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Majority Jury Verdicts in Criminal Trials

by

Talina Drabsch

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EXECUTIVE SUMMARY

The issue of whether majority verdicts should be introduced in New South Wales again came to the fore when the 10 week trial of Bruce Burrell for the kidnapping and murder of Kerry Whelan ended with a hung jury in November 2005. The case is to be retried in early 2006. The NSW Law Reform Commission in its 2005 report on majority verdicts had concluded that the requirement of unanimity should be maintained in NSW, as the arguments in support of unanimous jury decisions continued to outweigh those in favour of majority verdicts. The Commission noted that much was still unknown about the deliberation of juries and recommended that more research be conducted into juries in NSW. In November 2005, the Attorney General for NSW, the Hon Bob Debus MP, announced that the Government would introduce majority verdicts of 11:1 for criminal trials in NSW. If the measures proposed by the Government pass into legislation, majority verdicts would subsequently be available for all criminal offences, provided a minimum deliberation period has passed. Andrew Tink MP, Shadow Attorney General, has argued for the introduction of majority verdicts since the mid 1990s.

Section two (pp 3-8) of this paper provides an overview of the requirement of unanimity. The results of the 1997 and 2002 Bureau of Crime Statistics and Research studies are discussed, as are the findings of the 1999 New Zealand Law Commission study of juries in criminal trials.

An outline of the NSW Government proposal for majority verdicts in criminal trials in NSW is included in section three (pp 9-10). The history of Opposition attempts to introduce majority verdicts is also noted.

Section four (pp 11-17) compares the position adopted in the various jurisdictions in Australia. Unanimity continues to be required in NSW, Queensland and the ACT. The High Court has also interpreted section 80 of the Constitution as requiring the decision of the jury in a trial for an indictable Commonwealth offence to be unanimous. Whilst majority verdicts are permitted in Victoria, Tasmania, South Australia, Western Australia and the Northern Territory, these jurisdictions differ according to the number of dissidents permitted, the offences for which a majority verdict is permitted, and the minimum deliberation time required. This section also notes the position adopted in a number of international jurisdictions.

The main arguments in favour of the retention of unanimity are discussed in section five (pp 18-23). Such arguments generally focus on: the standard of proof in criminal trials being beyond reasonable doubt; the greater deliberation of issues facilitated by unanimity; the relative infrequency with which hung juries occur; the possibility of the disagreement of the minority jurors being based on sound reasons; ensuring consistency with the treatment of Commonwealth offences; and the fact that majority verdicts do not remove all of the difficulties associated with unanimity. The opinions of the NSW Law Reform Commission and representatives of the legal profession are also noted.

There are various arguments for the introduction of majority verdicts in criminal trials. The arguments canvassed in section six (pp 24-27) include: the reduction of the number of hung juries; overcoming the problem of the rogue or perverse juror; the avoidance of

compromise verdicts; reduction of the possibility of corruption; allowing for a more democratic decision-making process; more efficient verdicts; unanimity is not required to uphold proof beyond reasonable doubt; and ensuring greater consistency with civil proceedings and with the practice in the majority of Australian jurisdictions. Reference is also made to the opinions of the NSW Law Reform Commission, Justice John Dunford, Justice Reg Blanch and Nicholas Cowdery.

1 INTRODUCTION

The intensity of the debate on whether the verdict in a criminal trial should be decided unanimously or by the majority of jurors recently increased when the 10 week trial of Bruce Burrell for the kidnapping and murder of Kerry Whelan ended in a hung jury. Various advocates of majority verdicts saw this as the last in a line of examples of the time wasted by and significant cost of the requirement of unanimity. The issue of majority verdicts in criminal trials has arisen a number of times in NSW since the mid 1990s. Andrew Tink MP first introduced a private member's bill on the subject in the NSW Legislative Assembly in 1996. This and a subsequent attempt by Kerry Chikarovski MP were not successful. Another bill along similar lines was introduced by Andrew Tink in 2004 but has yet to be debated in Parliament. The Attorney General, the Hon Bob Debus MP, announced in November 2005 that despite the recent recommendations of the NSW Law Reform Commission the Government would introduce majority verdicts of 11:1 for all criminal trials, including murder. Whilst majority verdicts are common in Australia, with only the Commonwealth, Queensland, the Australian Capital Territory and New South Wales still requiring unanimity, the introduction of majority verdicts for *all* criminal offences is a somewhat bolder move. The Northern Territory is currently the only jurisdiction to allow majority verdicts in such broad circumstances.

Majority verdicts were first introduced in South Australia in 1927. The most recent changes were made in Victoria, which accepted majority verdicts in 1994. Majority verdicts are allowed in a number of jurisdictions overseas, and were instituted in England and Wales in 1967. They are also available in Ireland and Scotland. Majority verdicts are accordingly neither rare nor untested.

The role of the jury is often fraught with a number of challenges. According to Vidmar, the common law jury:

> brings together a small group of lay persons who are assembled on a temporary basis for the purpose of deciding whether an accused person is guilty of a criminal act... The jurors are conscripted and often initially reluctant to serve. They are untutored in the formal discipline of law and its logic. They hear and see confusing and contested evidence and are provided with instructions, most often only in oral form, about arcane legal concepts and sent into a room alone to decide a verdict without further help from the professional persons who developed the evidence and explained their duties.[1]

Despite this, Vidmar is quick to highlight the importance of the jury as they 'inject community values into the formal legal process, and thus they can bring a sense of equity and fairness against the cold and mechanistic application of legal rules'.[2]

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1 Vidmar N, 'A historical and comparative perspective on the common law jury', in Vidmar N (ed) *World Jury Systems*, Oxford University Press, New York, 2000, p 1.

2 Ibid.

The decision-making process of the jury is largely unknown. Therefore, the impact of the introduction of majority verdicts is in many respects speculative. This paper explores the issues associated with the introduction of majority verdicts for criminal trials in NSW. In doing so, it notes the arguments in support of unanimity as well as those that maintain that majority verdicts are preferable, and outlines the position adopted in a number of other jurisdictions, both in Australia and overseas.

2 UNANIMOUS VERDICTS

In NSW, criminal proceedings in the Supreme Court or District Court are generally to be tried by a jury.[3] However, the accused may, provided certain conditions are met, elect to be tried by the judge alone.[4] The trial by jury of criminal offences in NSW currently requires the jury to be unanimous in their decision of whether to convict or acquit the accused. Section 56 of the *Jury Act 1977* (NSW) allows a jury to be discharged if they are not likely to agree on a verdict. A jury that is unable to reach a decision is commonly known as a 'hung jury'. The matter may subsequently proceed to a retrial, or in some cases the prosecution may decide to no longer pursue the matter against the accused if it believes that it is unlikely to secure a conviction.

The requirement of a unanimous decision is firmly entrenched in the common law, having been established since the mid 14th century. However, the role and experience of the jury has changed quite dramatically since that time. Jurors were originally similar to witnesses, as their own knowledge of the matter was considered relevant. They were also subjected to various pressures to induce them to reach a unanimous decision, including hunger, as they were denied food and other necessities until a verdict was reached.

