



NSW LAW REFORM COMMISSION

REPORT 111

Majority Verdicts

August 2005

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NEW SOUTH WALES LAW REFORM COMMISSION

Letter to the Attorney General

To the Honourable Bob Debus MP
Attorney General for New South Wales

Dear Attorney

Majority verdicts

We make this Report pursuant to the reference to this Commission received 17 September 2004.



The Hon Justice Michael Adams
Chairperson

Commissioners

The Hon Justice Michael Adams
Associate Professor Jane Goodman-Delahunty
The Hon Justice David Kirby
Professor Michael Tilbury
Acting Judge Michael Chesterman
Dr Duncan Chappell
Dr Don Weatherburn PSM
Professor Janet Chan

August 2005

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TERMS OF REFERENCE

In a letter to the Commission received on 17 September 2004, the Attorney General, the Hon R J Debus MP asked:

That the NSW Law Reform Commission inquire into and report on whether the unanimity requirement in criminal trials should be preserved in New South Wales.

In undertaking this inquiry, the Commission should have regard to:

- Arguments for and against preserving the unanimity rule;
- The incidence of hung juries in New South Wales and the possible effect of majority verdicts on hung juries;
- 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 New South Wales; and
- any other related matter.

Participants

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

Commissioners

The Hon Justice Michael Adams (Commissioner-In-Charge)

Associate Professor Jane Goodman-Delahunty

The Hon Justice David Kirby

Professor Michael Tilbury

Acting Judge Michael Chesterman

Dr Duncan Chappell

Dr Don Weatherburn PSM

Professor Janet Chan

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RECOMMENDATIONS

RECOMMENDATION 1 - see page 58

The Commission recommends that the system of unanimity should be retained.

RECOMMENDATION 2 - see page 83

The Commission recommends that empirical studies should be conducted into the adequacy, and possible improvement, of strategies designed to assist the process of jury comprehension and deliberation.

1. Introduction

- Unanimity in jury verdicts

UNANIMITY IN JURY VERDICTS

Overview

1.1 In NSW, all members of a jury in a criminal trial must unanimously agree with the decision either to convict or acquit the accused. Where the accused is charged with a number of offences, the jury must unanimously agree on a verdict in relation to each of those charges. Should the jury not be able to reach a unanimous decision (commonly referred to as a “hung jury”), they will be discharged and no verdict can be delivered. As a result, the case will either be retried before a different judge and jury, or the prosecution may decide for various reasons not to pursue the matter any further.

1.2 It is generally considered that the requirement of unanimity results in more hung juries than does the alternative system of requiring only a majority of jurors to agree on a verdict. What constitutes a majority differs between jurisdictions that have embraced the concept, and may also depend on the type of offence being tried.¹

1.3 The inconvenience, cost and delay brought about by hung juries has led some jurisdictions to change to a system of majority verdicts. There have been calls over the years for NSW to follow suit. This Report examines the merits and drawbacks of majority verdicts over the current requirement of unanimity.

Legal basis

1.4 The rule requiring unanimity is an ancient one, with its common law origin able to be traced back to at least the mid-14th century.² The rule is said to have derived from a time when the role of a juror was akin to that of a witness, who would corroborate, or cast doubt upon, the testimony of the accused,

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1. In some jurisdictions, agreement between 11 out of 12 jurors will suffice, in others 10 out of 12 must reach agreement, while in Scotland, a verdict can be delivered on the basis of a bare majority of 7-8 out of 15 jurors: see para 2.16-2.17.
 2. The principle was settled by Thorpe CJ in an *Anonymous Case* (1367) 41 Lib Ass 11, referred to in *Cheatle v The Queen* (1993) 177 CLR 541 at 550.

based upon their personal and local knowledge.³ Historically, the unanimity rule was enforced rather dubiously, with jurors being carted around town in a wagon and starved until they could agree on a verdict.⁴ Thankfully those days have now passed.⁵

1.5 As a common law rule, the requirement of unanimity may be enforced or abrogated by statute.⁶ The *Jury Act 1977* (NSW) (“the Jury Act”) preserves the common law position. Section 56 provides that, “where the jury in criminal proceedings have retired, the court in which the proceedings are being tried may discharge them if it finds, after examination on oath of one or more of them, that they are not likely to agree on their verdict”.

Current practice

Jury trials in perspective

1.6 In considering the arguments for and against the introduction of majority verdicts, it is easy to become immersed in the merits of each issue, while disregarding the overall picture concerning jury trials. In reality, very few criminal charges are prosecuted before a jury. According to the most recent Australian Bureau of Statistics figures, 97% of all criminal cases in Australia in 2003-2004 were prosecuted in the magistrates’ courts, where defendants are tried summarily without a jury. Of the remaining cases adjudicated in the higher courts, more than 80% of defendants pleaded guilty, thus removing the need for a trial by

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3. *Cheatle v The Queen* (1993) 177 CLR 541 at 550; see also Sir P Devlin, *Trial by Jury* (Stevens & Sons Limited, London, 1966) at 48-49.
 4. In *The Queen v Laird* (1870) 9 SCR 131, it was held that a trial judge had erred in allowing a jury, who had deliberated for three hours and acknowledged that they were not likely to reach a verdict, to be provided with refreshments. The prisoner was found guilty, but the mistake of the judge did not invalidate the conviction. See also Devlin at 50-51.
 5. The rule against providing food and libations to jurors was overturned by 46 Vic No 17 s 340 (NSW). The modern equivalent is contained in section 55 of the Jury Act, which provides that a “court on any trial or a coroner holding any coronial inquest may permit the members of the jury to be supplied with such refreshments as the court or the coroner thinks fit at any time after they have been sworn and notwithstanding that they have retired to consider their verdict”.
 6. Except to the the extent to which it is entrenched in relation to Commonwealth offences by s 80 of the Commonwealth Constitution: see para 1.33, 2.8 and 3.17.

jury. This means that in 2003-2004, as few as 0.4% of all criminal cases were determined by jury trial.⁷

1.7 These figures correlate with the latest statistics regarding criminal cases in NSW published by the Bureau of Crime Statistics and Research (“BOCSAR”). Those figures reveal that the great majority of all criminal cases finalised in NSW in 2003 were dealt with by Local Courts, leaving just 2.68% of matters finalised in either the Supreme or District Courts (representing 3,673 out of a total 136,778 matters). Of these, 668 matters (representing 18% of superior court criminal cases, or 0.5% of criminal cases overall) proceeded to a defended hearing, either before a judge and jury, or a judge sitting alone.⁸

1.8 We have been mindful of these statistics in weighing the arguments discussed throughout this Report, and in coming to our conclusions in Chapter 4.

Procedure in jury trials

1.9 Generally, juries in criminal trials consist of twelve people chosen randomly by ballot in open court.⁹ In certain exceptional circumstances, such as where a juror dies or is discharged by the court due to illness or any other reason, trials may continue with fewer than twelve jurors.¹⁰ Should this occur, the remaining jurors must still reach a decision unanimously. Juries determine questions of fact based on the evidence presented during the trial and the testimony of witnesses. In summing up the trial, the judge explains the applicable law to the jury, and instructs them to deliberate on the facts, keeping the relevant law in mind. In NSW, there is no longer a minimum period of time for which a jury in a criminal trial must deliberate before they may be discharged for failing to reach a verdict.¹¹ However, in practice, judges will allow

7. See Australian Bureau of Statistics, *Criminal Courts, Australia* (February 2005, Catalogue no 4513.0): see www.abs.gov.au/ausstats.

8. BOCSAR, NSW *Criminal Court Statistics 2003*, Annual Report, Tables 1.3 and 3.6 (see www.lawlink.nsw.gov.au/bocsar/ll_bocsar.nsf/vwFiles/ccs03.pdf).

9. Jury Act s 19 and s 48.

10. Jury Act s 22. In the case of criminal proceedings, the number of jurors must not be reduced below 10 unless written approval from the prosecutor and the accused is obtained, or where the number remains above 8 and the trial has been in progress for at least 2 months: s 22(a).

11. The Jury Act previously specified a six hour minimum deliberation period for criminal trials. However, this specification was removed in 1987 following a recommendation made by this Commission in its Report

a jury to deliberate for a significant number of hours before questioning them as to their likelihood of reaching a verdict.

1.10 In situations where a jury is having difficulty reaching agreement, the judge will recall them to the court room and give them further directions, usually in the presence of counsel for both sides. The High Court has developed model directions, known as the *Black* directions,¹² for judges to issue to juries that are experiencing difficulty in reaching a decision. According to those directions, a judge should encourage the jurors to deliberate further and consider the evidence and the opinions of other jurors. However, if jurors cannot honestly agree with the conclusions reached by other members of the jury panel, they must decide according to their own view of the evidence.¹³ The judge must not pressure or induce jurors to accept the view of the majority or to compromise their views in any way.¹⁴ Nor should a judge warn a jury that failure to reach agreement would result in “public inconvenience and expense”.¹⁵

Secrecy in the jury room

1.11 Once jury members have been empanelled, significant restrictions are placed on public access to information concerning the identity of individual jurors, and the entire deliberation process. Generally speaking, what goes on in the jury room stays in the jury room. The Jury Act prohibits the disclosure, broadcast or publication of any information revealing the address of, or likely to lead to the identification of, a juror.¹⁶ It is also an offence to harass or solicit information from a past or present juror in order to obtain details of jury deliberations, including statements made, opinions expressed, arguments advanced, or votes cast, in the jury room.¹⁷

on *Criminal Procedure: The Jury in a Criminal Trial* (Report 48, 1986). The six hour minimum deliberation time still applies in relation to coronial inquests: see Jury Act s 59.

12. Formulated in *Black v The Queen* (1993) 179 CLR 44 at 51-52 (Mason CJ, Brennan, Dawson and McHugh JJ). Those directions, and juror reaction to them, are discussed at para 4.53-4.58.
13. *Black v The Queen* (1993) 179 CLR 44 at 51.
14. See R Johns, *Trial by Jury: Recent Developments* (NSW Parliamentary Library Research Service, Briefing Paper 4/05) at para 4.5.
15. *Black v The Queen* (1993) 179 CLR 44 at 51.
16. Jury Act s 68(1) and (3). The prohibition does not apply to the release of information with the consent of a juror, or to specific organisations for the purpose of investigating or prosecuting a contempt of court or an offence relating to a juror or jury: s 68(2) and (4).
17. Jury Act s 68A(1)-(2).

Notwithstanding the prohibition, the Attorney General may authorise information to be solicited from jurors, or may empower the sheriff to release information concerning jurors, to assist in conducting research projects into juries or jurors.¹⁸

1.12 So far as the jurors themselves are concerned, they are prohibited from wilfully disclosing any information as to jury deliberations during a trial or coronial inquest, except with the consent of, or at the request of, the judge or coroner.¹⁹ Nor can anyone, including a juror or former juror, disclose such information for a fee, gain or reward.²⁰ Jurors may, of course, disclose information to each other during the trial.²¹

1.13 In late 2004, amendments were made to the Jury Act aimed at preventing jurors from making their own enquiries into matters surrounding the events of the trial on which they are serving. For example, jurors are now prohibited from visiting the crime scene or conducting Internet searches, as they may obtain inaccurate and prejudicial information which would compromise the fairness or the trial.²² These amendments were precipitated by incidents which lead to the NSW Court of Criminal Appeal overturning two Supreme Court criminal convictions, being of the view that the juries' verdicts were tainted by juror misconduct.²³

1.14 The main reason for maintaining secrecy surrounding all aspects of jury deliberations is to secure the integrity of the administration of justice by enabling jurors to discuss issues freely, knowing that their individual views will not be broadcast publicly. This is particularly important when juries hang, since the hold-out juror or jurors could be subject to pressure and scrutiny from the

18. Jury Act s 68(5) and s 68A(3). Such authorisations have been obtained: for example, by BOCSAR in 1997 (see P Salmelainen, R Bonney and D Weatherburn, "Hung juries and majority verdicts" (1997) 36 *Crime and Justice Bulletin* 1); and during the conduct of a study into how the publication of prejudicial material impacted upon jury deliberations in NSW (see M Chesterman, J Chan, S Hampton, *Managing Prejudicial Publicity* (February 2001, Justice Research Centre, Law and Justice Foundation of NSW) at xiii).

