence in terms of measuring jury outcomes, however you might do that—I'm not sure it's possible to do that—rather than the experience and knowledge of people involved in the running of trials that have already contributed to this statutory review. Isn't that right?

MARK FOLLETT: That's exactly right, yes. We would say the evidence we got is invaluable from those participants in the justice system.

The Hon. CAMERON MURPHY: It's not possible, is it, to gather that sort of statistical evidence that's been referred to when people say, "Where's the evidence that four hours is better than eight?" You're not able to poll or ask individual jurors what they would have done, are you?

MARK FOLLETT: No.

The Hon. CAMERON MURPHY: Would there be any way to gather that type of evidence at all?

MARK FOLLETT: No, I don't think so. It would be really difficult, obviously, the deliberations being sacrosanct—and really, really difficult to extrapolate from outcomes as to what that actually meant.

The Hon. CAMERON MURPHY: Are you aware of any other jurisdiction that's been able to gather that sort of evidence before they've moved?

The Hon. WES FANG: To that point, and that was the point I'm about to make, is that what you can do is you can make comparisons to other jurisdictions that have—and we've already spoken today about the number of jurisdictions that have alternate views to New South Wales. At this stage I have not seen an analysis of an improvement—or an increase or decrease, shall I say—of outcomes from other jurisdictions that have either a higher or lower or even, in the case of Victoria, no restriction in relation to the hours. It seems to me to be a completely arbitrary, plucked out figure, "it's the middle point, let's go there" decision. Whereas if you were to look at the pure numbers from the submissions, you would be just as likely to pick that it be the discretion of the judge. Is that not correct? Could you not have done some analysis of other jurisdictions and provided that as an evidence base?

MARK FOLLETT: I'm not sure I follow what you mean—

The Hon. CAMERON MURPHY: Nobody does.

MARK FOLLETT: —but did we look at other jurisdictions? Absolutely. As you will see, the jurisdictions have different thoughts. Victoria is entirely judicial discretion. Can we measure the outcomes?

The Hon. SUSAN CARTER: Can you share with us the results of your looking at other jurisdictions?

MARK FOLLETT: No, I cannot. That's Cabinet in confidence.

The Hon. SUSAN CARTER: So you're asking to legislate. You're telling us that you've looked at other jurisdictions. You're not telling us what you've found when you looked at other jurisdictions, but you're saying, "Trust us and pass this legislation." It seems extraordinary to me.

MARK FOLLETT: I am not saying that. I'm saying that—

The Hon. WES FANG: No, Daley is.

The Hon. SUSAN CARTER: With respect, that's exactly what you are—

The Hon. CAMERON MURPHY: Isn't it the normal process in a review?

MARK FOLLETT: As you will appreciate though, a lot of advice from departmental officials goes into a Cabinet process. There is strict Cabinet confidentiality around that. The statutory review report is a transparent document that is attempting to—

The Hon. SUSAN CARTER: With respect, it's not transparent if it isn't giving us actually the results of the review that you tell us that you've conducted of the results of these changes in other States.

The Hon. CAMERON MURPHY: It's on the website, isn't it?

MARK FOLLETT: I'm sorry but that's what the review document seeks to do.

The Hon. SUSAN CARTER: Which page of the review will I find an analysis of the discretion of the judges working in Victoria as compared to the six-hour rule in South Australia? Where will I find that?

MARK FOLLETT: I don't think I said that we did that. I said we looked at jurisdictions.

The Hon. SUSAN CARTER: I'm sorry, I thought you indicated that you had undertaken a review of the way in which the different—

MARK FOLLETT: The legal provisions work in other jurisdictions and we looked for any evidence as to whether—

The Hon. SUSAN CARTER: Yes, so where do I find that?

The Hon. WES FANG: And the outcomes.

MARK FOLLETT: Well, we looked for that.

The Hon. SUSAN CARTER: Where do I find the outcomes of that review?

MARK FOLLETT: Well, I don't think—sorry.

The Hon. SUSAN CARTER: So you've done an outcome.

MARK FOLLETT: I don't think there are outcomes.

The Hon. SUSAN CARTER: So you've done a review of the other States.

MARK FOLLETT: No, we've looked at the provisions of other States and the legal provisions.

The Hon. SUSAN CARTER: Have you looked at how they work in other States?

The Hon. WES FANG: The outcomes that other States achieved and why it's better or worse than what we're doing at the moment.

The Hon. STEPHEN LAWRENCE: It's not widget making. It doesn't work like this.