The history of the introduction of trial by jury in NSW is a rather turbulent one. A right to a trial by jury in criminal matters in the Supreme Court and Court of Quarter Sessions did not feature in the legal system of NSW until 1833 when the *Jury Trials Act* was passed.[5]

The High Court clarified in *Black v The Queen*[6] that a jury must not be pressured in any way to reach a unanimous decision at the expense of the individual juror's own conclusion. The case concerned the trial and conviction of Michael Black of two counts of arson in the NSW District Court. He appealed to the Court of Criminal Appeal, arguing that the exhortation by the trial judge to the jury encouraging them to find a verdict in relation to one of the counts was premature. It was argued that a reference by the judge to considerable public inconvenience and expense if the jury could not agree involved inappropriate pressure or coercion. The appeal was rejected with an appeal subsequently made to the High Court.

Mason CJ, Brennan, Dawson, and McHugh JJ considered the direction of the trial judge and indicated that it had gone too far and may have resulted in the jury failing to properly consider the issues. Deane J also stressed:

> in a case where it appears that a jury has been unable to reach agreement after what is, in the circumstances of the particular case, a significant period, it is essential that

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3 Section 131 *Criminal Procedure Act 1986* (NSW)

4 Section 132 *Criminal Procedure Act 1986* (NSW)

5 Barker I, *Sorely tried: Democracy and trial by jury in New South Wales*, DreamWeaver Publishing, Sydney, 2003, p 76.

6 (1993) 179 CLR 44

> a direction requiring the jury to continue its deliberations carefully avoids anything at all that might be misunderstood as encouraging a minority juror to join in returning a "collective verdict" which does not completely accord with his or her own genuine views.[7]

The Court set aside the conviction relating to the first fire and ordered a new trial. Mason CJ et al indicated that, where relevant, a trial judge should give a direction along the following lines:[8]

> Members of the jury,
>
> I have been told that you have not been able to reach a verdict so far. I have the power to discharge you from giving a verdict but I should only do so if I am satisfied that there is no likelihood of genuine agreement being reached after further deliberation. Judges are usually reluctant to discharge a jury because experience has shown that juries can often agree if given more time to consider and discuss the issues. But if, after calmly considering the evidence and listening to the opinions of other jurors, you cannot honestly agree with the conclusions of other jurors, you must give effect to your own view of the evidence.
>
> Each of you has sworn or affirmed that you will give a true verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom and you are expected to judge the evidence fairly and impartially in that light. You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. You should calmly weigh up one another's opinions about the evidence and test them by discussion. Calm and objective discussion of the evidence often leads to a better understanding of the differences of opinion which you may have and may convince you that your original opinion was wrong. That is not, of course, to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.
>
> Experience has shown that often juries are able to agree in the end, if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to re-examine the matters on which they are in disagreement and to make a further attempt to reach a verdict before they may be discharged. So, in the light of what I have already said, I ask you to retire again and see whether you can reach a verdict.

These directions are known as Black directions, and provide the model for guidance that may be given when a court is faced with the prospect of disagreement amongst the jury.[9]

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7 At 56.

8 At 51 to 52.

9 See Criminal Trial Courts Bench Book.

2.1 Recent studies of juries

Trial by jury is not a common means of resolving criminal matters in Australia. Other possibilities include the accused being tried by a magistrate or judge alone, or the defendant may plead guilty to the charge against him or her. 0.4% of all criminal cases in Australia in 2003-04 were determined by a jury trial.[10] Hung juries result in only a small number of jury trials, and therefore represent only a minor proportion of all criminal cases. In 2004, 1% of all trials listed in the District Court of New South Wales resulted in a hung jury.[11]

Studies of juries are relatively scarce. Various limitations restrict the behaviour of jurors, journalists and potential researchers. Section 68A of the *Jury Act 1977* (NSW) forbids the solicitation of information from a juror or former juror concerning the deliberations of the jury and how opinions and conclusions were formed. However section 68A(3) provides an exception where the Attorney General has granted permission for the conduct of a research project. Jurors are prevented from disclosing for a fee, gain or reward, information about the deliberations of a jury or how opinions or conclusions were formed.[12]

2.1.1 1997 BOCSAR study

The NSW Bureau of Crime Statistics and Research (BOCSAR) concluded a study of hung juries and majority verdicts in 1997.[13] It considered the following four issues:

1. What proportion of jury trials end in a hung verdict?

2. Are juries more likely to be hung after a long trial?

3. Are juries more likely to be hung after a sexual assault trial?

4. In what proportion of trials overall and hung trials is the jury split either 11:1 or 10:2?

The study found that approximately 10% of jury trials that go to verdict end with a hung jury, and are about one-third longer than trials that do not hang. Juries are *not* more likely to be hung after a sexual assault trial (in fact the proportion which were hung was lower than the proportion of all trials). It found that an additional 2.7% of all charges on which juries deliberate would be resolved if verdicts were allowed with one or two dissidents (the proportion is only 2.1% if limited to the disagreement of one juror). If majority verdicts were introduced allowing up to two jurors to disagree with the majority, the amount of

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10 NSW Law Reform Commission, *Majority Verdicts*, report 111, August 2005, p 4.

11 District Court of New South Wales, *Annual Review 2004*, p 28.

12 Section 68B.

13 Salmelainen P, Bonney R and Weatherburn D, 'Hung juries and majority verdicts', *Crime and Justice Bulletin*, No 36, July 1997.

court time saved would be 1.7% (reduced to 1.1% if limited to the dissent of one juror). This led the authors to conclude that 'while the introduction of majority verdicts would probably produce some administrative benefits, in general they are only modest'.[14]

2.1.2 1999 New Zealand Law Commission study

The issue of majority verdicts was also considered recently in New Zealand. In 1997, the New Zealand Law Commission, together with researchers from the Victoria University of Wellington Faculty of Law, commenced a joint research project on jury decision-making. The Law Commission published a summary of its findings in 1999.[15] The project analysed a sample of 48 jury trials from the High Court and District Court, which deliberately included all the high profile jury trials of the sample period and a significant number of lengthy fraud trials and other complex cases. The impact of the sample on the research findings therefore needs to be kept in mind when considering the results.

The study found that the judge and jury essentially agreed on the verdict in half of the trials. However, in an additional 11 trials the jury's verdict appeared reasonable on the evidence, resulting in 35 out of 48 trials where the judge and jury either agreed in relation to the verdict or the evidence could be seen as supporting the decision. The researchers found that in the remaining 13 trials, five were 'compromise' verdicts (jury disagreement led to a compromise in relation to some of the charges), three were perverse or questionable verdicts, and five were the result of a fully hung jury (that is, no agreement on all counts).

The research team noted that hung juries were more likely to appear in the sample due to their choice of high profile and complex trials. The team found that two of the hung juries resulted from a 'rogue' juror who refused to consider a guilty verdict and did not participate in the deliberations. However, in the other three cases, the jurors in the minority were able to provide reasons for their decision. In one of these cases, the researchers believed that a questionable verdict would have resulted had the majority prevailed. In another, the judge agreed with the view of the minority jurors.