19. Jury Act s 68B(1).

20. Jury Act s 68B(2).

21. Jury Act s 68A(4A) and s 68B(4).

22. Jury Act s 68C.

23. See *R v K* [2003] NSWCCA 406 and *R v Skaf and Skaf* [2004] NSWCCA 37. See also NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 27 October 2004 at 12096.

public, and from the party not favoured by the verdict, if their views were widely known.²⁴

1.15 Juror secrecy also impacts on the nature of empirical studies conducted into jury deliberations, including research into the benefits of majority, as opposed to unanimous, verdicts. Since actual jury deliberations cannot be observed directly, the opportunity to study how real juries reconcile facts and law to reach a unanimous decision, and how they resolve disagreements, is limited. As a result, research studies employ differing methods, such as examining case files, conducting mock trials, using “shadow” juries, or interviewing consenting jurors after the conclusion of the trial and relying on their recollection of events.²⁵ As we point out in Chapter 2 of this Report, there are deficiencies in each of those methodologies. Consequently, caution needs to be exercised when attempting to correlate the findings from these studies with the way in which real juries actually deliberate.²⁶

Notable instances of hung juries

1.16 There have been some infamous examples in Australia of cases in which juries have been unable to reach a unanimous decision, rendering a verdict impossible. Perhaps the most famous example was the trial of former Queensland Premier, Sir Joh Bjelke-Petersen, for perjury in 1991. After deliberating for four days, the jury reported to the judge that they were unlikely to agree on a verdict, and were discharged. The prosecution decided not to proceed with another trial, due to the age and infirmity of the defendant, the difficulty of recalling witnesses from overseas, and the fact that the defendant was no longer in power in Queensland. Media reports later revealed that the jury had been split 11:1. The hold-out juror was not only the foreman of the jury panel, but a former president of the Young National party and a strong supporter of the defendant, who refused to agree with a verdict to convict. Apparently, the remaining jurors were unaware that they could complain to the court regarding the foreman’s lack of impartiality. It would seem that an abuse of the system had

24. See W Young, C Cameron and Y Tinsley, *Juries in Criminal Trials, Part Two: A Summary of Research Findings* (Preliminary Paper 37(2), New Zealand Law Commission: Wellington, New Zealand, 1999) at para 243-247 (hereafter “Young, Cameron and Tinsley, Preliminary Paper 37(2)”).

25. The Commission discusses and explains these methodologies at para 2.26.

26. See para 2.51-2.54.

allowed a “rogue” juror²⁷ to be empanelled and derail the entire trial. This case prompted many calls for reforms to the jury system in Queensland and elsewhere. Not only were unanimous verdicts under scrutiny, but also the selection and empanelling process, the need to provide better instructions to jury members concerning their rights and responsibilities to the court, and restrictions on the public release of information about jury deliberations.²⁸

1.17 NSW has also experienced some notable jury disagreements. The eventual conviction in 2001 of Phuong Ngo, former Mayor of Cabramatta, on charges of conspiracy to murder John Newman, MP, Member for Cabramatta, came after two previous attempts resulted in an aborted trial and a hung jury. During the 13 week trial that resulted in a 10:1 deadlock in May 2000 (one juror having been discharged), it was reported that some jurors were “in tears when their foreman told Justice James Woods that they could not reach a verdict”.²⁹ Once again, this case provoked calls from senior prosecutors to abandon unanimity in favour of majority verdicts to prevent the administration of justice being frustrated in this manner.³⁰

1.18 In 1979, three members of the Ananda Marga sect were tried on a number of charges, including conspiracy to murder Robert Cameron, former leader of a right-wing organisation known as the National Front. At the first trial, the jury was unable to agree on a verdict. The foreman of the jury later revealed that he held grave doubts about the evidence, and could not be persuaded to agree with the decision of the other 11 jurors to convict. The three were convicted at the retrial and sentenced to 16 years imprisonment. However, all three men received an unconditional pardon in 1985,

27. The notion of the “rogue” juror is one of the most cogent arguments advanced by those in favour of majority verdicts, and is discussed in chapter 3.

28. Many of these issues were addressed in the *Jury Act 1995 (Qld)*. Interestingly, despite the high profile nature of the Bjelke-Petersen trial, Queensland did not take the opportunity to introduce majority verdicts, and remains one of the few Australian jurisdictions, along with NSW, to have retained unanimous verdicts.

29. M Knox, *Secrets of the Jury Room: Inside the Black Box of Criminal Justice in Australia* (Random House, Sydney, 2005) at 275.

30. M Tedeschi, “Message from the President” *Newsletter of the Australian Association of Crown Prosecutors* (May 2000(4)) at 2; B Lagan, “When one juror won’t budge” *Sydney Morning Herald* (13 May 2000). See also G Griffith, *Majority Verdicts: Update to 6/96* (Parliamentary Library Research Service, Briefing Paper, 1996) at 3.

after an Inquiry into the convictions discredited much of the evidence on which the Crown case was based.

1.19 The actions of a lone juror again came under scrutiny in the 1996 trial of Hakki Souleyman, charged with murder and manslaughter in relation to the death of Sydney service station owner Toulia Soravia. The jury in Souleyman's first trial was hung 11:1, with one juror refusing to convict. Advocates for majority verdicts seized upon the case to renew the pressure for change. For example, in NSW Parliament, the Hon Andrew Tink, MP, expressed the following view:

It is obvious that the attitude of that one juror was completely irrational. He was not at all concerned about the evidence being led by the prosecution or, for that matter, by the defence. Though 11 jurors were firm in their view that the accused in the case was guilty, the total irrationality of one juror resulted in no verdict being able to be returned.³¹

1.20 However, at the retrial, the jury endorsed the judgment of the hold-out juror by unanimously voting to acquit Souleyman on those particular charges.³² Consequently, and somewhat ironically, the Souleyman case has subsequently been viewed by those in favour of retaining unanimity as a "sobering illustration of the arguments against majority verdicts".³³

A word about "rogue" jurors

1.21 The above examples of hung juries deal with the difficult situation where a single juror holds the contrary view from that of the majority and cannot be persuaded to agree. Interestingly, only one of the examples, (the Bjelke Petersen case), involved a "rogue" juror. The term refers to 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. There is a tendency, however, to label any lone juror who holds a view contrary to the rest of the jury panel as irrational and "rogue", even where that view results from a logical consideration of the evidence. The implication is that, if a view is held by 11 out

31. NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 19 September 1996 at 4380.

32. Souleyman was, however, convicted on other charges relating to events surrounding the death.

33. See NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, 17 April 1997 at 7731.

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.

1.22 The “rogue” juror argument is one of the strongest advanced by those in favour of majority verdicts. It is argued that, by eliminating the need for unanimity, a jury would no longer hang where one of their number refuses to participate. While some argue that majority verdicts would not eradicate hung juries in all cases involving a “rogue” juror, it is likely that the incidence of hung juries would be reduced.³⁴ In the case of a truly “rogue” juror, this outcome would be desirable. Of course, the drawback of a majority verdict system is that it would not only blunt the power of the “rogue” juror. The views of all hold-out jurors, even where genuinely held, would be negated. The above examples indicate that this is not always in the best interests of justice.

1.23 It is one thing to argue that majority verdicts would reduce hung juries by side-stepping “rogue” jurors. However, it does not follow that majority verdicts would rid the jury system of “rogues” altogether. “Rogue” jurors cause problems when they act in isolation, sticking to a verdict option opposed by all other jurors. It is conceivable, however, that other jurors could reach the same ultimate conclusion as the “rogue” via very different logical paths. As we point out in Chapter 2, jury deliberations are complex. While the presence of a “rogue” is never ideal, it will not necessarily result in a hung jury. If all jurors agree with the same verdict option as the “rogue” juror, albeit through consideration and reasoned debate, then a verdict can be delivered, notwithstanding the refusal of the “rogue” juror to participate in the deliberations. Where only some jurors agree, the jury will hang, but this result will not be solely attributable to the “rogue”. Consequently, even if majority verdicts were to be introduced, there is no guarantee that the “rogue” juror element would be eradicated completely.

Calls to consider reform

1.24 Criticism of the unanimity rule is not a new phenomenon, having been described in 1850 as a “preposterous relic of

34. Studies of hung juries have revealed that some jurors apart from the “rogue” had doubts about the evidence, but failed to raise those concerns as it was clear that the jury would not be able to reach a verdict anyway: see para 2.46 and para 3.46.

barbarism”.³⁵ While early criticism needs to be viewed in light of the harsh treatment of jurors in past times, criticism of the unanimity rule continues to gather momentum.

1.25 This Commission considered the benefits of unanimity as opposed to majority verdicts in 1986.³⁶ After reviewing all of the arguments for and against, the Commission concluded that unanimity was the “only appropriate basis for the determination of guilt by a jury”, and did not believe that the need to change the existing rule had been demonstrated. The Commission further argued that, even if such a need did exist, it was not satisfied that the perceived defects in the current system would be overcome by the introduction of majority verdicts.³⁷

1.26 In July 2004, the Hon Justice John Dunford indicated support for the introduction of majority verdicts “after a specified period of deliberation”.³⁸ In September 2004, the then Premier, the Hon Bob Carr, MP, responded in the following terms to a Question Without Notice:

One of the central planks of the New South Wales justice system is unanimous verdicts—long accepted as one of the key guarantees of a fair trial, and certainly the position to which I have always subscribed. But I was interested to hear Supreme Court Justice John Dunford recently make the case for a specific form of majority verdicts..... Given that the last Law Reform Commission report on this issue was back in 1986, the Attorney General and I have agreed that this issue may justify another look.

Certainly in those two decades a lot has changed here and overseas. In New South Wales the percentage of hung juries has more than doubled, from 3.55 per cent in 1985 to around 8 per cent today. Majority verdicts were introduced in Victoria in 1994 for all criminal cases except murder or treason, allowing an 11 to 1 majority if the jury remains deadlocked for six hours. Majority verdicts are also now permitted in Western Australia, South Australia, Tasmania and the Northern Territory, as well as in three American

35. Forsyth, *History of Trial by Jury* (London, 1850) at 245, quoted in Devlin at 49.

36. NSWLRC, *Criminal Procedure: The Jury in a Criminal Trial* (Report 48, 1986) (hereafter Report 48”).

37. Report 48 at para 9.1.

38. The Hon Justice J Dunford, keynote presentation at the Criminal Law Conference. 27 July 2004. Report in *Bar News* (Summer 2004/2005) 46 at 51-52.

States and in the United Kingdom. In fact, in the United Kingdom a 10 to 2 majority verdict may be returned after just two hours of deliberation ending in deadlock.

So there are emerging precedents for majority verdicts and there are questions that need to be answered. Should there be a majority of 10 or 11? Should there be time limits and, if so, how long? Should murder or other serious crimes still require unanimity from the jury? In addition, we must consider the impact of long trials on hung juries. A 1997 study by the Bureau of Crime Statistics and Research [BOCSAR] found that long trials are more likely to end with hung juries, so there may be a problem with jurors becoming confused or tired and that may cause mistrials. We might be able to fix that problem without letting go of the requirement for unanimous verdicts. Interestingly, the same BOCSAR report also found that majority verdicts could result in only very modest savings in court time, which tempers any enthusiasm for majority verdicts. There are arguments on both sides. We do not want to relinquish an ancient institution lightly....³⁹

1.27 In October 2004, the Hon Andrew Tink, MP, introduced a Private Member's Bill into Parliament. The *Jury Amendment (Majority Verdicts) Bill 2004* (NSW) is the latest in a series of attempts by the NSW Opposition to introduce majority verdicts.⁴⁰ The Bill purports to amend the Jury Act to permit majority verdicts on an 11:1 basis after the jury has considered their verdict for a minimum period of at least six hours and are unable to agree on a unanimous verdict. The court would have the discretion to refuse to accept a majority verdict if it appeared that the jury had not deliberated for a reasonable time given the nature and complexity of the proceedings.⁴¹

1.28 Most recently, the former NSW Opposition Leader, the Hon John Brogden MP, promised to introduce a system of majority verdicts, based on the above Bill, should the Opposition win Government at the next State election.⁴²

39. NSW, *Parliamentary Debates (Hansard)*, Legislative Assembly, Question Without Notice, 16 September 2004 at 11054.

40. See, eg, *Jury Amendment (Majority Verdicts) Bill 1996* (NSW), and *Jury Amendment (Dissenting Juror) Bill 2000* (NSW).

41. Proposed s 55F.

42. "Majority Verdicts: Brogden pledges jury shake-up" *Sydney Morning Herald* (Monday, August 15, 2005); "Brogden to change jury verdict law" *Sydney Morning Herald* (Tuesday, August 16, 2005).

Terms of Reference

1.29 In a letter to the Commission received on 17 September 2004, the Attorney General, the Hon R J Debus MP asked:

That the NSW Law Reform Commission inquire into and report on whether the unanimity requirement in criminal trials should be preserved in NSW.

In undertaking this inquiry, the Commission should have regard to:

- 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;
- 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.

This Report

Background

1.30 This Report is the first publication released by the Commission during the course of this reference. We decided against publishing an Issues or a Discussion Paper due to the tight timeframe for delivery of this Report to the Attorney General, and in view of the fact that the arguments relating to majority verdicts as opposed to unanimity have been well documented.

1.31 Instead, we wrote seeking the views of every Supreme Court Justice and all District Court Judges in NSW, the NSW Director of Public Prosecutions, the Public Defender's Office of NSW, the Legal Aid Commission, the Law Society of NSW, the NSW Bar Association, the Judicial Commission of NSW, and the Dean of every Law Faculty in Australia. In addition, we wrote to every Community Legal Centre in NSW, along with every office of the Aboriginal Legal Service and the Women's Legal Resources Centre. We also consulted the Homicide Victim's Support Group, the Victim's Advisory Board, Enough is Enough, and the NSW Sentencing Council. In order to obtain up-to-date statistics on

hung juries, we contacted every Supreme and District Court Registry in Australia. In total, we received 36 submissions.