The Hon. SUSAN CARTER: Have you looked at the way the discretionary rule works in Victoria as compared to what happens in New South Wales?

MARK FOLLETT: Yes.

The Hon. SUSAN CARTER: Where would I find the outcome of you looking at that?

MARK FOLLETT: We looked at the law, any judicial directions. I don't know whether my team spoke to Victoria. I mean it's a long time ago, so maybe they did.

The Hon. SUSAN CARTER: Did you actually talk to Victoria or didn't you?

MARK FOLLETT: If what you're asking for is are there empirical analysis from Victoria as to whether they get better—

The Hon. SUSAN CARTER: Sorry, can I break it down for you very simply?

MARK FOLLETT: Just hold on a moment. As to whether they can get—

The Hon. SUSAN CARTER: I'm sorry, I think we're at cross-purposes.

The Hon. STEPHEN LAWRENCE: Point of order: This witness has really been subjected to a barrage, and he should be given the dignity of responding in a complete way. He's trying to answer.

The Hon. SUSAN CARTER: If the witness is actually responding to the question that's asked.

The Hon. STEPHEN LAWRENCE: He is highly responsive.

Ms SUE HIGGINSON: To the point of order: The witness is the executive director of policy reform and legislation within the Department of Communities and Justice. He is very equipped to deal with this process.

The CHAIR: Order!

MARK FOLLETT: All I'm saying is if what you are after is "Did the department find some empirical evidence or analysis that the Victorian outcomes because they have judicial discretion and no floor are better in terms of all of the policy objectives that this changes?" I don't think that exists, and I don't think you will find that outcome. I think that's looking for something that will not exist in this area of policy that we are talking about.

The Hon. SUSAN CARTER: Did you look at the Victorian experience and compare it to the New South Wales experience?

MARK FOLLETT: We looked at the Victorian provisions and what they rely on, which is heavy reliance on judicial discretion.

The Hon. SUSAN CARTER: Did you look at the way that is working in Victoria and compare it to the way the eight-hour rule is working in New South Wales?

MARK FOLLETT: Yes, in terms of looking at the case law and the outcomes and whether there has been any adverse—

The Hon. SUSAN CARTER: Did you find reasons why New South Wales should move to the Victorian model, or reasons against moving to the Victorian model?

MARK FOLLETT: Yes, and some of that was provided by stakeholders, which you've heard today from the DPP, His Honour Judge Price—

The Hon. SUSAN CARTER: Where would this Committee find the outcome of that comparison?

MARK FOLLETT: I think you've heard some of it today.

The Hon. SUSAN CARTER: No, we have not heard any comparison between Victoria and New South Wales, South Australia and New South Wales.

MARK FOLLETT: Sorry. No, I don't think that exists.

The Hon. WES FANG: And it's not so much just for this Committee; ultimately it's for the Parliament and for the members of both Houses to satisfy themselves that the legislation that has been brought forward by the Attorney General will lead to better outcomes for the people of New South Wales. At the moment it seems to be on the vibe and, "Trust us, we've rolled the dice here."

The Hon. CAMERON MURPHY: That's just wrong. That characterisation is wrong.

The Hon. WES FANG: Unless you can provide me the evidence, Mr Murphy—

The Hon. CAMERON MURPHY: We've heard it from the chief judge; we've heard it from the other witnesses.

The Hon. WES FANG: I'm not questioning you; I'm questioning the witnesses. But the evidence that we have heard today is that some stakeholders are strongly against moving away from the eight-hour position; some witnesses believe that the four-hour position is an okay position. Ultimately, when we test that position with them they seem to fall more in line with discretion of the judicial officers as opposed to the four-hour rule. So ultimately we're making a change here to legislation which is—I think the best word is—"compromise", as I think you said earlier, but it isn't the gold star because nobody has provided us evidence to say that four hours is the magic number. Nobody has provided us evidence to say that four hours is exactly what they want. It seems to be they either want judicial discretion or they want to retain the eight hours. Yet we're in this odd position where the bill before us and that we've got to write recommendations on says four hours.

The Hon. CAMERON MURPHY: Point of order: Is there a question in this?

The Hon. WES FANG: We are trying to drill down on where this four hours has come from.

The Hon. CAMERON MURPHY: Sorry, Chair, I was just going to say it was an extremely long statement without a question. The purpose of this hearing is to ask questions.

The Hon. WES FANG: Look, I'm just channelling Greg—Donnelly, if we're not clear.

The Hon. STEPHEN LAWRENCE: He's not here to defend himself.