2.1.3 2002 BOCSAR study

The NSW Bureau of Crime Statistics and Research conducted a study in 2002 that analysed, amongst other things: the prevalence of hung juries in the NSW District Court; the demand hung juries placed on the Court; and any factors that predict a hung jury.[16] The study examined 182 hung trials, 77% of which were hung on all charges and the remaining 23% hung on some of the charges. The study found that the average length of hung trials was 6.6 days compared to 4.5 days, and 82% were listed for a retrial. Trials held in a Sydney metropolitan court were 3.8 times more likely to end with a hung jury than trials

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14 Ibid, p 3.

15 New Zealand Law Commission, *Juries in Criminal Trials: Part Two*, Preliminary paper 37 – volume 2, November 1999.

16 Baker J, Allen A and Weatherburn D, 'Hung juries and aborted trials: an analysis of their prevalence, predictors and effects', *Crime and Justice Bulletin*, No 66, March 2002.

held in the country. It was suggested that this might be due to the more diverse pool from which jurors in the Sydney metropolitan area were drawn, as well as the fact that the more complex cases were often held in Sydney. The study also found that longer trials were more likely to be hung, with trials of four or more days at least three times more likely to be hung than trials of one to three days. The authors of the study suggested that the larger the volume of evidence and the greater its complexity, the more likely jurors would be not to agree on its interpretation and implications.

However, the study also indicated that hung juries were not related to:

- the number of counts on which an accused was tried;
- the type of offences for which the accused was tried;
- the number of accused tried;
- the bail status of the accused;
- whether an interpreter was required for the trial;
- whether a voir dire[17] or any legal argument took place during the trial;
- the judge's years of experience;
- the number of times a case had been listed for trial; or
- whether the case had been transferred from another venue.

2.2 Examples of hung juries in NSW

There have been a number of high profile criminal trials that experienced a hung jury, including the 1991 trial of Joh Bjelke-Petersen for perjury. Chesterman has observed:

> From time to time, the incidence of hung juries in trials where no majority verdict is allowed prompts calls for the introduction of majority verdicts in those jurisdictions which do not permit them. A familiar reason advanced is the waste of criminal court time caused by the need to retry cases that would have been resolved the first time around if majority verdicts were permitted.[18]

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17 A voir dire, or trial within a trial, is 'a hearing where the admissibility of evidence, or the competency of a witness or juror is examined': *Butterworths Legal Dictionary*, p 1250. The voir dire should be conducted in the absence of the jury. See section 189 *Evidence Act 1995* (NSW).

18 Chesterman M, 'Criminal trial juries in Australia: from penal colonies to a federal democracy', in Vidmar N (ed) *World Jury Systems*, Oxford University Press, New York, 2000, p 154.

Recent trials in NSW that attracted much publicity and ended with a hung jury include:

- The 1996 trial of Hakki Souleyman for the murder and manslaughter of Toula Soravia.[19]

  The original trial of Hakki Souleyman for the murder and manslaughter of service station owner Toula Soravia resulted in a hung jury with one juror allegedly dissenting from a verdict of guilty. Souleyman was subsequently retried and found not guilty of murder.[20]

- The trial of Phuong Ngo for conspiracy to murder John Newman MP.[21]

  Phuong Ngo, the former mayor of Cabramatta, was convicted in 2001 on charges of conspiracy to murder John Newman MP after two previous attempts led to an aborted trial and a hung jury. The hung jury resulted after a 13 week trial.

- The 2005 trial of Bruce Burrell for the kidnapping and murder of Kerry Whelan.

  In November 2005, the 10 week trial of Bruce Burrell for the kidnapping and murder of Kerry Whelan resulted in a hung jury. There have been media reports of allegations that only one or two jurors dissented from a guilty verdict.[22] The case is to be retried in 2006.

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19 NSW Law Reform Commission, above n 10, p 9.

20 Iemma M, *NSWPD*, 17/4/97, p 7730.

21 NSW Law Reform Commission, above n 10, p 8.

22 'Majority verdicts for murder cases', *The Australian*, 10/11/05, p 3; 'Burrell jury frustrated, claims juror', *Sydney Morning Herald*, 4/11/05, p 1.

3 MAJORITY VERDICTS

The current proposal for majority verdicts in NSW, as announced by the Attorney General, the Hon Bob Debus MP, would allow 11:1 verdicts for either conviction or acquittal, after the requisite period of time is spent in deliberation. Like the Northern Territory, majority verdicts would be permitted for murder trials (unanimity is still required in other states in relation to a conviction for murder). Mr Debus believes that 'the introduction of majority verdicts is a practical and workable step forward in resolving the issue of hung juries'.[23] Whilst the proposal does not follow the recommendation of the NSW Law Reform Commission that the requirement of unanimity be retained (see section 5.8.1), Mr Debus stressed that the Commission's advice led the Government to restrict majority verdicts to the dissent of one juror, rather than allowing 10:2 decisions as are permitted in some other jurisdictions in Australia. The announcement met with a mixed response from members of the legal profession and the public.[24]

There have been a number of attempts since the mid 1990s to introduce majority verdicts for criminal trials in NSW. Andrew Tink MP of the NSW Opposition has been at the forefront of this movement. The Jury Amendment (Majority Verdicts) Bill 1996 proposed to insert a section 55F into the *Jury Act 1977* to allow majority verdicts of 11:1 in criminal trials. It also proposed to insert section 56 to empower a court to discharge a jury after it had been deliberating for six hours, if it was unlikely that the jury would be able to reach either a unanimous or majority verdict. The Opposition, however, did not favour majority verdicts of 10 out of 11 or 10 out of 12 as it was seen as facilitating the collective reasonable doubt of the jury.[25] The bill lapsed with the end of session.

The Jury Amendment (Dissenting Juror) Bill 2000 was introduced by Kerry Chikarovski MP on behalf of the Opposition. The bill sought to make similar changes to those proposed by Andrew Tink in 1996. In the second reading speech on the bill, Mrs Chikarovski noted:

> The Opposition sees it as a major flaw that one dissenting voice can have the final say and, in effect, overrule 11 others and decide how a case concludes. An 11 to one system of verdicts will remove the expense and inconvenience of hung juries unable to reach a unanimous decision and at the same time the bill will ensure that the safeguard of reasonable doubt remains firmly in place.[26]

The bill was defeated on party lines.

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23 Debus B, 'NSW to introduce majority verdicts', *Media Release*, 9/11/05.

24 See, for example: Brown D, 'Majority verdicts: a poor judgement', *Sydney Morning Herald*, 10/11/05, p 11; 'Law waves goodbye to 12 angry men', *Sydney Morning Herald*, 10/11/05, p 1; 'Government verdict shakes up NSW jury system', *Australian Financial Review*, 10/11/05, p 10; 'Majority verdicts for murder cases', *The Australian*, 10/11/05, p 3; 'The odd person out', *The Australian*, 15/11/05, p 15; 'Majority rules', *Daily Telegraph*, 10/11/05, p 30.

25 Tink A, *NSWPD*, 19/9/96, p 4380.

26 Chikarovski K, *NSWPD*, 17/8/00, p 8309.

The most recent bill proposing the introduction of majority verdicts is the Jury Amendment (Majority Verdicts) Bill 2004, which was introduced by Andrew Tink on 21 October 2004. The contents of the bill are similar to those of the 1996 and 2000 bills.