Context

1.32 In formulating the recommendations made in this Report, the Commission has given due consideration to the overall context in which the debate over unanimity versus majority verdicts occurs. Part of that context involves the fact that jury trials represent only a small proportion of all criminal cases in NSW,⁴³ with those involving hung juries accounting for a fraction of those trials.⁴⁴

1.33 Furthermore, while there is the capacity for NSW to change to a system of majority verdicts, unanimity is entrenched in relation to offences against Commonwealth laws by virtue of the decision in *Cheatle v The Queen*.⁴⁵ These are tried in State and Territory Courts. Consequently, it would not be possible to avoid the unanimity requirement altogether in NSW should majority verdicts be introduced. NSW juries in trials involving Commonwealth offences would still have to reach unanimous agreement on the Commonwealth charges, whether or not offences against NSW laws were included in the same trial.

1.34 Finally, in discussing the concept of majority verdicts in this Report, we refer to verdicts delivered on the basis of 11:1 or 10:2, as occurs in other common law jurisdictions that have adopted a system of majority rule. Unless otherwise indicated, we do not use the term “majority verdict” to refer to a bare majority of one. While this system exists in Scotland,⁴⁶ it has not been proposed for NSW and is not considered in this Report.

Structure

1.35 In Chapter 2 of this Report, the Commission discusses the available statistics, including the incidence of hung juries in NSW, the predictors of hung trials, and the incidence of retrial. These figures are compared with those from other jurisdictions that have majority verdicts. The chapter also examines what inferences can be drawn from the statistics. Finally, we discuss studies that have been conducted into the way in which juries deliberate, and the impact, if any, made by requiring unanimity as opposed to majority verdicts.

43. See para 1.6-1.7.

44. See para 2.2-2.4.

45. (1993) 177 CLR 541. See para 2.8, 3.4 and 3.9.

46. See para 2.16-2.17.

1.36 Chapter 3 examines the arguments in favour of, and against, retaining the current system of unanimity, and introducing verdicts based on the views of a majority of jurors. We conclude by recommending that, based on the statistics, evidence and arguments discussed throughout the Report, the case for change is not sufficiently made out at present. This view is held primarily for the reasons that:

- **the arguments in favour of majority verdicts are balanced and countered by those in favour of retaining unanimity;**
- **there is insufficient evidence that majority verdicts would reduce the incidence of hung juries;**
- **even if there were such evidence, the numbers are not significant enough to overhaul the existing system; and**
- **the introduction of majority verdicts would not be an appropriate response to the perceived problem of hung juries in NSW.**

1.37 Finally, in Chapter 4, the Commission discusses measures aimed at helping to reduce the incidence of hung juries, such as providing clearer directions, without needing to abrogate the unanimity rule. We recommend the need for further research to be conducted into the jury system as a whole, with a particular focus on hung juries in NSW.

2. Statistics and Research

- Introduction
- Incidence and nature of hung juries in NSW
- Studies into jury deliberations

INTRODUCTION

2.1 This chapter examines the available statistics concerning the numbers of hung juries in NSW, and the factors that could influence the likelihood of jury disagreements. It also looks at statistics in jurisdictions that have introduced majority verdicts to see what inferences may be drawn from the comparison. Finally, the Commission traverses the literature regarding studies that have been conducted into the way in which juries deliberate, with a view to determining key differences between juries deciding under a requirement of unanimity and those operating in systems where a majority verdict will suffice.

INCIDENCE AND NATURE OF HUNG JURIES IN NSW

Figures for NSW

2.2 In 1986, the NSW Law Reform Commission reported that 3.55% of 179 trials studied resulted in jury disagreement.¹ That percentage had increased by 1997 when the Bureau of Crime Statistics and Research (“BOCSAR”) conducted a comprehensive post-trial survey of jurors to investigate the appropriateness of majority verdicts for NSW, and to examine the incidence of hung juries in NSW.² This study drew on evidence from 343 trials held between 1 November 1996 and 31 May 1997, involving 853 charges. It found that, of all trials studied, approximately 10% ended with the jury being hung on at least one of the charges.³ Of this number, 33% percent involved one dissenting juror, with a further 10% involving two.⁴ In terms of the total number of charges, these figures indicate that juries hung with one or two dissenting voters on 2.7% of all charges on which they deliberated.⁵ The BOCSAR 1997 study further found that “where the jury was

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1. Report 48 at para 9.19. The study was of trials between 30 September 1985 to 13 December 1985.
 2. P Salmelainen, R Bonney and D Weatherburn, “Hung juries and majority verdicts” (1997) 36 *Crime and Justice Bulletin* 1 (hereafter “BOCSAR 1997 study”).
 3. BOCSAR 1997 study at 2.
 4. BOCSAR 1997 study at 2-3.
 5. BOCSAR 1997 study at 3.

hung, there were about twice as many charges where the majority vote was for conviction than where it was for acquittal”.⁶

2.3 In 2002, BOCSAR conducted another survey into the prevalence of hung juries and aborted trials.⁷ This was a file-based survey⁸ of trials held in the District Court of NSW over a three-year period, that were either aborted, reached a verdict, or in which juries were hung. That study found that between 1998 and 2001 around 8% of juries were unable to reach a unanimous verdict.⁹ Of the 182 trials studied in which juries hung, 77% were hung on all charges, with 23% hung on only some of the charges.¹⁰ The average length of trials involving hung juries was 6.6 days, compared with 4.5 days for trials that reached a verdict. Of the 182 hung jury trials studied, 82% were listed for retrial, with 54% actually proceeding to retrial (some on more than one occasion). Following a hung jury, cases took, on average, an additional 7.3 months to finalise, either by retrial or another method.¹¹ It was estimated that trials with hung juries accounted for 598 court days per year: 176 days more than the trial would have taken had it proceeded to verdict initially.¹²

2.4 The Commission has also received more recent, unofficial figures, directly from the Supreme Court and District Courts. Those figures indicate that, in the Supreme Court in 2003, 112 cases were listed for trial. The jury was discharged in 8 of those cases,¹³ with at least 3 of those 8 cases identified as having hung juries.¹⁴ In the period from January to October 2004, the Supreme Court informed the Commission that 4 matters had resulted in hung juries.¹⁵ In the District Court during 2003, 27 trials resulted

6. BOCSAR 1997 study at 3.

7. J Baker, A Allen, and D Weatherburn, “Hung Juries and Aborted Trials: An analysis of their prevalence, predictors and effects” (2002) 66 *Crime and Justice Bulletin* 1 (hereafter “BOCSAR 2002 study”).

8. In contrast to the 1997 study which involved post-trial interviews with jurors.

9. BOCSAR 2002 study at 5.

10. BOCSAR 2002 study at 6.

11. BOCSAR 2002 study at 6.

12. BOCSAR 2002 study at 7.

13. Which could be for a number of reasons, including failure to agree.

14. Information supplied in an email from the Supreme Court to the Commission dated 5 November 2004. Assuming that the actual number of hung juries is somewhere between 3 and 8, this puts the percentage rate at between 2.6% and 7.1% of trials listed.

15. Information supplied in an email from the Supreme Court to the Commission dated 20 October 2004.

in hung juries, representing 3.9% of all cases that proceeded to trial.¹⁶

Predictive factors regarding hung juries

2.5 A significant indicator of whether a jury will hang appears to be the length and complexity of a trial. The BOCSAR 1997 study found that the average duration of trials in which juries hung was 33% longer than the duration of trials that delivered a verdict on all charges, suggesting that longer trials are more likely to result in hung juries.¹⁷ This result was confirmed in the BOCSAR 2002 study, which found that the odds of hung juries in trials lasting 4-5 days, 6-10 days, and 11 days or more, were, respectively 3.4, 3.0, and 3.9 times higher than trials lasting 1-3 days. This is understandable, given that the greater number of charges, and the amount and complexity of the evidence in longer trials, increase the likelihood that a jury will disagree on the interpretation of the evidence.¹⁸

2.6 The BOCSAR 2002 study also found that one of the most significant predictors of hung juries is the location of the court registry. In trials held in a Sydney metropolitan court, the odds of trials ending in a hung jury were 3.8 times higher than trials held in a country court. The odds of juries hanging in trials in metropolitan courts outside Sydney were 2.7 times higher than in trials held in a country court.¹⁹ This may be due to the increased diversity of the juror pool in metropolitan areas, and thereby the increased likelihood of juror disagreement.²⁰ Another reason could be that Sydney metropolitan courts are more likely to host longer, more complex trials, which have a higher chance of ending in a hung jury.

2.7 Interestingly, BOCSAR found that a number of factors had little or no influence on whether or not trials resulted in hung

16. Information supplied to the Commission from the District Court in October 2004.

17. BOCSAR 1997 study at 2. Trials involving hung juries took an average of 7.3 days to complete, whereas other trials delivered a verdict in 5.5 days on average.

18. BOCSAR 2002 study at 8.

19. BOCSAR 2002 study at 8.

20. This finding is supported by research in the United States: see V Hans, P Hannaford-Agor, N Mott and T Munsterman, "The Hung Jury: The American Jury's Insights and Contemporary Understanding" (2000) *Criminal Law Bulletin* 1 at 9.

juries. Those factors included the type of offence with which the accused was charged, or the number of accused persons and whether or not there were multiple charges.²¹ This reinforces the 1997 study, which found that trials involving sexual assault charges were no more likely to result in a hung jury than trials involving other offences.²² Also having little or no impact on the likelihood of a hung jury was the bail status of the accused, whether an interpreter was required for the trial, whether a *voir dire* had occurred, the judge's years of experience, the number of times a case had been listed for trial, and whether a case had been transferred from another venue.²³

Comparison with other jurisdictions

Australian jurisdictions

2.8 The unanimity rule has been preserved so far as offences under Commonwealth law are concerned. In *Cheatle v The Queen*,²⁴ the High Court determined that the guarantee of trial by jury in section 80 of the Commonwealth Constitution precluded "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".²⁵ Indictable Commonwealth offences are tried in State and Territory courts,²⁶ either alone, or in conjunction with State and Territory offences.²⁷ Consequently, the decision in *Cheatle v The Queen* has a direct impact on jury trials in NSW.

2.9 Like NSW, Queensland and the Australian Capital Territory have retained the unanimity rule for criminal offences.²⁸

21. BOCSAR 2002 study at 7-8.

22. BOCSAR 1997 study at 2. However, trials involving fraud, sex, or other violent offences, were more likely than other trials to be aborted: BOCSAR 2002 study at 8-9.

23. BOCSAR 2002 study at 7-8.

24. (1993) 177 CLR 541.

25. (1993) 177 CLR 541 at 562.

26. Indictable Commonwealth offences are those punishable by imprisonment for more than 12 months, unless the contrary intention appears: *Crimes Act 1914* (Cth) s 4G. While some indictable offences may be punished summarily, offences with a penalty of more than 10 years imprisonment must be punished on indictment: *Crimes Act 1914* (Cth) s 4J.

27. See *Judiciary Act 1903* (Cth) s 68(2). See also para 1.33.

28. See *Jury Act 1995* (Qld) s 59. The common law requirement of unanimity has not been abrogated by the *Juries Act 1967* (ACT).

2.10 Majority jury verdicts are permitted in criminal trials in Victoria,²⁹ Tasmania,³⁰ South Australia,³¹ Western Australia³² and the Northern Territory.³³ South Australia was the first Australian jurisdiction to adopt majority verdicts (in 1927), with Victoria being the latest to change in 1994. There are differences in the detail of the models adopted by each State and Territory. For example, Victoria permits only one juror to disagree with the majority,³⁴ whereas the other jurisdictions provide for two dissenters.³⁵

2.11 Most States have excluded certain crimes from the application of majority verdicts. Only the Northern Territory permits majority verdicts in all criminal trials, including murder trials. South Australia and Tasmania require verdicts to be unanimous when juries vote to *convict* a person of murder and treason, but a majority verdict is sufficient to acquit someone of those offences.³⁶ Western Australia has expanded the requirement of unanimity beyond murder and treason to include offences that are punishable by “strict security life imprisonment”. In Victoria, majority verdicts are allowed except in relation to murder, treason, and drug trafficking or cultivation of narcotic plants in large commercial quantities.

2.12 Another variation is the hours of deliberation required before the jury is given a direction that they are allowed to return a majority verdict. In Tasmania, juries must deliberate for a minimum of two hours before a majority verdict may be delivered, except for murder and treason trials, where the period is six hours

29. *Juries Act 2000* (Vic) s 46.

30. *Juries Act 1899* (Tas) s 48.

31. *Juries Act 1927* (SA) s 57.

32. *Juries Act 1957* (WA) s 41.

33. *Criminal Code Act* (NT) s 368.

34. Where the jury consists of 12, 11 must agree. Where the number of jurors is reduced, 10 out of 11, or 9 out of 10 must agree: *Juries Act 2000* (Vic) s 46.

35. In South Australia, at least 10 must agree where the jury panel consists of 12 jurors. If the jury has been reduced, 10 out of 11, or 9 out of 10 must agree: *Juries Act 1927* (SA) s 57. In the Northern Territory, where the jury panel consists of 11 or 12, at least 10 must agree, but if the panel is reduced to 10, then 9 must agree: *Criminal Code* (NT) s 368.