The Hon. WES FANG: I know he's not here to defend himself, sorry. Mr Follett, you were going to say something?

The CHAIR: Mr Fang, if you want to get an answer, ask a question.

MARK FOLLETT: I think the point I was just going to make is that absolutely there are very diverse views on this and there is strong opposition from some stakeholders that you've heard today, particularly the Bar Association, the Law Society and Legal Aid. It is not uncommon when we're trying to move the justice system in terms of making policy changes that there are diverse views. In fact, in my day job that's a daily occurrence, and often you can have a reasonable idea of which stakeholders are going to sit in which corners. So part of the idea of making the justice system better for all and for the taxpayers as well is to try and come up with the best policy positions that we can. The discretion point—I'll just make this final point, I'm sorry; I don't mean to interrupt. Those pushing for judicial discretion as the sole—that is absolutely retained. The point of this bill is to just move the floor from eight to four hours and no change to judicial discretion. That still is an absolutely integral part.

The Hon. WES FANG: Coming back to the point I am really trying to drill down on, in that answer you said there are people who you almost know which camp they are going to fall into. Is that right?

MARK FOLLETT: Yes.

The Hon. WES FANG: So you have camps that are for eight hours at the moment and you have camps that are for discretion. Can you tell me who is in the four-hour camp?

MARK FOLLETT: I can't off the top of my head. As I said, four hours–

The Hon. WES FANG: Because it is a compromise position, is that correct? Nobody is in the four-hour camp except for the Attorney General, because everyone is either in the eight-hour camp or the discretion camp, and this is the middle ground. You are effectively trying to please everybody and, by doing that, you are pleasing nobody. That is my absolute, rock-hard assessment of what the bill is doing.

The Hon. STEPHEN LAWRENCE: Point of order: That is nothing more than an idiosyncratic observation on the evidence. It is not a question. It is not seeking to elicit anything relevant.

The Hon. WES FANG: I want to know who is in the four-hour camp. That is what I am trying to find.

The Hon. SUSAN CARTER: It's anecdotal, like the DPP—

The Hon. WES FANG: It's anecdotal, like the DPP provided.

The Hon. STEPHEN LAWRENCE: It's diarrhoea. That's what it is.

The CHAIR: I think we have heard today that there is gradation from nothing through to eight hours in all the jurisdictions. That is my observation.

The Hon. WES FANG: Who is in the four-hour camp, Mr Follett? Who are we going to please by doing four hours?

The CHAIR: The New South Wales Government wants to be in the four-hour camp.

MARK FOLLETT: The proposition in the bill is for four hours. When in a policy process—

The Hon. SUSAN CARTER: But where did that come from?

MARK FOLLETT: Well, it's part of the policy analysis around—you've got positions of full judicial discretion, you've got "retain the eight hours", and then there's compromise positions. And they're ultimately supported.

The Hon. WES FANG: Supported by who?

MARK FOLLETT: I don't know off the top of my head, but if that is the position, for example—I hope, anyway—supported by the advocates that would like judicial discretion and no floor, because in their mind it's better than eight.

The Hon. SUSAN CARTER: Can I just clarify, Mr Follett? Because I am very confused by your evidence. I believe I heard you say that you or people in the department or people connected with the review have looked at the experience in Victoria, South Australia and other States and compared it to the experience in New South Wales.

MARK FOLLETT: No. We've looked at—

The Hon. SUSAN CARTER: So we have not compared the experience in Victoria, South Australia and other States to New South Wales?

MARK FOLLETT: We have looked at the law and any adverse judicial—

The Hon. SUSAN CARTER: But we have not looked at how the four-hour rule, the six-hour rule or the discretion rule works.

MARK FOLLETT: I think the same limitations for what we can do in terms of juror experience and data and deliberations would be in those jurisdictions, so I'm not sure that we—

The Hon. SUSAN CARTER: My question is that we have evidence given to us today from a couple of cases of difficulties with the eight-hour rule, on which a lot of this change seems to be predicated. In jurisdictions where there is a six-hour rule, do fewer of those cases occur? In jurisdictions where there is a four-hour rule, do fewer of those cases occur? In jurisdictions where there is a discretionary rule, do fewer of those cases occur?

MARK FOLLETT: I can't answer that.

The Hon. SUSAN CARTER: Has that not been considered as part of the review or the drafting of this legislation?

MARK FOLLETT: It may have been considered by the stakeholders that submitted to us, but I can't recall whether we did that.

The Hon. SUSAN CARTER: Why would that not be considered in formulation of a four-hour rule when we have living examples of that in other States?