4 POSITION ADOPTED IN VARIOUS JURISDICTIONS

Whether jury decisions in criminal trials are to be unanimous or by majority varies according to jurisdiction. This section outlines the approach adopted in each of the states and territories in Australia. It also briefly surveys the use of majority verdicts in other countries.

For a comprehensive overview of the law as it relates to the verdicts of juries in both civil and criminal trials in the states and territories of Australia see *Trial by Jury: Recent Developments* by Rowena Johns, NSW Parliamentary Library Briefing Paper No 4/05, pp 48-50.

4.1 Australia

4.1.1 Unanimous verdicts

Decisions by juries for criminal trials in NSW must be unanimous. Section 56 of the *Jury Act 1977* (NSW) allows a jury in criminal proceedings to be discharged if the court finds them unlikely to agree on a verdict. Majority verdicts are not accepted for criminal trials in Queensland[27] and the Australian Capital Territory[28]. Unanimous verdicts are also required in relation to indictable Commonwealth offences as a result of the High Court decision in *Cheatle v The Queen* [29].

Cheatle v The Queen concerned the criminal trial of Mr and Mrs Cheatle for conspiracy to defraud the Commonwealth. The matter was tried in South Australia, a jurisdiction in which majority verdicts are permitted. It eventually came before the High Court regarding the question of whether section 80 of the Constitution, which directed that a trial of an indictable Commonwealth offence be by jury, included the requirement that the decision of the jury be unanimous.[30]

The High Court noted that at the time of Federation the common law institution of trial by jury had been adopted in all of the Australian colonies as the method of trial for serious criminal offences. Section 80 accordingly referred to that institution. The Court also observed that it had 'long been settled under the common law that a verdict of guilty could only be returned by a criminal jury by the agreement or consensus of all the jurors'.[31] The Court discussed the history of the requirement of unanimity, which was established in *Anonymous Case* (1367) 41 Lib Ass 11, and claimed:

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27 Section 59 *Jury Act 1995*.

28 Section 38 *Juries Act 1967*.

29 (1993) 177 CLR 541

30 Section 80 states: 'The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes'.

31 At 550.

> It follows from what has been said above that the history of criminal trial by jury in England and in this country up until the time of Federation establishes that, in 1900, it was an essential feature of the institution that an accused person could not be convicted otherwise than by the agreement or consensus of all the jurors…. In the context of the history of criminal trial by jury, one would assume that s 80's directive that the trial to which it refers must be by jury was intended to encompass that requirement of unanimity.[32]

As well as *history*, the Court believed that *principle* supported the essential nature of unanimity. The Court saw unanimity as having the authority of settled doctrine, having been around since the fourteenth century. They also referred to unanimity as a reflection of 'a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given the benefit of any reasonable doubt'.[33] The Court saw majority verdicts as suggesting that a reasonable doubt did exist, and that there was accordingly a greater risk of conviction of the innocent.

Finally, the Court referred to *authority* as supporting the necessity of unanimity. Whilst the Court accepted that no actual decision of the Court established that s 80 of the Constitution required a unanimous verdict, the Court concluded that 'the clear weight of authority supports the conclusion that the requirement of unanimity is an essential feature of the institution of trial by jury adopted by s 80'.[34]

The Court did acknowledge the existence of a number of arguments against the finding of unanimity including:

1. There were some undesirable characteristics of trial by jury in 1900.

2. Unanimity was not necessary in the case of civil juries in some Colonies.

3. Arguments of convenience.

However, each of these positions was dismissed. Unlike the changes that had been made to the characteristics of a trial by jury, such as allowing women to serve as jurors, the Court believed that 'to abrogate the requirement of unanimity involves an abandonment of an essential feature of the institution of trial by jury'.[35] The Court also saw a difference between civil and criminal juries, in that civil trials did not rely on proof beyond reasonable doubt. Nor did the Court believe that considerations of convenience favoured the abolition of unanimity.

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32 At 552.

33 At 553.

34 At 554.

35 At 560.

Therefore, the High Court concluded that:

> history, principle and authority combine to compel the conclusion that s 80's guarantee of trial by jury precludes a verdict of guilty being returned in a trial upon indictment of an offence against a law of the Commonwealth otherwise than by the agreement or consensus of all the jurors.[36]

4.1.2 Majority verdicts

Majority verdicts are permitted in civil trials in all states and territories that still allow a jury in civil matters (South Australia and the ACT do not have civil juries). South Australia, Western Australia, the Northern Territory, Tasmania and Victoria also allow majority verdicts in criminal trials provided certain conditions are met, as detailed in the table below. Majority verdicts were introduced most recently in Victoria in 1994, in response to the government's belief that unanimous verdicts were a potential source of expense and unfairness in the case of a dissenting juror. Majority verdicts were seen to 'strike an appropriate balance between the principle that guilt should be determined beyond reasonable doubt and the need to manage courts efficiently and fairly'.[37] According to the Attorney General for NSW, the Hon Bob Debus MP, 'the advice the Government has received strongly indicates that the systems in those other States operate fairly and are regarded as an unexceptional part of the legal system in those places'.[38]

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36 At 562.

37 Plowman S, *VPD(LA)*, 20/10/93, p 1157.

38 Debus B, *NSWPD*, 9/11/05, p 19357.

Jurisdictions in which majority verdicts are permitted in criminal trials

Year introduced	Jurisdiction	Legislation	Details
1927	South Australia	Section 57 *Juries Act 1927*	A majority verdict (of at least 10 jurors, except where the jury consists of 10 jurors in which case a verdict of nine of the jurors will suffice) is permitted if the jury has deliberated for at least four hours, except in relation to a verdict of guilty of murder or treason.
1936	Tasmania	Section 48 *Jury Act 1899*	Majority verdicts of 10 jurors are permitted where the jury has deliberated for two hours. However, they are not permitted in relation to a verdict of guilty of treason, murder or a crime punishable by death.
1960	Western Australia	Section 114 *Criminal Procedure Act 2004*	Majority verdicts (10 or more jurors) are permitted, except in relation to a charge of wilful murder or murder, after the jury has deliberated for at least three hours.
1963	Northern Territory	Section 368 *Criminal Code Act*	Majority verdicts (10 or more jurors, except where the jury consists of 10 jurors in which case nine jurors are required to agree) are permitted once the jury has deliberated for at least six hours.
1994	Victoria	Section 46 *Juries Act 2000*	Majority verdicts may be permitted (except in relation to murder, treason, trafficking a large commercial quantity of drugs, or the cultivation of a large commercial quantity of narcotic drugs) after the jury has deliberated for at least six hours. Only one juror is allowed to dissent from the verdict (but no less than nine out of 10 jurors).

As revealed in the table, majority verdicts are only permitted in Australia after the jury has deliberated for a minimum period of between two and six hours. No jurisdiction permits more than two jurors to dissent. The offences in relation to which majority verdicts are available also differ, with all jurisdictions, except the Northern Territory, preventing their use for convictions for murder.