36. *Juries Act 1927* (SA) s 57. In Tasmania, unanimity is also required in relation to a conviction for a crime punishable by death, or any special finding on which the accused would be convicted of such a crime: *Jury Act 1899* (Tas) s 48(3).

before a jury may decide on the basis of a majority rule to acquit the accused on a charge of murder or treason. Jurors are required to consider their verdict for at least three hours in Western Australia, at least six hours in Victoria and the Northern Territory, and at least four hours in South Australia.

New Zealand

2.13 Unanimous verdicts are currently required under the common law in New Zealand. In 2001, the New Zealand Law Reform Commission released a report into the role of juries in criminal trials.³⁷ The Report followed more than three years of investigation and research into jury trials, including the issue of majority verdicts, and recommended that verdicts on the basis of an 11:1 majority should be introduced in all criminal trials.³⁸ The significant number of hung juries in High Court cases, together with the rogue juror argument, appear to be the primary reasons for this recommendation.³⁹ As a result, the *Criminal Procedure Bill 2005* (NZ) contains a provision to amend the *Juries Act 1981* (NZ) to introduce majority verdicts in criminal cases on an 11:1 basis, where the jury has deliberated for at least four hours.⁴⁰

Canada

2.14 The unanimity requirement for juries in criminal trials has been preserved in Canada, with the Criminal Code making no provision for majority verdicts.⁴¹

England and Wales

2.15 Majority verdicts were introduced in England and Wales in 1967 for all criminal trials by the *Criminal Justice Act 1967* (UK). A majority verdict of at least 10 jurors will be accepted after the jury has deliberated for at least two hours, or a longer period of time if the court thinks this is reasonable, having regard for the

37. New Zealand Law Commission, *Juries in Criminal Trials* (Report 69, 2001) (hereafter “NZLC Report 69”).

38. NZLC Report 69, Recommendation after para 441.

39. NZLC Report 69 at para 419 and 435.

40. *Criminal Procedure Bill 2005* (NZ) s 82A. That Bill also provides for majority verdicts in civil cases in circumstances where the jury has deliberated for four hours, and the verdict has been agreed upon by at least three-quarters of the jury panel

41. N Vidmar, “The Canadian Criminal Jury: Searching for a Middle Ground” in N Vidmar (ed) *World Jury Systems* (Oxford University Press, New York, 2000) at 219.

nature and complexity of the case.⁴² Juries are initially instructed by the judge that they must seek a unanimous verdict, but that “a time may come when a majority verdict will be permissible, at which point they will receive further directions”.⁴³ Interestingly, the role of the jury in the UK has been in gradual decline over many years, with the option for trial by jury having been virtually abolished in civil cases, and seriously curtailed in many criminal cases.⁴⁴

Scotland

2.16 Unlike other jurisdictions where the requirement of unanimity existed for centuries and has gradually been eroded, majority verdicts appear to have always been a feature of the Scottish legal system, becoming formally established in the mid-sixteenth century. Furthermore, the Scottish system requires only a majority of one, so that the agreement of eight jurors from a panel of fifteen is sufficient to secure either a conviction or an acquittal.⁴⁵ Before retiring to consider their verdict, juries are made aware that a bare majority is enough to produce a result in the trial. Consequently, hung juries do not exist in Scotland.

2.17 The adequacy of having a bare majority, and the greater likelihood that it may result in wrongful conviction, has been examined in recent years.⁴⁶ However, there has been little support for its abandonment. This is possibly due to the long history of majority verdicts in Scotland, and to the fact that the Scottish legal system has other unique features to help ensure proof of guilt, such as the requirement that the Crown case be corroborated, and the availability of an additional verdict of “not proven”.⁴⁷

42. The agreement of 10 jurors is sufficient where the panel consists of 11 or 12. Where the panel has been reduced to 10, 9 jurors must agree: *Juries Act 1974* (UK) s 17(1).

43. S Lloyd-Bostock and C Thomas, “The Continuing Decline of the English Jury” in Vidmar (ed) at 86.

44. S Lloyd-Bostock and C Thomas, “Decline of the ‘Little Parliament’: Juries and Jury Reform in England and Wales” (1999) 62 *Law and Contemporary Problems* 7 at 39-40.

45. P Duff, “The Scottish Criminal Jury: a very peculiar institution” in Vidmar at 270.

46. P Duff in Vidmar at 270-271.

47. Juries in Scotland have three verdict options: guilty, not guilty or not proven. Verdicts of not guilty and not proven result in acquittal. The not proven verdict implies that a jury is not convinced of the innocence of the accused, but is equally unconvinced that the evidence in the Crown case is strong enough to justify a guilty verdict. It is estimated that about

Incidence of hung juries in other jurisdictions

2.18 In New Zealand, figures show that in 1999-2000, the percentage of District and High Court trials ending with a jury hung on at least one charge ranged from 7.7% to 8.7%, averaging 8.27%.⁴⁸

2.19 Available statistics on hung juries in other jurisdiction are sketchy and imprecise, since most States and Territories do not systematically track the number of trials with hung juries. For example, the Supreme Court of Victoria does not keep statistics on hung juries. There are also differences in the way that figures on hung juries are counted and recorded. For example, in NSW, if a jury is hung and the retrial also results in a hung jury, then this is counted as two hung juries. Whereas, in other jurisdictions, the final outcome overwrites any prior case history, and so only one hung jury would be recorded.⁴⁹

2.20 However, some statistics are available. In its 2002 study, BOCSAR noted that, between 1998 and 2001, the prevalence of hung juries in Queensland was 5%, in South Australia it was 3%, while Western Australia reported that 4% of juries failed to reach a verdict. The Commission has also received information from the various court registries. The Registrar of the Supreme Court of the Australian Capital Territory reported that, in 2003-2004, 20 trials were completed, with one jury hung on all charges (representing 5%).⁵⁰ In South Australia from 1 January 2004 to 2 December 2004, 74 trials were listed in the Supreme Court, with 23 finalised and no recorded hung juries.⁵¹ In Western Australia, the District Court reported 38 hung juries out of a total of 515 trials in 2003-2004 (representing 7.3%).⁵² In the Supreme Court of Western

one-third of all jury acquittals are the product of the not proven verdict: see P Duff in *Vidmar* at 272-277.

48. NZLC Report 69 at para 4.17-4.18.

49. See BOCSAR 2002 study at 6 and note 8 at 12.

50. This compares with previous years: in 2002-2003, two trials out of total of 33 involved a jury hung on some charges; and in 2001-2002, juries in 8 out of a total of 33 trials hung on all charges: letter from the Registrar, Supreme Court of the Australian Capital Territory to the Executive Director of the Law Reform Commission dated 13 December 2004.

51. Letter from the Deputy Registrar, South Australian Criminal Courts Registry, to the Executive Director of the Law Reform Commission dated 20 December 2004.

52. Letter from the Principal Registrar, District Court of Western Australia, to the Executive Director of the Law Reform Commission dated 24 December 2004. The Principal Registrar noted that in some, but not all

Australia, between 1994 and 2004, there had been 43 hung juries out of a total of 735 cases heard (representing 5.35%).⁵³ These figures have fluctuated quite significantly over that 10 year period, with a high of 9.68% in 1996 to a low of less than 2% in 2004, with the average settling at around 6 %.

2.21 Several court registries also indicated to the Commission that statistics record only the verdicts themselves, and not the composition of the verdicts. Consequently, there are no figures kept concerning the number of trials determined by means of majority verdicts.

Inferences that can be drawn from the statistics

2.22 It would appear from the available statistics that the rate of hung juries in NSW has increased over the last 20 years from around 3.5% in 1985 to somewhere between 8-10% today. While this increase is significant, it can be explained to some extent by methodological differences between the Commission's 1986 report and the later BOCSAR surveys. The focus of the 1986 report was not specifically targeted at the issue of hung juries, but was a more general review of the role of the jury. That report also excluded evidence from long running trials and consequently did not capture the more complex cases heard in NSW in that year. This is significant because, as the both BOCSAR studies show, the complexity and length of a case are apparently causal to the incidence of hung juries.⁵⁴

2.23 Another interesting inference that could be drawn from the statistics is the apparently lower incidence of hung trials in jurisdictions with majority verdicts. While this can be attributed in part to the differences in tracking and recording figures on hung juries, other Australian jurisdictions do appear to have fewer jury disagreements than NSW. However, whether or not this can be attributed to majority verdicts alone is questionable. BOCSAR noted that if these statistics reflect a real difference, it is worth considering that South Australia and Western Australia (which

trials in which there was a hung jury, the judge would have given a direction that the jury could determine the matter by majority verdict.

53. Letter from the Business Services Project Manager, Supreme Court of Western Australia, to the Executive Director of the Law Reform Commission dated 15 December 2004.

54. See para 2.5.

have majority verdicts) have only marginally lower rates of hung juries than Queensland (where unanimity is required).⁵⁵

2.24 The figures also indicate that, while the percentage rate of hung juries may be quite small, the impact on court delays due to trials with hung juries taking longer, and possibly needing to be retried, is troubling. The number and length of trials with hung juries, and the court time taken up as a result, may seem to be a compelling argument in favour of majority verdicts. However, as BOCSAR noted in its 1997 study, the figures should be treated with caution and read in conjunction with other statistics and considerations. For example, since only a minority of juries hang with one or two dissenters, the introduction of a majority decision based on 11:1 or 10:2, would affect the outcome of less than half of the 8% of trials with hung juries in NSW. When this is taken into account with the fact that not all matters proceed to retrial, and that some cases with hung juries also involve Commonwealth offences which require a unanimous verdict, BOCSAR estimates that the introduction of majority verdicts would result in a potential net saving in criminal court time of only 1.7% for 10:2 verdicts, and 1.1% for 11:1 verdicts.⁵⁶

STUDIES INTO JURY DELIBERATIONS

2.25 The way in which juries reach decisions, or, in some cases, fail to arrive at a verdict, has been of interest to researchers for several decades. While jurors are instructed not to form any clear view until they retire to consider their verdict, research has suggested that most jurors begin deliberations with an opinion as to the accused's guilt or innocence, formed on the basis of listening to the evidence, the judge's instructions, and the juror's own knowledge and life experience.⁵⁷ The manner in which group deliberations are conducted has a significant impact on whether that initial view is confirmed or changes. A recent study in New Zealand revealed the importance of jury deliberations, reporting that 22% of jurors changed their mind from their initial view

55. BOCSAR 2002 study at 6.

56. BOCSAR 1997 study at 4.

57. See P Darbyshire, A Maughan and A Stewart, "What Can the English Legal System Learn From Jury Research Published up to 2001?" (2001) (<http://www.kingston.ac.uk/~ku00596/elsres01.pdf>) at 22 and 29.

during deliberations, with a further 20.5% forming a view after being undecided at first.⁵⁸

2.26 A significant amount of research has been conducted over many years, mostly in the United States of America, examining the impact on jury deliberations of requiring unanimous decisions as opposed to majority verdicts. These studies have adopted four primary methodologies. First, mock jury experiments have been conducted involving simulated trials; secondly, researchers have conducted interviews with ex-jurors; thirdly, file-based analyses of jury verdicts have been obtained from court records; and fourthly, field studies or experiments involving real juries.

2.27 While each of these methodologies has inherent drawbacks,⁵⁹ the following paragraphs represent fairly consistent findings from a number of studies over the last four decades.

Early majority view tends to prevail

2.28 The first systematic research into the way in which juries deliberate began in the United States in the 1950s with the Chicago Jury Project. As part of that project, Harry Kalven and Hans Zeisel conducted post-trial interviews with judges, attorneys and jurors. The study looked at, among other things, the verdict preference of jurors based on the first ballot cast during deliberations, as compared with the final verdict in each case. Their report, entitled *The American Jury*,⁶⁰ published in 1966, found that the verdict preferred by the majority of jurors on the first ballot was the jury's final verdict in over 90% of cases. This has become one of the most "robust and widely replicated findings in jury research",⁶¹ both in studies with real juries and in mock jury studies.

2.29 Mock trial research has indicated that the size of the majority at the first ballot has an influence in whether juries

58. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 6.53.

59. The Commission discusses the strengths and weaknesses of each approach at para 2.51-2.54.

60. H Kalven and H Zeisel, *The American Jury* (Chicago University Press, 1966).

61. See DJ Devine, LD Clayton, BB Dunford, R Seying and J Pryce, "Jury Decision Making" (2001) 7(3) *Psychology, Public Policy and Law* 622 (hereafter referred to as "Devine et al") at 623.

convict, acquit or hang.⁶² The studies suggest that, where there is a strong majority of two-thirds or more, that view will usually constitute the final verdict. Where there is a weak majority, or juries are evenly divided, the final result will usually be an acquittal or a hung jury.⁶³ Research has also supported the existence of an asymmetrical leniency effect towards acquittal, so that if “7 or fewer jurors favour conviction at the beginning of the deliberation, the jury will probably acquit, and if 10 or more jurors believe the defendant is guilty, the jury will probably convict. With 8 or 9 jurors initially favouring conviction, the final verdict is basically a toss-up”.⁶⁴

2.30 While studies with real juries have also noted the tendency for the early majority vote to prevail, a “small but not insignificant” number of “*Twelve Angry Men*” cases has also been observed. A recent United States study has reported that, in 89 cases where there was a strong initial majority favouring conviction, the jury ultimately voted to acquit in 11 (or about 12%) of those cases. The reverse scenario occurs less often, with 3 out of 71 juries voting to convict following an overwhelming initial majority supporting acquittal.⁶⁵ A NSW study reported one case in which a minority of jurors persuaded the majority to accept a lesser verdict. When interviewed, the judge considered the lesser verdict to be preferable to the verdict initially favoured by the majority.⁶⁶

Deliberation styles

2.31 Deliberation style refers to way in which juries reach their decisions. The bulk of research on jury decision-making has suggested that there are two basic forms of deliberation. The first is evidence-driven deliberation, where jurors identify and discuss

62. Studies conducted by J H Davis (1973) and R J MacCoun and N L Kerr (1988) that reported findings on the majority effect are discussed in Devine et al at 690-691.