MARK FOLLETT: I'm not sure I follow the point of that.

The Hon. SUSAN CARTER: If the four-hour rule is meant to address a problem, and the four-hour rule exists in another State, why have we not looked at whether the four-hour rule addresses that problem in another State to inform our drafting?

MARK FOLLETT: We have taken the stakeholder submissions that talk about whether it's a problem here in New South Wales.

The Hon. SUSAN CARTER: No. I'm asking have we looked at how it works in the other States?

The Hon. WES FANG: This is contrary to the evidence you gave earlier. Ms Carter asked you if there had been analysis work done. You indicated that there were policy issues done. She then drilled down into whether comparisons were done between our State and other jurisdictions, not just considering the policy aspects—the legislative rules that exist in each State—but the actual outcomes. You indicated that you had, but it was Cabinet in confidence. One of these two things has happened: Either we have looked at—

MARK FOLLETT: I'm not sure that's—

The Hon. WES FANG: I'm happy to check *Hansard*, but I'm convinced that that's what I heard.

MARK FOLLETT: No, our policy analysis is Cabinet in confidence—the advice we give to government.

The Hon. WES FANG: Everyone has bandied about this 1.8 or 1.9 per cent figure of trials where we have had issues come up, and that's what we're trying to fix now by moving from eight hours to four hours. Surely the department has done some work to say—

MARK FOLLETT: That's not the only policy driver behind the change.

The Hon. WES FANG: No, but that's the one that's been bandied about in any number of instances, both today and in the lead-up to the introduction and debate around this bill that's before the House. Surely the department has done some analysis to look at other jurisdictions and outcomes that have been achieved in other jurisdictions with a lower number or no floor, where judicial discretion is employed, to look at whether the outcomes are better so that we can address this 1.8 or 1.9 per cent of cases where we have an issue. Has that occurred?

MARK FOLLETT: I think that's a different question. If you are asking are there less hung juries in those jurisdictions—

The Hon. SUSAN CARTER: No. There is an eight-hour rule in New South Wales and a six-hour rule in South Australia. Has anybody said, "Do the same problems that we are experiencing in New South Wales, which act as a driver for change, occur at the same frequency in South Australia?" Do they occur at the same

frequency in Queensland? Can we learn from experience or do we have to make mistakes that we fix up later ourselves?

MARK FOLLETT: I do not know the answer to that. We would need to look back into our deliberative processes.

The Hon. SUSAN CARTER: Are you able to inform the Committee of the answer to that?

MARK FOLLETT: I can take on notice whether—

The Hon. SUSAN CARTER: It's a fairly straightforward question.

MARK FOLLETT: I think you've asked a number of different questions about jurisdictional comparisons and you are conflating the way that—

The Hon. SUSAN CARTER: I'm trying to get an answer.

MARK FOLLETT: With due respect—

The Hon. CAMERON MURPHY: With respect, Mr Follett, wouldn't it be extremely difficult, if not impossible, to compare jurisdictions because of the nature of trials and matters that are in each court's jurisdiction in those other States and Territories?

MARK FOLLETT: Absolutely. I also think there's an issue here about our—

The Hon. SUSAN CARTER: With respect, does that stop us having model codes that operate across States?

MARK FOLLETT: Sorry?

The Hon. SUSAN CARTER: We are able to compare jurisdictions and how things operate when we look at having model codes and model laws. I do think that we would be capable of looking at the experience in South Australia and, if there were particular trial issues, noting those so that we could perhaps consider some of the carve-outs that operate in, for example, Victoria as a jurisdiction.

MARK FOLLETT: You've asked about a number of different things, one of which is less hung juries as a statistical analysis. Mr Fang was asking about that. I don't know the answer to that. You've also asked about outcomes. What are you talking about in terms of outcomes? There are a lot of different outcomes we are trying to get here.

The Hon. SUSAN CARTER: Mr Follett, I'll make it very clear. I'm looking at have you looked at the policy drivers behind this change and have you looked at whether they are at all different in other States which have different rules to help you decide whether this is a good policy proposition that is supported by the experience of other States.

MARK FOLLETT: That's not the question you asked before.

The Hon. SUSAN CARTER: Can you answer that question?

MARK FOLLETT: Did we do a jurisdictional comparison that looks at the policy drivers when they made changes?

The Hon. SUSAN CARTER: That is not the question I asked. I asked—in probably five different ways because I'm finding it difficult to get an answer, with respect—have you looked at other jurisdictions which have a six-hour rule and a four-hour rule and have you looked at whether the experience in those jurisdictions with respect to the policy drivers is the same or is different?