4.2 International

Majority verdicts feature in a number of international jurisdictions including England and Wales, Scotland, Ireland, France and in some US states. They are not permitted in Canada or New Zealand, although a bill currently before the New Zealand Parliament proposes their introduction. Duff has highlighted the benefits of considering the position of other legal systems as:

> What is regarded in one jurisdiction as the only possible or acceptable way of doing something is often revealed to be pure preconception. In other words, the comparative study of law can act as a balance to the unconscious ethnocentrism often displayed in legal and political ideology.[39]

[39] Duff P, 'The Scottish criminal jury: a peculiar institution', in Vidmar N (ed) *World Jury Systems*, Oxford University Press, New York, 2000, p 249.

4.2.1 New Zealand

Unanimous verdicts are currently required in criminal trials in New Zealand. However, the issue of majority verdicts was recently considered by the New Zealand Law Commission as part of its inquiry into juries in criminal trials. The Commission noted that in October 2000 the rate of hung juries was 8.7% (13.1% for the High Court and 7.8% for the District Court).[40] The high rate led the Commission to support the introduction of majority verdicts. It recommended:

> Majority verdicts of 11:1 should be introduced. They should be available for both acquittals and convictions, and in all cases, including murder. The jury should be required to deliberate for at least four hours before being permitted to return a majority verdict. The fact that a verdict has been reached by majority will be known only to the jury.[41]

The Commission believed that allowing one dissenting juror would overcome the problems caused by a rogue juror. It also argued that there are no principled grounds for drawing a distinction between the different offences for which a majority verdict will be allowed – if majority verdicts are not safe then they should not be permitted for any offence.

The Criminal Procedure Bill 2005 (a government bill) is currently before the New Zealand Parliament having been introduced on 22 June 2004. The key change proposed by the bill in relation to the *Juries Act 1981* is to allow majority verdicts of 11:1 in criminal cases provided the jury has deliberated for a minimum of four hours. The Law and Order Committee reported on the bill on 29 July 2005 and noted that the proposal both corresponded with the recommendation of the New Zealand Law Commission in *Juries in Criminal Trial* and had clear support within the legal profession.[42] In response to concerns that a change to majority verdicts would undermine the standard of proof of beyond reasonable doubt, the Committee argued that, 'majority verdicts will allow dissent to be registered, and produce a more honest result. A single juror may otherwise be pressured by the 11 others to return a verdict against his or her conscience'.[43] It also stressed that 'majority verdicts uphold public confidence by making bribery or intimidation of jurors more difficult'.[44]

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40 New Zealand Law Commission, *Juries in Criminal Trials*, report 69, February 2001, p 161.

41 Ibid, p 168.

42 New Zealand, Law and Justice Committee, *Criminal Procedure Bill: Report*, p 23.

43 Ibid.

44 Ibid, p 24.

4.2.2 England and Wales [45]

The *Criminal Justice Act 1967* removed the requirement of unanimity in jury verdicts in England and Wales. Majority verdicts of 10:2 were subsequently accepted. Lloyd-Bostock and Thomas note that there are various opinions as to why majority verdicts were introduced including: to prevent criminals escaping conviction by either bribing or intimidating a juror; allowing the views of extremists to be discounted; and to save the expense of retrials.[46] Majority verdicts are relatively common in England and Wales – 23% of defendants convicted in the Crown Court in England and Wales after pleading not guilty were convicted by a majority verdict in 2004.[47]

4.2.3 Scotland

Scotland differs from other jurisdictions in a number of ways – juries consist of 15 jurors and majority verdicts have always been accepted. A simple majority of 8:7 is all that is required, thus hung juries are not possible. Juries do not have to initially attempt to reach a unanimous verdict and they also have a choice of three verdicts: guilty; not guilty; or not proven. It has been argued that the requirement of proof beyond reasonable doubt is upheld in Scotland by requiring corroboration of the Crown case and also by the provision of a not proven verdict.[48]

4.2.4 Ireland

Majority verdicts are permitted in criminal trials in Ireland provided at least 10 of the 11 or 12 jurors agree and have deliberated for at least two hours.[49]

4.2.5 France [50]

Whilst the legal system in France is *significantly* different to Australia, being a civil law as opposed to common law jurisdiction, it provides an interesting contrast to Australia and is useful in terms of illustrating an alternative approach to a requirement of unanimity. However, it must be stressed that its inclusion in this paper is limited to this purpose.

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45 Lloyd-Bostock S and Thomas C, 'The continuing decline of the English jury', in Vidmar N (ed) *World Jury Systems*, Oxford University Press, New York, 2000, pp 53-91.

46 Ibid, p 86.

47 United Kingdom, Department for Constitutional Affairs, *Judicial Statistics Annual Report 2004*, p 91.

48 Duff, above n 39, p 270.

49 Oasis, Information on Public Services, 'Functions and duties of a jury in Ireland', http://oasis.gov.ie/justice Accessed 1/12/05.

50 McKillop B, 'What can we learn from the French criminal justice system?', *Australian Law Journal*, 76, January 2002, pp 49-72.

In France, eight out of 12 jurors must agree on any finding against the accused. According to McKillop, the debate in France is not whether unanimity should be required but rather whether there should be a return of the simple majority.[51] It is noteworthy that the accused is acquitted if the numbers required for a conviction are not achieved. This completely avoids the problem of hung juries. McKillop suggests that this might be an option for reducing the number of hung juries in Australia and the associated expense and delay. Acquittals could be decided by a majority verdict, whilst retaining unanimity for a finding of guilt. According to McKillop: 'This should significantly reduce the number of hung juries without prejudice to existing requirements for convictions'.[52]

51 Ibid, p 66.

52 Ibid.

5 ARGUMENTS FOR UNANIMITY

Many arguments have been advanced in support of a requirement of unanimity. This section discusses some of the most common ones, as well as noting a sample of organisations and prominent individuals that continue to support unanimous verdicts.[53]

5.1 It upholds the requirement of proof beyond reasonable doubt

The standard of proof in a criminal trial is beyond reasonable doubt. Unanimous verdicts require every juror to be convinced of the guilt of the accused before he or she can be convicted. Allowing a juror to dissent from a verdict of guilty means that at least one juror had a reasonable doubt, which can create uncertainty in relation to the conviction. Requiring unanimity avoids speculation as to the reasons behind the dissent of a juror. The fact that jurisdictions in Australia that permit majority verdicts for criminal matters do not allow them in murder trials (except for the Northern Territory) also suggests some unease with majority verdicts.[54]

5.2 It facilitates the participation of jurors and enhances deliberation of the issues

When unanimity is required, the opinion of every juror must be sought and considered, as the agreement of each person is needed before a verdict may be reached. This is thought to allow for a more thoughtful deliberation of the issues, as discussion cannot cease as soon as the requisite number is achieved nor may an alternative view be simply dismissed. According to the NSW Law Reform Commission:

> Consistent minority dissent has been shown to widen the range of considerations in jury deliberations, stimulate divergent thinking along with the consideration of multiple perspectives, and aid the quality of decision-making and performance. This suggests that minority dissent assists in the detection of truth and in finding creative solutions to problems.[55]

A more thorough consideration of the issues is also likely to reduce the likelihood of a wrongful conviction.