63. See Devine et al at 690. See also V P Hans, P L Hannaford-Agor, N L Mott and G T Munsterman, “The Hung Jury *The American Jury's Insights and Contemporary Understanding*” (2003) *Criminal Law Bulletin* at 14 and 16.

64. See MacCoun and L Kerr (1988) reported in Devine et al at 691-692.

65. See also V P Hans, P L Hannaford-Agor, N L Mott and G T Munsterman (2003) at 15.

66. M Chesterman, J Chan, S Hampton, *Managing Prejudicial Publicity* (February 2001, Justice Research Centre, Law and Justice Foundation of NSW) at para 414.

the evidence and issues in the case at significant length before any vote is taken. The second deliberation style is known as poll-driven or verdict-driven, since jurors take an initial vote to see where they stand, and then work on eliminating the difference of opinion among them.⁶⁷ Other studies have identified a mixed style, where jurors briefly discuss the evidence or the relevant law, and then quickly take a vote.⁶⁸ Given the tendency for the early majority vote to determine the verdict, the type of deliberation style adopted by a jury may have a significant effect on the eventual outcome. It has generally been assumed that juries required to be unanimous favour the evidence-driven approach, while juries operating under a majority decision rule more commonly use the poll-driven approach.⁶⁹

2.32 As pointed out in the New Zealand study, it has sometimes been said that evidence-driven deliberations promote more effective decision-making, as they are less divisive, keep jurors working together, and promote thoughtful discussion.⁷⁰ The New Zealand study found that some juries that took an initial poll floundered in their task as their deliberations were unstructured, with the focus being on the difference of opinions amongst jurors, and how to persuade the minority to change their minds. However, other “poll-driven” juries methodically applied the facts to the law and functioned efficiently. Interestingly, some juries that did not take an initial poll were “disorganised, inefficient and essentially lacking in focus or direction”.⁷¹ The study concluded that the “most important factor in determining the effectiveness of jury decision-making ... was not how they started but the extent to which they adopted a systematic structure for assessing the evidence and applying the law”.⁷² Methods used by juries to structure their deliberations included flow charts and diagrams of the evidence

67. See Devine et al at 693. See also Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 6.1, and Y Tinsley, “Juror Decision-Making: A Look Inside the Jury Room”, *British Criminology Conference 2000: Selected Proceedings* (Volume 4, 2001) (www.britisocrim.org/bccsp/vol04/tinsley1.htm).

68. See Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 6.2; and R Hastie, S D Penrod and N Pennington, *Inside the Jury* (Harvard University Press, Cambridge Massachusetts, 1983) reported in Devine et al at 692.

69. P L Hannaford-Agor, V P Hans, N L Mott and G T Munsterman, *Are Hung Juries a Problem?* (National Centre for State Courts, 2002) at 14.

70. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 6.1.

71. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 6.6.

72. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 6.7.

and the law constructed from the judge's summing up, a written list of questions supplied by the judge at the request of the jury, and a summary of the evidence compiled by a juror prior to the commencement of the deliberations.⁷³ A skilful foreperson was also found to be crucial in structuring productive deliberations.⁷⁴

2.33 Whether or not juries adopt a “poll-driven” approach to deliberating, all juries must eventually take a vote on whether to convict or acquit the accused on each charge. Studies which examined the way opinions are expressed in the jury room, found that individual preference change during deliberation is influenced by polling regularity, polling format (public versus secret), poll timing (early versus late) and the prior sequence of votes.⁷⁵ However, the actual effect of these influencing factors is often unclear. For example, one study noted that juries polled at regular intervals were somewhat less likely to hang than juries that were not, whereas another found that mandated polling at regular intervals produced longer deliberations and more hung juries.⁷⁶

Unanimous decisions versus majority rulings

2.34 Studies have reported various findings concerning the effect of requiring consensus as opposed to majority rule on jury decision-making. Some studies found that there was little or no difference in decision-making between groups required to decide under unanimity and those deciding under a majority rule.⁷⁷ However, it has been pointed out that these studies have methodological weaknesses, such as severely curtailed deliberation times and small samples.⁷⁸ In most studies, it has been found that juries operating under a majority verdict system generally tend to reach a verdict in less time, as they can stop deliberating when the

73. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 6.7.

74. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 6.24.

75. See Devine et al at 694.

76. See Devine et al at 694.

77. See T Kameda, “Procedural influence in small group decision-making: Deliberations style and assigned decision rule (1991) 61 *Journal of Personality and Social Psychology* 245-256; and P D P Velasco, “The influence of style and decision rule in jury decision-making” in G Davies, S Lloyd-Bostock, M McMurran and C Wilson (eds), *Psychology, law and criminal justice: International developments in research and practice* (Berlin, Germany, 1995) at 344-348.

78. See Devine et al at 669.

requisite number of jurors reach agreement.⁷⁹ Also, juries who are not required to reach unanimity were found to take fewer polls,⁸⁰ debate the evidence more quickly and less thoroughly,⁸¹ recall less evidence,⁸² and hang less often.⁸³ Consistent with these findings are studies reporting that decisions made under the unanimity rule took longer, involved more “robust” argument, and required more rounds of voting.⁸⁴

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79. See studies by J H Davis, N L Kerr, R S Atkin, R Holt, D Meek, “The decision processes of 6 and 12 person mock juries assigned unanimous and two-thirds majority rules” (1975) 57 *Journal of Personality and Social Psychology* 1-14; R D Foss, “Structural effects in simulated jury decision making” (1981) 40 *Journal of Personality and Social Psychology* 1055-1062; R Hastie, S D Penrod, and N Pennington, *Inside the Jury* (Harvard University Press, Cambridge Massachusetts, 1983); and C Nemeth, “Interactions between jurors as a function of majority versus unanimity decision rules” (1977) 7 *Journal of Applied Social Psychology* 38-56 at 55; R J MacCoun, “Experimental Research on Jury Decision-Making” (June 1989) 244 *Science* 1046-1050: all cited in Devine et al at 669.
80. J H Davis, N L Kerr, R S Atkin, R Holt, D Meek, “The decision processes of 6 and 12 person mock juries assigned unanimous and two-thirds majority rules” (1975) 57 *Journal of Personality and Social Psychology* 1-14; N L Kerr, R S Atkin, G Stasser, D Meek, R W Holt and J H Davis, “Guilt beyond a reasonable doubt: Effects of concept definition and assigned decision rule on the judgments of mock jurors” (1976) 34 *Journal of Personality and Social Psychology* 282-294: cited in Devine et al at 669.
81. See Hans, Hannaford-Agor, Mott and Munsterman, (2003) at 4-5; R J MacCoun, (June 1989).
82. MacCoun, (June 1989).
83. N L Kerr, R S Atkin, G Stasser, D Meek, R W Holt and J H Davis, “Guilt beyond a reasonable doubt: Effects of concept definition and assigned decision rule on the judgments of mock jurors” (1976) 34 *Journal of Personality and Social Psychology* 282-294; C Nemeth, “Interactions between jurors as a function of majority versus unanimity decision rules” (1977) 7 *Journal of Applied Social Psychology* 38-56; and M J Saks, “What do jury experiments tell us about how juries (should) make decisions? (1997) 6 *Southern California Interdisciplinary Law Journal* 1-53: all cited in Devine et al at 669.
84. C E Miller, Group Decision Making Under Majority and Unanimous Decision Rules (1985) 48(1) *Social Psychology Quarterly* 51-61 at 59; M F Kaplan and C E Miller, “Group Decision Making and Normative Versus Informational Influence: Effects of Type of Issue and Assigned Decision Rule” (1987) 53(2) *Journal of Personality and Social Psychology* 306-313 at 307; C Nemeth, “Interactions between jurors as a function of majority versus unanimity decision rules” (1977) 7 *Journal of Applied Social Psychology* 38-56 at 55.

2.35 On the other hand, the unanimity rule gives every group member the power of veto, and each member's opinion must be taken into account in the decision, enabling minority group members to participate more in discussions.⁸⁵ Research has found that juries under the unanimity rule conduct a more thorough assessment of the evidence and the law, with jurors more likely to participate equally and be more satisfied with the outcome.⁸⁶ In unanimous verdict jurisdictions, research has shown that discussion and debate over the evidence continues even after a substantial majority of 10 or so has been reached. It is often at this time that error correction occurs and references are made to the standard of proof, or questions are put to the judge.⁸⁷

2.36 It has also been found that marked differences between jury deliberations requiring unanimity and those made under a majority verdict scheme are likely to be contingent on factors other than the type of verdict required, such as the strength of the evidence. So, for example, where the prosecution case is not very strong, or the evidence lends itself to a number of interpretations, deliberations are likely to be lengthier and more difficult where unanimity is required than under a majority verdict scheme.⁸⁸

Little difference as to verdict

2.37 Many researchers in the 1970s and early 1980s conducted studies to examine the effects of group decision rules on jury deliberations. These studies repeatedly demonstrated that requiring a unanimous decision as opposed to a majority ruling has little effect on the direction of final verdicts.⁸⁹ That is, regardless of whether unanimity or some variant of the majority rule is prescribed, juries tend to return the verdict preferred by a majority of jurors at the beginning of the deliberation. However, it has been pointed out that the failure to find any significant differences in verdict choices could be explained by the fact that most jury studies involve a choice between two alternative decisions (that is, guilty or not guilty). Differences in verdicts have been recorded in

85. Nemeth (1977) at 53 and 55.

86. R Hastie, S D Penrod, and N Pennington (1983); Nemeth (1977) at 55.

87. Darbyshire, Maughan and Stewart (2001) at 30.

88. See Devine et al at 669.

89. See, eg, B Grofman, "Not necessarily twelve and not necessarily unanimous: Evaluating the impact of *Williams v Florida* and *Johnson v Louisiana*" in G Bermant, C Nemeth, and N Vidmar (eds) *Psychology and the Law* (Lexington, MA, 1976); Nemeth (1977) at 55; and MacCoun (June 1989).

studies where a wider range of alternative choices along a continuum have presented.⁹⁰

2.38 Furthermore, post-trial interviews with jurors in systems requiring unanimous verdicts found that juries did not always decide between guilty or not guilty on each charge in isolation. The studies found that jurors sometimes compromised on verdicts. For example, a jury may agree to a conviction of manslaughter rather than convicting or acquitting for murder, or may “trade off” acquittals on some charges for convictions on others.⁹¹

Juror satisfaction

2.39 The New Zealand study involving post-trial interviews with jurors in 48 trials revealed that many jurors felt pressure to reach uniformity.⁹² That pressure was due mainly to the juror’s own feelings of obligation to reach a verdict and not cause a hung jury; the directions given by the judge to juries who may be having difficulty reaching an agreement; pressure from other jurors to accord with the majority view; and other factors such as time constraints, poor facilities and late sittings. In some cases, the pressure from other jurors involved deliberately presenting the hold out juror with false information about the evidence, or refusing to allow that juror to take a break in order to coerce him or her into agreement.⁹³

2.40 However, jurors have also reported that unanimity leads to a fuller exploration of relevant arguments and to more thorough deliberation and participation by all members of the panel.⁹⁴ This results in jurors feeling that their opinions had been listened to, and led to more satisfaction and confidence in the final verdict.⁹⁵

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90. C E Miller, “Group Decision Making Under Majority and Unanimous Decision Rules” (1985) 48(1) *Social Psychology Quarterly* 51-61 at 51 and 58.
91. Chesterman, Chan, and Hampton at para 408-416. Compromise verdicts are discussed further at para 3.23-3.26.
92. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 8.2-8.15.
93. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 6.47
94. Nemeth (1977) at 55; Hastie, Penrod, and Pennington (1983); L L Thompson, E A Mannix, M H Bazerman, “Group Negotiation: Effects of Decision Rule, Agenda and Aspiration (1988) 54(1) *Journal of Personality and Psychology* 86-95 at 92; Hannaford-Agor, Hans, Mott and Munsterman (2002) at 14; Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 9.16.
95. M J Saks, “What do jury experiments tell us about how juries (should) make decisions? (1997) 6 *Southern California Interdisciplinary Law*

Some studies also found the converse to be true regarding juries deliberating under a majority verdict rule, with jurors less likely to feel that justice had been administered.⁹⁶

Research into hung jury deliberations

2.41 The classic study conducted by Kalven and Zeisel in 1966 contained findings relating to hung juries. Although the sample was small and the methodology may be somewhat questionable today, those findings set the benchmark for decades regarding assumptions about hung juries, and have been relied on in subsequent studies. Kalven and Zeisel found that approximately 5.6% of juries in the United States required to reach a unanimous verdict were unable to do so, while those juries allowed to reach a majority verdict hung at a rate of 3.1%.⁹⁷

2.42 The reasons for hung juries, they concluded, were mainly evidence factors, which accounted for 71% of hung juries. Juries were most likely to hang in cases where the evidence was evenly balanced, in that it did not strongly favour the accused or the defendant.⁹⁸ In 63% of hung juries, the majority favoured conviction, compared with 24% where the majority favoured acquittal.⁹⁹ Less than half (42%) of all juries failing to reach a verdict hung because of one or two hold out jurors. Finally, Kalven and Zeisel found that most hung juries were characterised by an evenly split vote on the initial ballot, involving significant disagreement amongst jurors. Consequently, even in cases where the jury eventually hung on the basis of only one or two votes, the views of the hold out jurors had initial support from a number of other jurors, signifying that debate about the evidence, rather than the recalcitrance of a single juror, accounted for the failure to decide in most hung juries.¹⁰⁰

2.43 These findings of nearly 40 years ago are remarkably similar to the results of recent studies. A four-year study of hung juries in

Journal 1-53; Nemeth (1977) at 55; Hannaford-Agor, Hans, Mott and Munsterman (2002) at 14.