MARK FOLLETT: From when they made a change? What's my comparison group?

The Hon. SUSAN CARTER: From how the four-hour rule is operating compared to our eight-hour rule.

MARK FOLLETT: That is very difficult to do because you are talking about two jurisdictions—

The Hon. SUSAN CARTER: Have you done it?

MARK FOLLETT: No. You are talking about two jurisdictions—

The Hon. SUSAN CARTER: Okay, so we have not learnt from other jurisdictions in terms of trying to develop this four-hour proposition?

MARK FOLLETT: No, we've looked at other jurisdictions, looked at the settings they have. Your question goes to whether—

The Hon. SUSAN CARTER: Have we learnt from other jurisdictions? That's my question, yes.

MARK FOLLETT: Have we learnt from other jurisdictions?

The Hon. SUSAN CARTER: Yes.

MARK FOLLETT: Well, yes. In terms of, "Are we taking guidance from other jurisdictions?", absolutely.

The Hon. SUSAN CARTER: No. Are we looking for how it works in other places, which informs our decision-making?

MARK FOLLETT: Yes, because we look at the law in other jurisdictions—

The Hon. SUSAN CARTER: In what way have we done that?

MARK FOLLETT: —and then we look at the case law in other jurisdictions. I'm not sure—so you're asking about—

The Hon. SUSAN CARTER: I'm asking what work the department did—

The Hon. CAMERON MURPHY: I think we've run out of time, Chair.

The CHAIR: Yes, I think we're heading towards a termination.

The Hon. SUSAN CARTER: —to arrive at this policy position informed by the experience in other States?

Ms SUE HIGGINSON: I've just got a question for the Sheriff as well.

The Hon. SUSAN CARTER: And I think what I'm hearing is "no".

Ms SUE HIGGINSON: Can I ask you, Ms Hall, Sheriff, a question? In terms of the proposals to provide more powers, I suppose, to the Sheriff to undertake the tasks, is there a resourcing issue with that? Is that something that the Sheriff's Office will require more resourcing?

TRACEY HALL: No, we won't.

Ms SUE HIGGINSON: Really?

TRACEY HALL: No.

Ms SUE HIGGINSON: Now's your time to say yes.

TRACEY HALL: I'd love to be able to say yes. But, no, we have a number of officers that are trained in investigations and are used at different times to do the investigations. However, I'll have to defer to the deputy in relation to the number that we currently do. He'll know the answer to that; that's his area.

DANIEL GORDON: Thank you, ma'am. Since 2021 we've undertaken 12 jury investigations which have resulted in—so in 2021 there were two and then we've had five over the last two years. When we're looking at the expansion of that investigatory power around looking at conduct towards jurors, because we're already going through an investigative process, we allocate resourcing that we've already got as part of our establishment to do that. It's mainly the time taken in investigation more so than requiring additional resources to do that.

Ms SUE HIGGINSON: The evidence of the Chief Judge—did you hear that?

TRACEY HALL: No, I didn't.

Ms SUE HIGGINSON: He is very supportive. He referred to sticking his neck out, if he may, so that he could support the proposition, and said that the Sheriff and the Sheriff's Office is definitely best placed to undertake this work, and particularly not police doing this work. Is your view the same as the Chief Judge's view around that?

TRACEY HALL: Yes. I can expand on that for the reasons. We're actually not parties to the proceedings, which takes it out of any areas of uncertainty. Also, we have safeguards that are built in—and those safeguards will also be built into the legislation. Number one, we do our investigation. We then have a report that's given to the presiding judge. The presiding judge will then determine what outcome he wants and will make a direction to us to go down a certain path. If that's to continue with a prosecution then we have a process for the prosecution that is referred to the Crown Solicitor's Office, who then review it. They then will seek an advice from

the Crown Advocate, and then the Crown Advocate's advice will be taken by the Crown Solicitor's Office and the matter will then proceed as a prosecution through the Crown Solicitor's Office. There's a number of safeguards in the process.

If we were required, or if the nature of the irregularity involved perhaps serious crime gangs, obviously we would seek the assistance of New South Wales police to do that because that's the nature of the criminal action. But, if it's under the Jury Act, we would proceed down the path that I just described. If it was with the police, we work very well with the police in these types of matters. There would be good safeguards and oversight.

The CHAIR: On that point, we might call it a day. Thanks very much for attending.

(The witnesses withdrew.)

The Committee adjourned at 15:20.