The 1986 report of the NSW Law Reform Commission highlighted that the rate of majority verdicts in the UK had trebled since their introduction in 1967. The Commission argued:

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53 The opinions summarised in sections five and six of this paper have been previously canvassed in various papers including: NSW Law Reform Commission, *Majority Verdicts*, Report 111, August 2005, pp 41-58; *Trial by Jury: Recent Developments* by Rowena Johns, NSW Parliamentary Library Briefing Paper No 4/05, pp 46-47; New Zealand Law Commission, *Juries in Criminal Trials*, Report 69, February 2001, pp 158-162; *Majority Jury Verdicts* by Gareth Griffith, NSW Parliamentary Library Briefing Paper No 6/96, pp 6-8; NSW Law Reform Commission, *The Jury in a Criminal Trial*, Report 48, March 1986, pp 143-155.

54 NSW Law Reform Commission, above n 10, p 43.

55 Ibid.

> Unanimity not only ensures that the minority viewpoint is heard, it gives people in the minority a vote which has a real value. The requirement for unanimity therefore enhances the representative character of the jury by ensuring that participation by individual citizens on the jury is real rather than illusory.[56]

A rogue juror who refuses to cooperate and consider the views of others hampers the deliberations of the jury. Nonetheless, the NSW Law Reform Commission concluded in its 2005 report that:

> The blanket introduction of majority verdicts to enable the views of one or two jurors to be overlooked in every case, to redress a problem that occurs in a handful of cases is, in our view, an inappropriate solution to an ill-defined problem.[57]

5.3 Hung juries are relatively infrequent

Hung juries occur relatively infrequently when considered in the context of all criminal matters. Not all criminal matters proceed to a trial by jury – less than 1% of all criminal cases in Australia in 2003-04 were determined by jury trial, and only 8% of these resulted in a hung jury.[58] The juries that were hung might have had anywhere from one to six dissenting jurors. The proportion of juries that are hung with only one juror is therefore likely to be small. Hung juries will continue to occur even if majority verdicts of 11:1 are permitted. The NSW Law Reform Commission believes that less than half of all juries that are hung would be affected by the introduction of majority verdicts, which suggests that the impact of majority verdicts may not be as great as desired.[59] The Commission concluded that 'while the implementation of measures aimed at reducing the number of hung juries is a valid and worthwhile goal, it is unlikely that any strategy, short of introducing majority verdicts based on a bare majority of a single vote, would completely eliminate hung juries'.[60]

Studies have found that juries that commenced deliberations split either 10:2 or 11:1 are usually able to achieve unanimity, whereas those who started 7:5 or 6:6 will generally not be able to reach a conclusion even if majority verdicts are permitted.[61] Cameron, Potter and Young considered the situation in New Zealand and noted:

> The problem in assessing the merits of majority verdicts is that we have little reliable or unambiguous evidence on the nature of hung juries or the reasons why

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56 NSW Law Reform Commission, *The jury in a criminal trial*, report 48, 1986, p 153.

57 NSW Law Reform Commission, above n 10, p 56.

58 Ibid, p 44.

59 Ibid, p 56.

60 Ibid, p 55.

61 Ibid, p 53.

> they may be increasing. Majority verdicts are often mooted on the assumption that hung juries result from the obstinacy of one or two irrational 'rogue' jurors who hold out against the reasoned views of the majority. That assumption, however, is unproven. If it is instead the case that minority jurors rarely stick to their view without some initial support and that hung juries usually occur when there is a substantial division of initial opinion amongst jurors, the case for majority verdicts becomes considerably weaker.[62]

5.4 There may be good reasons for disagreement

The NSW Law Reform Commission has highlighted the tendency to label any dissident as a rogue juror, irrespective of whether or not he or she had logically considered the evidence. This implies that 'if a view is held by 11 out of 12 people, then that view must be right, and it is legitimate to disregard the opinion of the remaining juror as not being based on reason'.[63] A number of studies have found that the incidence of the rogue juror is rather low. A joint research project on jury decision-making in New Zealand analysed a sample of 48 trials.[64] Five resulted in a hung jury, two of which were directly attributable to a juror who refused to consider a guilty verdict. However, in the remaining three cases, the jury began their deliberations fairly evenly divided. The jurors in the minority were able to provide a clear and reasonable rationale for their decision.

5.5 Juror corruption is not a major issue in NSW

Some supporters of majority verdicts argue that unanimity increases the chances of juror corruption as each juror may potentially cause the jury to be hung as a result of improper influence. The 1986 report of the NSW Law Reform Commission hypothesised that if juror corruption was a significant cause of hung juries then the following should also feature:[65]

- A higher proportion of disagreements in the trial of wealthy or organised criminals who would be more likely to succeed in corrupting a juror.
- Further disagreement at retrials where the original jury failed to agree. In other words, if corruption does occur, it would usually persist in the same cases.
- A high number of convictions at retrial, indicating that the failure to agree was the result of one juror corruptly holding out for acquittal.

However, in relation to Australia, the Law Reform Commission concluded that:

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62 Cameron N, Potter S and Young W, 'The New Zealand jury: towards reform', in Vidmar N (ed) *World Jury Systems*, Oxford University Press, New York, 2000, p 202.

63 NSW Law Reform Commission, above n 10, p 9.

64 New Zealand Law Commission, above n 15.

65 NSW Law Reform Commission, above n 56, p 149.

> None of these has been demonstrated to be features of the criminal justice system at present. We reiterate the principle stated earlier that the onus of showing the need for change, particularly to long established rules, is on the proponent of change. There is no evidence to show that corruption of jurors operates as a cause of jury disagreements in New South Wales at present. There is, accordingly, little basis for the argument that abolition of the requirement for unanimity will reduce corruption.[66]

5.6 Majority verdicts do not eliminate all of the pressures on jurors

A juror may experience various pressures to agree with the remainder of the jury and thus ensure a unanimous verdict. This pressure may come from other members of the jury, the public, or from a desire to not waste the time and money of those involved, amongst other things. The New Zealand Law Commission noted that the introduction of majority verdicts would not entirely eliminate the pressures on jurors. It highlighted:

> Where there is division of opinion within a jury, it is frequently the case that juries begin their deliberations with four or more dissenters from the majority opinion. Thus, the introduction of majority verdicts would simply change the threshold at which the pressure on minority jurors came into play. While one or two could avoid compromising their principles, the remainder would be under exactly the same pressure as currently exists to change their mind.[67]

5.7 Unanimity is consistent with indictable Commonwealth offences

As discussed earlier in this paper, the High Court has held that the guarantee in section 80 of the Constitution of a trial by jury in relation to an indictable Commonwealth offence includes a requirement of unanimity. Some matters involve both state and federal offences, which may complicate the experience of a jury in a jurisdiction that permits majority verdicts.

5.8 Some opinions in support of unanimity

5.8.1 New South Wales Law Reform Commission

The NSW Law Reform Commission recently released its report on majority verdicts.[68] The terms of reference required the Commission to inquire into:

- Arguments for and against preserving the unanimity rule;
- The incidence of hung juries in NSW and the possible effect of majority verdicts on hung juries;

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66 Ibid.