96. Nemeth (1977) at 53; M F Kaplan and C E Miller, "Group Decision Making and Normative Versus Informational Influence: Effects of Type of Issue and Assigned Decision Rule" (1987) 53(2) *Journal of Personality and Social Psychology* 306-313 at 312.

97. Kalven and Zeisel (1966) at 461.

98. Kalven and Zeisel (1966) at 456.

99. Kalven and Zeisel (1966) at 460.

100. Kalven and Zeisel (1966) at 463.

the United States,¹⁰¹ completed in 2002, found that the average hung jury rate across 30 large urban courts was 6.2%, slightly higher than in 1966.¹⁰² That study also found evidentiary factors to be major contributors to whether or not a jury hung, with complex, weak and/or ambiguous evidence, and a poor performance presenting the evidence by either the prosecutor or defence attorney, more likely to result in a deadlocked jury. Also relevant was the strength and credibility of police evidence and the testimony of the accused, with hung juries having greater differences of opinion as to credibility.¹⁰³ Juror's views concerning the fairness of the law were also found to have an impact on the outcome of a trial (playing some role in 27% of deadlocked cases), with some jurors deciding to hang the jury as they believed the "legally correct" outcome to be unfair.¹⁰⁴ Hung juries also reported more trouble recalling the evidence, understanding and interpreting the judge's instructions, and a greater degree of interpersonal conflict amongst the jury panel.¹⁰⁵ However, this study revealed that, in general, juror characteristics and demographics, such as age, ethnicity, race or sex, were *not* significant predictors of whether or not a jury would hang.¹⁰⁶

2.44 Like the 1966 study, the 2002 study found that juries with a fairly even split, or with only a slight majority on the first ballot, tended to hang.¹⁰⁷ Interestingly, the 2002 study also found that 42% of hung juries were on the basis of one or two votes.¹⁰⁸ This also mirrors the findings of the BOCSAR 1997 study mentioned above.¹⁰⁹

101. This research consisted of a file-based study of hung jury rates in state and federal courts, together with an in-depth study involving interviews with judges, jurors and attorneys from courts across four jurisdictions. Due to difficulty securing co-operation from some jurisdictions, the study covers only jurisdictions which require unanimous verdicts: see Hannaford-Agor, Hans, Mott and Munsterman (2002) at 2-3.

102. This is an averaged rate for those 30 state courts, with individual rates varying significantly: Hannaford-Agor, Hans, Mott and Munsterman (2002) at 83.

103. Hannaford-Agor, Hans, Mott and Munsterman (2002) at 75-78 and 81.

104. Hannaford-Agor, Hans, Mott and Munsterman (2002) at 78 and 81.

105. Hannaford-Agor, Hans, Mott and Munsterman (2002) at 78 and 81.

106. Hannaford-Agor, Hans, Mott and Munsterman (2002) at 57.

107. Hannaford-Agor, Hans, Mott and Munsterman (2002) at 66.

108. Hannaford-Agor, Hans, Mott and Munsterman (2002) at 67.

109. See para 2.2.

2.45 In the 2001 New Zealand study, 5 out of the 48 trials studies ended with a hung jury. In three of those trials, the minority jurors provided an articulated and reasoned basis for their dissent. In fact, regarding one of those three trials, the researchers were of the opinion that the minority view was the correct one, and had the trial not hung, the verdict of the majority would have been “questionable, if not...perverse”. In the second case, the evidence was finely balanced, and a post-trial interview revealed that the judge agreed with the minority view.¹¹⁰ The lack of a verdict in the third case stemmed from a misunderstanding of the evidence, which the researchers suggest could have been rectified if the evidence had been presented more clearly.¹¹¹

2.46 The New Zealand study found that the remaining two hung juries were the result of a single juror who steadfastly refused to consider a guilty verdict, explain the reasons for adhering to the contrary view, or take part in deliberations.¹¹² However, the study also noted that it could not be determined conclusively that a guilty verdict would have been recorded had a majority verdict system been operating, since other jurors in those trials had misgivings about the evidence which were not resolved or addressed, since it was clear that the jury was going to hang anyway.¹¹³

The Commission's view

Conclusions from research

2.47 It would appear from the research to date that juries required to make unanimous decisions consider the evidence more carefully and thoroughly, and report higher levels of juror confidence in the ultimate decision, than juries operating a majority verdict system. Where a verdict must be unanimous, the views of each juror must be considered, allowing those in the minority to be included in the decision making process, and encouraging groups to expend more effort on problem solving. However, it would also appear that juries required to reach consensus take longer to deliberate and hang more often than juries requiring only a majority of votes. Jurors also reported

110. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 9.13 and 9.16. Both of these cases would have resulted in a verdict under a majority verdicts system of 11:1 or 10:2.

111. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 9.13.

112. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 9.12.

113. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 9.12.

feeling pressure to achieve uniformity, not only stemming from other jurors, but also from their own desire not to cause the jury to hang.

2.48 Studies have apparently shown the majority decision rule to be less time consuming, less subject to simple compromise, with jurors able to be more “honest” in their views. It would also appear that juries not required to attain unanimity also hang less often. On the other hand, decisions under majority rule often exclude the desires of some group participants from the final decision, and the use of majority rule is more likely to reduce the cohesiveness or unity of a group. Interestingly, studies do not appear to show a significant difference in verdict preferences between juries deciding on the basis of unanimous, as opposed to majority, verdicts.

2.49 Studies also show the importance of how jury deliberations are structured, and the crucial nature of the first ballot in determining the eventual verdict, with juries more likely to hang where the discussions are disorganised and the initial poll is evenly split. They also highlight the significance of evidentiary factors, with hung juries more likely in trials involving complex and ambiguous evidence that does not strongly favour one side over the other. It has also been consistently found that less than half of all juries that hang do so on the basis of one or two votes, and, even in those cases, there was initial support from other jurors for the minority view.

Need for caution

2.50 The results of the various studies described above are interesting in terms of the light they shed on jury deliberations, particularly given the sacrosanct nature of those deliberations and the difficulty of knowing exactly what occurs beyond the jury room door. However, caution should be adopted when drawing conclusions from the studies, especially concerning the benefits of one verdict system over another.

2.51 Many of the findings need to be considered in light of the methodology used in the studies. A number of studies, particularly those involving mock juries, used groups much smaller than the twelve that generally constitute a criminal jury, and placed stringent limits on deliberation times. Mock jury studies have the benefit of being able to control and manipulate evidence in order to isolate and identify behavioural patterns and test juror reaction to specific stimuli. However, this works against them replicating the environment of real jury deliberations. Further, mock jury studies

cannot mirror courtroom conditions, such as the judge's instruction, the demeanour of the witnesses, and way in which prosecutors and defence counsel present the evidence.

2.52 Also, many of the mock juries were directed to reach a verdict of either guilty or not guilty: that is, participants were not given the option to hang the jury. It is also difficult to simulate long trials, which is crucial to obtaining information about hung juries since it is lengthy trials that are less likely to result in a verdict.¹¹⁴ Perhaps the biggest barrier to the general applicability of mock jury studies is that it is "impossible to recreate the responsibility of deciding the fate of one's fellow man".¹¹⁵ The real life consequences are lacking in simulated jury experiments, and jurors who acquiesce with the majority in a mock trial may hang a jury when confronted with the prospect of a wrongful conviction or acquittal.¹¹⁶ As a result, "although mock jury research can provide some valuable insights, it is limited in what it can explain about the actual frequency of hung juries or their underlying causes".¹¹⁷

2.53 Interviews with ex jurors and file studies are useful techniques as they involve actual juries, but also have their limitations. For example, while interviews obtain the feelings and perceptions of actual jurors, they rely on ex post facto recall of events in trials that may have lasted weeks. Further, they can only occur with the consent and cooperation of jurors who choose to participate, and so risk obtaining a skewed picture of events. File studies are limited by the types of records kept by courts, which vary between jurisdictions, and often lack the sort of information that would help to determine why and how juries hang.¹¹⁸

2.54 These methodological deficiencies do not negate the worth of the studies into jury deliberations, and weight is certainly added to the findings when they occur repeatedly across different studies using various methods. The studies are useful indicators of when and why juries may hang, and the merits of unanimity over majority verdicts, and vice versa. However, the Commission is of the view that they are indicative only, and do not offer definitive conclusions.

114. See Chesterman, Chan and Hampton at para 82.

115. See Darbyshire, Maughan and Stewart (2001) at 21.

116. Hans, Hannaford-Agor, Mott and Munsterman (2003) at 8.

117. Hans, Hannaford-Agor, Mott and Munsterman (2003) at 8.

118. Devine et al at 626-627.

3. The case for both sides

- Preserving the requirement of unanimity
- Introducing majority verdicts
- The Commission's view
- RECOMMENDATION 1

3.1 In this chapter, the Commission discusses the advantages and disadvantages of unanimity and majority verdicts. The benefits and drawbacks of each system are discussed in turn. While this risks a degree of repetition, it avoids the danger of assuming too readily that the drawbacks of the current system can be addressed by adopting the advantages of majority rule. It clarifies that both unanimity and majority verdicts have positive and negative points that need to be explored. Further, an advantage of one system may not always signify a defect in the other, while deficiencies in one system are not necessarily redressed by the advantages of the alternative system.

3.2 The arguments discussed below are grounded on data, research or other evidence, while some are based on strongly held perceptions. Either way, the arguments for and against unanimous and majority verdicts have had a pervasive influence on legal discourse for many decades. The Commission concludes this chapter by presenting its views regarding the more cogent of those arguments, leading to the recommendation that the current system of unanimity should be retained.

PRESERVING THE REQUIREMENT OF UNANIMITY

Arguments in favour

Accords with the principle of beyond reasonable doubt

3.3 In criminal trials, the onus is on the prosecution to convince the jury of the guilt of the accused beyond reasonable doubt. The need to convince all twelve jurors acts as a safeguard to ensure that the verdict of conviction or acquittal is achieved beyond reasonable doubt. It has been argued that, if one or two of the jurors lack confidence as to the guilt or innocence of the accused, then this is enough to constitute reasonable doubt.¹

3.4 As the High Court noted in *Cheatle v The Queen*,²

It is true that there is no logical inconsistency involved in the co-existence in the law of the criminal onus of proof and majority verdicts of guilt. Nonetheless, assuming that all jurors are acting reasonably, a verdict returned by the majority of the jurors, over the dissent of others, objectively

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1. See Law Society of New South Wales, *Submission*; Judge G D Woods, *Submission*. See also Devlin at 56.
 2. (1993) 177 CLR 541.

suggests the existence of reasonable doubt and carries a greater risk of conviction of the innocent than does a unanimous verdict.³

3.5 Advocates of unanimity strongly hold the view that the inconvenience and expense that may sometimes be brought about by jury disagreements should not be considered above the interests of justice.⁴

3.6 Further, commentators have pointed out that, of Australian jurisdictions which have introduced majority verdicts, the Northern Territory is alone in allowing majority verdicts in murder cases, which some have interpreted as an acknowledgement that the burden of proof should not be diluted in serious matters.⁵

Allows for greater deliberation of the issues

3.7 Empirical evidence has suggested that juries appear to be competent fact-finders and that the process of deliberation can be an important element in the fact finding process. Once a majority verdict is acceptable, jurors who endorse a minority viewpoint may be ignored, the deliberation may be less thorough, and the effectiveness of fact-finding may be reduced.⁶

3.8 Studies of unanimous jury deliberations have found that they are characterised by more conflict or debate, with more opinions being changed as a result of the deliberation process. It has been reported that jurors had more confidence in a unanimous verdict, and were more likely to feel that justice had been administered.⁷ 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.⁸

3. (1993) 177 CLR 541 at 553.

4. P Alcorn, *Submission*; F Hum, *Submission*; and J Anderson and T Duffy, *Submission*. See also Young, Cameron and Tinsley, Preliminary Paper 37(2) at ch 9.

5. Law Society of New South Wales, *Submission*; His Honour Judge S Walmsley, *Submission*; His Honour Judge P Berman, *Submission*; and Redfern Legal Centre, *Submission*. See also Young, Cameron and Tinsley, Preliminary Paper 37(2) at 47.

6. F Hum, *Submission*; and J Anderson and T Duffy, *Submission*. Also, see discussion of studies into jury deliberations at para 2.34-2.36.

7. Nemeth at 55. See also para 2.35 and para 2.39.

8. Nemeth at 55. See para 2.34-2.35.

3.9 As the High Court noted in *Cheatle v The Queen*, the “necessity of a consensus of all jurors, which flows from the requirement of unanimity, promotes deliberation and provides some insurance that the opinions of each juror will be heard and discussed”.⁹ A unanimity rule not only ensures that the minority viewpoint is heard, it gives people in the minority a vote which has real value. As the Commission pointed out in its 1986 Report, 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. The requirement of unanimity also minimises the effect of racial, social, or economic prejudice by according a right of participation to minority points of view”.¹⁰

Problems arise in only a small number of cases

3.10 The incidence of hung juries needs to be kept in perspective. As the Commission noted in Chapter 1, the latest available figures show that only about 0.4% of all criminal cases are tried by a jury. Of these, approximately 8% of juries are unable to reach a verdict.¹¹ Consequently, the number of cases in New South Wales involving jury disagreements is extremely small.

Juries may disagree for good reasons

3.11 The fact that juries hang is not in itself an indication that the system is failing and is in need of reform.¹² As the Commission noted in its 1986 Report, a “jury disagreement should not be regarded as an inappropriate result in every case. The existence of a disagreement may well reflect the difficulty of the case rather than the perversity of some jurors”.¹³ This view was endorsed in some submissions to the current inquiry.¹⁴

3.12 Longer trials involving complex evidentiary issues tend to result in jury disagreements more often than shorter, straightforward trials, suggesting that such disagreements are the

9. *Cheatle v The Queen* (1993) 177 CLR 541.

10. Report 48 at para 9.41.

11. See para 2.3.

12. See Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 9.10-9.13 and 9.16.

13. Report 48 at para 9.17.

14. Judge G D Woods, *Submission*; P Zahra, C Craigie, and A Haesler, *Submission*; J Phelan, *Submission*; and His Honour Judge K Shadbolt, *Submission*.

result of juries taking their task seriously, rather than evidence of tampering or juror stubbornness.¹⁵

3.13 Critics of the unanimity rule often point to the expense and delay of a retrial as a negative outcome of jury disagreement.¹⁶ While the emotional and financial expense of a retrial is a matter for concern, it needs to be kept in perspective. A re-trial is not held as a matter of course. In 2002, the New South Wales Bureau of Crime Statistics and Research found that only 54% of all hung trials proceeded to retrial.¹⁷ The decision not to proceed is made in consideration of various factors, including where the Crown decides that the chances of a conviction are not sufficient to warrant further action.

3.14 A study in New Zealand showed that, in three of the five hung trials studied, the minority jurors “provided a clearly articulated and reasoned basis for their dissent. In two of these cases, the dissent actually appeared to be well-founded: in one, the researchers thought that the view of the majority would have resulted in a questionable, if not a perverse, verdict; and in the other the case was finely balanced and the judge shared the view of the minority”.¹⁸ In such cases, a hung jury would be the preferable result. It has been argued that eliminating or reducing the opportunities for juries to hang (for example, through the introduction of majority verdicts), increases the probability of wrongful convictions or acquittals.¹⁹ In cases where the evidence is evenly split and supports both sides, a hung jury may be the most appropriate outcome.²⁰

Promotes community confidence in justice system

3.15 Unanimity carries with it an impression of more certain verdicts. The fact that all twelve jurors considered the evidence, debated the issues and reached a consensus, conveys to the public the sense that the verdict is a safe one. Public confidence in jury decisions can influence public support for the law and the legal system. The effective denunciation of criminal behaviour and

15. See para 2.5 and 2.43.

16. Director of Public Prosecutions, *Submission*.

17. See para 2.3.

18. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 9.13. The juries in the remaining two trials hung due to a single hold-out juror: see para 2.45-2.46 and 3.39.

19. Hannaford-Agor, Hans, Mott and Munsterman (2002) at 14.

20. Hannaford-Agor, Hans, Mott and Munsterman (2002) at 7.

community support for law enforcement may be compromised by public uncertainty as to the correctness of jury decisions.²¹

3.16 Confidence in the certainty and accuracy of jury decisions is important since, unlike decisions of judges based on matters of law, juries are not required to state reasons for their verdicts. Also, jury decisions are difficult to overturn on appeal.²²

Consistent with trials for Commonwealth offences

3.17 As noted in Chapter 2, the High Court in *Cheatle v The Queen* established that the Commonwealth Constitution precludes a verdict of guilty on any basis other than unanimity where the alleged offence is one against Commonwealth law.²³ Uniformity with federal law is perceived by some commentators as desirable, particularly in cases involving both State and Commonwealth offences.²⁴ In this scenario, if majority verdicts were introduced in New South Wales, the presiding judge would need to give two sets of jury directions in one trial: one set concerning the need for unanimity regarding the Commonwealth offences; and another set of directions as to reaching a majority in relation to the State offences. While this is not insurmountable (and must occur in those State jurisdictions that have introduced majority verdicts) it is considered somewhat unsatisfactory.²⁵

Insufficient evidence to support need to change

3.18 Many submissions received by the Commission were of the view that the need to change the existing rule has not been demonstrated by empirical, qualitative research.²⁶ Even if this need had been demonstrated, allowing majority verdicts would not overcome the supposed defects of the present system.²⁷ While the introduction of majority verdicts on an 11:1 or 10:2 basis may

21. Young, Cameron and Tinsley, Preliminary Paper 37(2) at p 48.

22. Report 48 at para 9.43.

23. (1993) 177 CLR 541.

24. Judge G Woods, *Submission*; and J Willis, *Submission*; Law Society of New South Wales, *Submission*; and Judge J Nicholson, *Submission*.

25. M Finnane, *Submission*.

26. Australian Institute of Criminology, *Submission*; The Law Society of New South Wales, *Submission*; P Zahra, C Craigie, and A Haesler, *Submission*; J Hulme, *Submission*; M Finnane, *Submission*; Mr Justice D Kirby, *Submission*; S Walmsley, *Submission*; Her Honour Judge M Latham, *Submission*; Mr Justice G James, *Submission*; Mr Justice Studdert, *Submission*; P Alcorn, *Submission*; Mr Justice B Sully, *Submission*; J Willis, *Submission*; and J Anderson and T Duffy, *Submission*.

27. Report 48 at para 9.1.

reduce the deliberation time in a small number of cases, it would not eliminate the incidence of jury disagreements or hung juries.²⁸ Only the introduction of a bare majority would ensure this, and, as noted in Chapter 1, that is not an option that has been proposed to, or is being considered by, the Commission.²⁹

Arguments against

More likely to result in hung trials

3.19 A major criticism of unanimity is that it results in more hung juries than under a majority verdicts system.³⁰ The inability to reach a verdict frustrates the administration of justice. Cases may need to be retried, resulting in emotional, financial and time costs for all concerned.³¹ Alternatively, the prosecution may decide not to proceed for various reasons, leaving the victim frustrated and without any sense of closure.

The problem of the “rogue” juror

3.20 When jury verdicts are required to be unanimous, trials will hang in cases where one juror irrationally and obstinately refuses to agree with the majority. Where this disagreement results from a refusal to consider the evidence impartially, rather than stemming from a genuinely held belief in the guilt or innocence of the accused based on the facts at hand, the juror is often referred to as “rogue” or “perverse”.³² Sir Patrick Devlin rather poetically described the rogue juror as the “man whose spiritual home is in the minority of one and who, often in compensation for his social ineffectiveness, delights in the power of veto, is a nuisance”.³³

3.21 In a recent study carried out in New Zealand, based on detailed interviews and observations of 48 juries, researchers concluded that some of the trials failed to reach a verdict because of the questionable actions of a single juror:

In two of the five trials, the failure to reach a verdict was directly attributable to the actions of a single ‘rogue’ juror who refused to consider a ‘guilty’ verdict but made little attempt to participate in deliberations, and was unable or

28. His Honour Judge M Finnane, *Submission*.

29. See para 1.34.

30. See statistics at para 2.2-2.24.

31. Director of Public Prosecutions, *Submission*; His Honour Judge N J Rein, *Submission*.

32. See Report 48 at para 9.31-9.32.

33. Devlin at 56.

unwilling to articulate any rational argument in favour of a 'not guilty verdict'.³⁴

3.22 Those in favour of majority verdicts see the rogue juror argument as one of the key objections to the unanimous verdict requirement.³⁵ The need for consensus amongst all twelve jurors before a verdict can be recorded means that the actions of one rogue juror will debase an entire trial, resulting in time and monetary cost for the justice system, and ultimately the community. More significantly, however, the failure to reach a verdict places huge emotional strain on the victim. He or she will either have to face the ordeal of a retrial, or be forced to accept that a verdict will never be reached.³⁶

Danger of "compromise" verdicts

3.23 Supporters of majority verdicts argue that at least some unanimous verdicts are the result of undesirable compromises, with dissentient jurors persuaded to acquiesce to the majority view, while not being actually convinced of the soundness of that position. Such acquiescence may involve unenthusiastic compliance with the majority in circumstances where the dissentient jurors are uncertain as to which decision to make. Compromise verdicts can also come about due to attrition, or the gradual wearing down of jurors through exhaustion.³⁷ More disturbing is the situation where jurors in the minority may be harassed and bullied into agreement with the majority view. This is especially so, it is argued, where there is only one member of the jury who disagrees with the others.³⁸

3.24 In these circumstances, unanimity is more imagined than real, since the verdict is in actuality a majority one rather than a true consensus. Given the paucity of knowledge about the actual processes of deliberation in the jury room, it is impossible to know how often such compromises occur. However, studies involving interviews with jurors after the conclusion of trials have discovered that, in trials where an accused is charged with multiple or alternative offences, a degree of bartering or "horse-trading" may occur. For example, if a jury disagrees in relation to conviction or

34. Young, Cameron and Tinsley, Preliminary Paper 37(2) at p 70.

35. Director of Public Prosecutions, *Submission*; Mr Justice G Barr, *Submission*; and The Hon Justice R O Blanch, *Submission*.

36. Director of Public Prosecutions, *Submission*. The Commission offers its views on the rogue juror issue in chapter 4.

37. The Hon Justice RO Blanch, *Submission*.

38. Report 48 at para 9.6 and para 9.25-9.26.

acquittal on a particular charge, they may compromise and decide to convict or acquit on another lesser or more serious charge rather than hang.³⁹

3.25 A study in New Zealand involving post-trial interview with jurors also found evidence of this type of compromise verdict. The study reported that some jurors:

felt uneasy about the unprincipled nature of their decision, but most simply saw it as a pragmatic and sensible solution to the problem they confronted: they all thought that the accused was guilty of something; they differed as to the nature and extent of that guilt; and they therefore decided that ‘guilty’ verdicts on some of the charges would dispense justice, albeit perhaps rough justice, and avoid the expense of a retrial.⁴⁰

3.26 The study noted that while these cases all involved some “questionable verdicts” which could not be justified on the evidence, they cannot be regarded as “wholly perverse”, and with “negligible” effect in some cases on the eventual sentence.⁴¹

Juror corruption

3.27 Critics of the rule requiring unanimity argue that it encourages interference with jurors in order to secure a desired verdict, or ensure that no verdict is delivered.⁴² If one juror can be corrupted through bribery or intimidation, the remainder of the jury is rendered powerless. Although corruption can occur in any institution regardless of its model, it is said that juries operating under unanimous verdicts provide more opportunity for corruption as only one juror needs to be threatened or offered bribes. It is argued that, under a majority verdicts system, more than one juror would need to be approached, presenting greater logistical difficulties and increasing the risk of detection.⁴³

3.28 In Report 48, the Commission noted that the risk of juror corruption is countered by the power of prosecuting authorities to conduct a re-trial after a jury fails to agree on a verdict. If the corruption of jurors were a significant cause of hung juries, one or more of the following could be expected:

39. Chesterman, Chan and Hampton at para 408-416.

40. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 9.7.

41. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 9.8.

42. Mr Justice J Dunford, *Submission*.

43. See Report 48 at para 9.27-9.29.

- A higher proportion of disagreements in the trials of wealthy or organised criminals who may be more likely to succeed in corrupting a single juror.
- Further disagreement at re-trials of cases where the original jury hung (in cases where corruption occurred it would be more likely to persist).
- A high conviction rate at re-trial, indicating that failure to agree was the result of one juror holding out due to corruption.⁴⁴

Too weighted in favour of protecting the accused

3.29 In Report 48, the Commission noted that “it is generally believed that juries which are deadlocked or having difficulty in reaching agreement are more likely than not in that position because a small minority are unwilling to convict on evidence which convinces the majority”.⁴⁵ This was found to be the case in the BOCSAR 1997 study.⁴⁶ As a result, an argument could be made that unanimity protects accused people who would otherwise be convicted at a greater rate than the prevention of wrongful conviction.