67 New Zealand Law Commission, above n 15, p 72.

68 NSW Law Reform Commission, above n 10.

- The operation of majority verdicts in other Australian and international jurisdictions;
- The advantages and disadvantages of different models for majority verdicts currently operating in other jurisdictions;
- Whether any other procedures or measures could decrease the incidence of hung juries in NSW; and
- Any other related matter.

The Commission concluded that the case for the introduction of majority verdicts was not sufficiently made out, as it believed that the arguments for the preservation of unanimity continued to outweigh those in favour of majority verdicts. Accordingly, the first recommendation of the Commission was for the retention of the system of unanimity (a report of the Law Reform Commission from 1986 had similarly recommended the preservation of unanimity).[69] Nonetheless, the Commission also suggested that empirical studies be conducted into 'the adequacy, and possible involvement, of strategies designed to assist the process of jury comprehension and deliberation'. This resulted from its belief that:

> We simply do not know enough about how actual juries really deliberate and why they reach the decisions they do. While studies have shown *when* juries are likely to hang, they have revealed only limited insight into *why* some juries remain deadlocked. Until more information is uncovered as to the problems that need to be addressed, the introduction of majority verdicts would be of limited value.[70]

According to the Law Reform Commission:

> The strength of the jury is based on the coming together of 12 individuals, each with his or her own beliefs, values and experience, to judge the guilt or innocence of one or more of their peers. Where each of those 12 individuals reaches a conclusion based on a genuine assessment of the evidence, each one of those 12 views needs to be respected. Where one or two of these views can be ignored because they differ from the rest, then the true significance of the jury as an instrument of peer judgment is lost.[71]

5.8.2 Representatives of the legal profession

John North, former President of the Law Society of NSW, has argued that the requirement of unanimity should continue, describing it as one of the safeguards of the right result. He

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69 NSW Law Reform Commission, above n 56.

70 NSW Law Reform Commission, above n 10, p 83.

71 Ibid, p 56.

highlighted the current movement for national uniformity in relation to the law, which he believes would be inconsistent with the introduction of majority verdicts in NSW, as unanimity is guaranteed at the Commonwealth level by the High Court decision of *Cheatle*.[72] The current President of the Law Society, John McIntyre, believes that a change to majority verdicts would 'water down the effectiveness of the jury system'.[73] He was reported in *The Australian* as supporting unanimity as it upheld the requirement of proof beyond reasonable doubt.[74]

Ruth McColl, former President of the NSW Bar Association, has argued:

> Adherence to the principle that jurors' decisions in criminal trials should be unanimous is at the heart of the administration of criminal justice. The jury is representative of the community at large. It is only if that community can be unanimously persuaded of guilt beyond reasonable doubt that justice can be seen to be done. Anything else is second class justice, a consolation prize, if you will.[75]

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72 North J, 'President's message: the jury system', *Law Society Journal*, 38(5), June 2000, p 5.

73 'Law waves goodbye to 12 angry men', *Sydney Morning Herald*, 10/11/05, p 1.

74 'Majority verdicts for murder cases', *The Australian*, 10/11/05, p 3.

75 McColl R, 'Let justice run its course', *Sydney Morning Herald*, 22/5/00, p 19.

6 ARGUMENTS FOR MAJORITY VERDICTS

This section considers the various arguments that have been made in support of majority verdicts in criminal trials. The statements of some prominent persons advocating the introduction of majority verdicts are also included.

6.1 It reduces the number of hung juries

The waste of time and money associated with hung juries, not to mention the emotional cost for victims and witnesses, is reduced with majority verdicts. This factor is often argued in relation to sexual assault victims who may need to serve as witnesses again when a matter is retried.[76] The cost of another trial can be significant. However, the prosecution may in some cases decide to not proceed with the matter if they believe that it is unlikely that a conviction will be secured. Public dissatisfaction with the criminal justice system may result.

6.2 It overcomes the problem of the rogue or perverse juror

The NSW Law Reform Commission defined a 'rogue juror' as 'someone who enters the jury room having prejudged the verdict, and stubbornly refuses to participate in the debate or listen to the evidence or the views of the other jurors'.[77] A rogue juror through the power of veto can cause a jury to be hung. An incidence of the difficulties caused by a rogue juror occurred in relation to the 1991 trial of Joh Bjelke-Petersen for perjury.

6.3 Compromise verdicts are avoided

Some believe that verdicts are often not as unanimous as may appear, as jurors who disagree on the evidence may conform to the will of the majority to avoid a hung jury and the associated inconvenience. Jurors may also compromise on some charges in order to have their way on others. Members of the jury may exert pressure on other jurors to agree with the majority, with some alleged examples of this aired on Radio National on 7 November 2005.[78] The NSW Law Reform Commission noted that a dissenting juror might comply with the will of the majority as a result of attrition, harassment or exhaustion.[79]

The New Zealand Law Commission found in its study of juries in criminal trials that jurors were pressured in four major ways when deliberating:[80]

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76 However, it should be noted that section 306B was recently inserted into the *Criminal Procedure Act 1986* (NSW) by the *Criminal Procedure Amendment (Evidence) Act 2005* (NSW) and allows a record of the original evidence of the complainant to be tendered when a new trial is ordered following an appeal against a conviction of a prescribed sexual offence, provided certain conditions are met.

77 NSW Law Reform Commission, above n 10, p 9.

78 Radio National, 'Majority jury verdicts', *ABC Radio*, 7/11/05.

79 NSW Law Reform Commission, above n 10, p 48.

80 New Zealand Law Commission, above n 15, p 64.

1. Pressure from other jurors to agree to the majority view.

2. Jurors' own feelings of obligation to reach an agreed verdict.

3. Papadopoulos directions.[81]

4. Time constraints, poor facilities and late sittings exacerbated the other pressures.

6.4 The possibility of juror corruption is reduced

Juror corruption may be a concern in trials involving organised crime. It is thought that it is easier to detect attempts to bribe or corrupt multiple jurors, as would be required should majority verdicts be permitted, than in cases subject to a unanimous decision where only one juror is needed to hang the trial. The prevention of juror corruption was one of the main arguments for introducing majority verdicts in England and Wales.

6.5 It allows a more democratic decision-making process

Majority decisions are characteristic of numerous institutions. For example, parliamentary debates and judgments in appeal courts are determined by the will of the majority. Therefore, the requirement of unanimity for the jury is something of an anomaly. Majority verdicts prevent the will of one juror overriding the wishes of the remainder.

6.6 Majority verdicts are quicker and easier

Majority verdicts allow the jury to cease their deliberations once the requisite number of jurors agree with the decision. Studies have found that there is little difference in the outcome of a trial whether decided by unanimous or majority verdict, the only distinction being the amount of time consumed.[82] Establishing a minimum deliberation time before a majority verdict will be accepted may also facilitate the proper consideration of the relevant issues.

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81 In New Zealand, if a jury is having difficulty reaching a decision, the judge may direct them to try again to reach a verdict. 'The jury is told that if it is necessary to discharge them a new trial will ordinarily follow; that they have a duty to listen to and weigh dispassionately one another's view, and that an honestly held view can be honestly changed as a result; and that no juror should vote against his or her conscientious view based on the evidence': New Zealand Law Commission, above n 15, p 65.

82 NSW Law Reform Commission, above n 10, p 50.

6.7 Unanimity is not essential to proof beyond reasonable doubt

A unanimous verdict is only one means of upholding the standard of proof of beyond reasonable doubt. Other considerations are also relevant, and have been noted by Maher:

> it can be said that insisting on an unanimity rule is not always necessary in order to show that the principle of proof of the guilt of the accused beyond reasonable doubt is being taken seriously. For if a jury is large in size and is also representative of the community or society in general, then some relaxation of the rule may not frustrate the purpose of the principle which is to give the accused a right not to be convicted of a charge unless the case against him has been made out at a level of practical certainty. The rule of unanimity may also be relaxed where this right receives adequate protection by other means, such as a rule of corroboration of prosecution evidence. But it can be said that if no such other safeguards exist for an accused then jury verdicts must be unanimous, or be near to unanimity, if the accused's right to proof of his guilt at the level of practical certainty is to be upheld.[83]

Johns has also highlighted that 'reasonable doubt cannot be quantified in a numerical way to mean that 100% of jurors, no matter what the size of the jury, must agree unanimously'.[84] It is arguable that the larger the jury, the less a unanimous finding is necessary.

6.8 It is consistent with civil proceedings

South Australia and the Australian Capital Territory do not permit civil cases to be tried before a jury. However, the remaining states and the Northern Territory not only provide for juries in civil matters, they also allow the jury decision to be determined by the will of the majority. Therefore, it could be argued that the introduction of majority verdicts in criminal trials in NSW would ensure consistency with the current system for civil cases.

6.9 It is consistent with the practice in most Australian jurisdictions

NSW, Queensland and the ACT, together with the Commonwealth, are currently the only jurisdictions to not allow majority verdicts in criminal trials. Majority verdicts have been permitted in South Australia since 1927. Therefore, majority verdicts are not unknown nor untested in the Australian legal system.

Some believe that allowing majority verdicts only complicates the task of the jury in a trial that includes some Commonwealth offences. The jury may be required to reach a unanimous verdict in relation to some offences whilst for others a majority verdict will suffice. Nonetheless, this does not seem to have been much of an issue for juries in those jurisdictions that currently allow majority jury decisions.

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83 Maher G, 'The verdict of the jury', in Findlay M and Duff P (eds) *The Jury Under Attack*, Butterworths, Sydney, 1988, p 49.

84 Johns R, *Trial by Jury: Recent Developments*, NSW Parliamentary Library Briefing Paper No 4/05, p 46.

6.10 Some opinions in support of majority verdicts

6.10.1 Justice John Dunford

A number of interested persons and groups have indicated their support for the introduction of majority verdicts in relation to criminal trials. Justice John Dunford, a past Supreme Court judge, expressed his support of majority verdicts in a presentation in Sydney 2004 on the direction of criminal law.[85] Whilst Dunford J was a firm believer in the jury system for the trial of serious criminal offences, he argued that permitting majority verdicts after a specified deliberation period would result in a much more efficient jury system. Dunford J noted that allowing either a 10:2 or 11:1 majority would avoid new trials 'where the jury is hamstrung by a perverse, disinterested or unreasonable, or simply incompetent juror, where the result of a new trial is going to be that of the overwhelming majority in the original trial'. The comments of Dunford J led the NSW Government to refer the issue of majority verdicts to the NSW Law Reform Commission.[86]

6.10.2 Nicholas Cowdery and Justice Reg Blanch

Others to have voiced their support for majority verdicts include Nicholas Cowdery (Director of Public Prosecutions) and Justice Reg Blanch (Chief Judge of the NSW District Court).[87] Cowdery has stated:

> Majority verdict is my hobby horse… One juror who won't play the game properly can disrupt the entire process by being irrational, pig-headed, and a disruptive individual. Under the system of unanimous verdicts, that person can do something that requires the whole process to go on again. I have letters from jurors – three or four a year – expressing tremendous frustration at not being able to do their job because of one irrational juror. When they're moved enough to write to my office, it suggests that this is something of great importance. Also, [discarding the unanimity requirement] narrows down the possibility of corruption. If you have a lot of money, you may be able to corrupt one juror, and possibly two jurors, but it's hard to see anyone being able to corrupt more than two. The views of the holdout person should always be taken into account, and the rest of the jury should consider them. But the odds of a holdout juror being a hero are pretty slim compared to the odds of the holdout being an obstructive ratbag.[88]

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85 Dunford J, 'Looking forward – the direction of criminal law', Presentation to the Criminal Law Conference 2004, Sydney, 27 July 2004.

86 Carr B, *NSWPD*, 16/9/04, p 11054.

87 Debus B, 'NSW to introduce majority verdicts', *Media Release*, 9/11/05.

88 Knox M, *Secrets of the Jury Room*, Random House Australia, Milsons Point, 2005, p 276.

7 CONCLUSION

Less than 1% of all criminal cases in Australia proceed to a jury trial and only a small proportion of those that do end with a hung jury. The incidence of hung juries in criminal trials will not be eliminated altogether should NSW proceed with the current proposal to introduce majority verdicts – juries with a minority of more than one will continue to be hung. Unanimity will also continue to be required in relation to indictable Commonwealth offences. Nonetheless, advocates of majority verdicts believe that allowing one dissident in the jury will help overcome at least some of the problems and traumas associated with hung juries and the rogue juror.

Barker has warned of the dangers of reducing the role of the jury too quickly:

> New South Wales has the historical distinction of being the only settlement of British people who had to fight for trial by jury. Governments who take it away, bit by bit, pay little regard to history. Trial by jury is becoming more and more a procedure prescribed for the most serious offences. In civil cases it is becoming an historical curiosity. This state of affairs is contrary to the public interest. If we want to preserve the jury as an institution we should protect it more carefully.[89]

However, some see majority verdicts as strengthening the jury system as compromise decisions are avoided, and no one juror has the power of veto. According to Shadow Attorney General, Andrew Tink MP, NSW 'should follow the overwhelming majority of other States that have majority verdicts… we should come into line with them and have the same standard of practical and effective justice in New South Wales that those jurisdictions have'.[90]

If NSW proceeds with allowing majority jury verdicts in criminal trials, Queensland, the ACT and Commonwealth will remain the only jurisdictions that still require unanimity. Whilst the position at the Commonwealth level is the result of the High Court's interpretation of the Constitution and is thus unlikely to change in the immediate future, it remains to be seen what pressure a change to majority verdicts in NSW would exert on the arrangement in Queensland and the ACT.

Whilst majority verdicts are certainly not unknown in Australia, they are generally limited in the offences to which they apply. By allowing majority verdicts for all criminal offences, NSW would be entering less familiar territory. The alterations proposed for NSW would, in one respect, see it simply 'catch up' to the other jurisdictions, yet in another respect, NSW could possibly be a forerunner (with the Northern Territory) of further change in Australia.

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89 Barker, above n 5, p 256.

90 Tink A, *NSWPD*, 21/10/04, p 11816.

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