Unanimous verdicts are undemocratic

3.30 It is sometimes argued that unanimous verdicts are undemocratic since the will of a small minority can override the majority view and derail the verdict.⁴⁷ Accepting the will of the majority has become an accustomed feature in many facets of society, with critics of unanimity being of the view that this acceptance should also extend to the jury system.

INTRODUCING MAJORITY VERDICTS

Arguments in favour

Quicker and easier verdicts

3.31 Studies have shown that juries operating under a majority verdict system deliver their verdicts faster as they can stop deliberating when a majority of 10 or 11 is reached. Empirical evidence has also indicated that there is little difference in the

44. Report 48 at para 9.28.

45. Report 48 at para 9.9.

46. BOCSAR 1997 study at 2-3.

47. Report 48 at para 9.14.

outcomes of the cases considered by juries functioning under the unanimity and majority principles, apart from the faster deliberation time of juries delivering majority verdicts.⁴⁸ Further, studies suggest that most juries that form a clear early majority tend not to deviate from that view, whether the ultimate verdict is unanimous or a majority vote.⁴⁹ Based on this, the argument could be made that majority verdicts lose little in terms of accuracy in comparison with unanimous ones, but achieve savings in terms of time and cost.

Less pressure on jurors to achieve conformity

3.32 Under a majority verdict system, jurors would not be pressured to deliver a unanimous verdict, and so the problem of compromise verdicts would be avoided. In that sense, jurors would be empowered to reach a more “honest” decision. Studies conducted into jury deliberations revealed that jurors deciding issues on a majority basis felt less pressure to conform and more free to express their true opinions.⁵⁰

Negates effect of the “rogue” juror

3.33 One of the key arguments put forward by proponents of majority verdicts is the elimination of the problem of the rogue juror. Should a panel deciding a case under a majority verdict system encounter a “rogue” juror, the problem would be side-stepped, since the majority view of the remaining 11 jurors would decide the matter. It would be extremely unlikely to encounter more than one such juror on the same panel.

Consistent with civil proceedings

3.34 The *Jury Act 1977* (NSW) permits majority verdicts in civil trials. Section 57 of that Act provides that where a jury in civil proceedings have retired for more than 4 hours and they are unable to agree on their verdict, a decision of 3 out of 4 jurors (in the case of a 4 person jury), or 8 jurors in the case of a 9-12 person jury, shall be taken to be the verdict of all. The introduction of majority verdicts in criminal trials would be consistent with that position.

48. See para 2.37-2.38. However, see the Commission’s views on the need for caution with regard to the studies into jury deliberations at para 2.47-2.54.

49. See para 2.28-2.30.

50. See para 2.39-2.40.

Consistent with most other Australian jurisdictions

3.35 Majority verdicts are currently permitted in Victoria, Tasmania, South Australia, Western Australia, and the Northern Territory.⁵¹ This may indicate a trend toward majority verdict rules; the introduction of majority verdict rule in New South Wales would therefore be desirable in the interests of uniformity among State jurisdictions. Furthermore, in none of these jurisdictions is there any evidence that majority verdicts have produced injustice, nor has there been any call for reform.⁵²

Arguments against

Verdicts may be reached after insufficient negotiation

3.36 The negative side of achieving faster verdicts is the commensurate reduction in the quality of jury deliberations. The availability of majority verdicts reduces the need and opportunity for juries to deliberate issues as fully as they must do under a unanimous system. It is argued that this creates a greater likelihood of wrongful conviction or acquittal. While the early majority usually carries the day in terms of the ultimate verdict, it is not unknown for the majority to be persuaded by the minority view.⁵³ As noted above, the need to achieve uniformity promotes full, and often impassioned, discussions of issues considered from various perspectives. This has the propensity to be lost in a majority verdict as the jury stops deliberating when they achieve the required numbers, and can disregard the views of the minority.

3.37 In recognition of this defect, some jurisdictions have introduced minimum deliberation times before a verdict can be delivered. While minimum required deliberation periods may create the opportunity for discussion and argument, they do not ensure that the minority will be listened to, as the jury will inevitably be aware of its ultimate ability to return a majority verdict.⁵⁴

Contrary to the required standard of proof

3.38 This is the inverse of the argument advanced in favour of majority verdicts at para 3.3-3.6. Where there is a majority verdict to convict, a reasonable doubt about the guilt of the accused person exists in the mind of at least one member of the jury. The existence

51. See para 2.8-2.12.

52. Director of Public Prosecutions, *Submission*; and G Hillier, *Submission*.

53. See para 2.30.

54. Young, Cameron and Tinsley, Preliminary Paper 37(2) at 47.

of a dissenting voice casts a shadow over the validity of the conviction.⁵⁵ Studies involving interviews with, and surveys of, ex jurors, have reported that, although majority verdicts often produced easier deliberations, some jurors felt less satisfied with the verdict, and less certain that justice had been served.⁵⁶

Negates the views of a small minority

3.39 As we pointed out at paragraph 1.21-1.23, not every juror who stands alone against a majority view can be considered a “rogue” or perverse juror. However, a majority verdicts system would not discriminate between irrational “rogues”, and those jurors who genuinely believe that the evidence points to the opposite verdict from the one favoured by the remaining 10 or 11 jurors. It is questionable whether, in the interests of justice, these soundly-based minority views should be disregarded. Further, as the New Zealand study has shown, had a system of majority verdicts been operating, the decision of the majority would have resulted in a questionable verdict.⁵⁷

Implies a distrust of the jury system

3.40 In its 1986 Report, the Commission noted that majority verdicts involve “a presumption that amongst twelve members of the community there is a definite likelihood that one of them will be either corruptible or incompetent”.⁵⁸ This can create the impression of uncertainty, which may undermine public confidence in the justice system.⁵⁹

Negligible effect on reducing hung trials

3.41 Surveys which have been conducted in other jurisdictions have found that juries that begin with a 10:2 or 11:1 split tend to reach a unanimous decision, whilst a jury initially split 7:5 or 6:6 will not reach a 10:2 majority verdict, let alone unanimity.⁶⁰ As noted in Chapter 2, studies by BOCSAR have indicated that, of the estimated 8% of criminal cases that hang each year, 57% of those jury disagreements involved three or more dissentient jurors. As

55. Redfern Legal Centre, *Submission*; J Willis, *Submission*; F Hum, *Submission*; D Hamer, *Submission*; and J Anderson and T Duffy, *Submission*.

56. See para 2.34-2.35 and 2.39-2.40.

57. See para 2.45.

58. Report 48 at para 9.42.

59. Report 48 at para 9.39. See also P Zahra, C Craigie, and A Haesler, *Submission*; His Honour Judge P Berman, *Submission*; Redfern Legal Centre, *Submission*; and J Anderson and T Duffy, *Submission*.

60. Report 48 at para 9.24.

such, the introduction of majority verdicts based on 11:1 or 10:2 splits would make no difference to these cases.⁶¹ Taking into account the constitutional requirement that verdicts in trials of Commonwealth offences must be unanimous, BOCSAR estimates that the introduction of majority verdicts would only lead to the resolution of an additional 1.7% of all NSW criminal cases that involve juries.⁶²

THE COMMISSION'S VIEW

3.42 As can be seen from the above discussion, there are strong arguments for and against both unanimous and majority verdicts. In some cases, those arguments balance each other out. For example, on the one hand, majority verdicts would probably result in quicker verdicts and may reduce the incidence of hung juries. On the other hand, juries may hang for good reasons, and usually hang with more than one or two dissentients. The argument that unanimous verdicts are less democratic than majority verdicts can be balanced by arguing that unanimity allows for greater participation of jurors and the fact that each vote actually counts. Similarly, the view that unanimity forces compromise verdicts brought on by the pressure to reach agreement is countered by the argument that majority verdicts are, by their very nature, a compromise of a different sort.

61. See para 2.2.

62. BOCSAR 1997 study at 4.

3.43 Perhaps the strongest argument against unanimity is the higher rate of hung juries than occurs in systems operating under a majority verdict rule. Hung juries do represent a barrier to the effective administration of justice, and should be avoided if possible. However, 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. As the Commission noted in Report 48, it “is to be expected that there will be a small number of cases in which 12 individuals drawn at random from a heterogenous community such as that which exists in New South Wales will not be able to agree”.⁶³

3.44 It is also questionable whether the complete elimination of hung juries is a laudable aim in the interests of justice. When considering the issue of hung juries, it is easy to lose perspective and view all deadlocked juries as necessarily bad. Disagreement among jurors can force the evidence to be viewed from different perspectives, and leads to more thorough investigation of the issues. In some circumstances, those disagreements can be resolved and a verdict can be delivered. In others, no agreement can be reached and the jury hangs. Where a jury hangs because of confusion or misunderstanding about the evidence and the law, there are measures to assist juror comprehension that can, and should, be introduced, which would hopefully avoid a deadlock in these cases. We discuss these strategies in Chapter 4. However, evidence from research suggests that many juries hang because they simply cannot, on the evidence presented, favour one side over the other. In these situations, it is preferable in the interests of justice that the trial concludes with a hung jury rather than an unsafe verdict. The Commission is of the view that this would be the case regardless of whether one juror or seven jurors remained genuinely unconvinced.

3.45 The argument concerning hung juries is often paired with the notion of the rogue juror, with proponents of majority verdicts arguing that eliminating the need to consider the views of all jurors evades the problem and results in fewer hung juries. There is no doubt that the derailment of a trial because of the actions of a single juror who holds a prejudiced view, and who stubbornly refuses to consider the evidence or the opinions of other jurors, is

63. Report 48 at para 9.16.

contrary to any sense of justice. However, the evidence to support the view that hung juries are wholly, or even significantly, caused by the recalcitrance of a rogue juror, simply does not exist. 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.

3.46 As discussed throughout this Report, research has repeatedly indicated that most hung juries do so on the basis of fairly evenly divided votes. Consequently, the introduction of majority verdicts based on an 11:1 or 10:2 split would potentially affect less than half of all hung juries. Furthermore, there is no guarantee that the remaining juries would deliver a verdict even if majority rule were permitted. As was found in the New Zealand study, other jurors besides the “rogue” may have misgivings concerning the evidence, and may speak up rather than deliver an unsafe verdict.

3.47 In Chapter 4, the Commission recommends further research be conducted into the jury system as a whole to provide a clearer picture of the strengths and weaknesses of juries in New South Wales. That research could investigate reforms such as better screening of jurors during the empanelling process and the efficacy of having reserve jurors, which would assist in alleviating the problem of the rogue juror without overturning the requirement of unanimity.

3.48 There is a large degree of irony in the debate over majority verdicts. On the one hand, its aim is ostensibly to overcome the biggest perceived weakness of the current jury system: namely, that verdicts cannot be delivered when one or two jurors do not agree with their fellow panel members. However, allowing the views of one or two jurors to be disregarded, and the majority view to carry the day, potentially strikes at the very strength of the jury system: being the fact that all jurors can discuss, assess and reconcile their differing views to reach a common conclusion beyond reasonable doubt. 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 those 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.

3.49 Consequently, the Commission does not consider that the case for introducing majority verdicts has been sufficiently made out at this time. Although some of the arguments in favour of majority verdicts are strong, we believe they are outweighed by those in favour of unanimity. Further, there is no convincing evidence from majority verdict jurisdictions to prove its advantages. While the rate of hung juries in those jurisdictions is apparently lower,⁶⁴ there is no indication of the soundness of, or juror or judicial satisfaction with, the verdicts being delivered.

3.50 In particular, the symbolic nature of unanimous verdicts should not be overlooked:

The sense of satisfaction obtainable from complete unanimity is itself a valuable thing and it would be sacrificed if even one dissentient were overruled. Since no one really knows how the jury works or indeed can satisfactorily explain to a theorist why it works at all, it is wise not to tamper with it until the need for alteration is shown to be overwhelming.⁶⁵

3.51 In examining the impact of unanimity and majority rule on jury decision-making, one researcher noted the advantage held by unanimity that a system of majority verdicts could never match:

[T]he considerations involved in unanimity versus non-unanimity in jury deliberations are not simply whether or not the actual verdicts are significantly altered. This appears not to occur, at least on a large scale. What may well be altered is the belief on the part of the jurors that they have deliberated until all persons have agreed, that they feel that the verdict was appropriate, and that they have a sense that justice has been administered. If the jurors themselves feel that these values have not been implemented, the very important symbolic function of the trial by jury may suffer, not only for the jurors themselves, but for the community at large.⁶⁶

3.52 While the requirement that verdicts be unanimous has a number of drawbacks, the introduction of majority verdicts would bring another set of problems. In the Commission's view, it would be a mistake to substitute one verdict system for another in the absence of any convincing data based on actual jury studies in NSW indicating the benefit of such an approach. The Commission is of the view that the disadvantages of unanimity should be

64. See para 2.2-2.24 for a discussion of hung jury rates and the inferences that can be drawn from those figures.

65. Devlin at 57.

66. Nemeth at 55-56.

examined through further research, and redressed through strategies such as those outlined in the following chapter.

RECOMMENDATION 1

The Commission recommends that the system of unanimity should be retained.

4. Reducing the incidence of hung juries

- Introduction
- Strategies for reducing hung juries
- RECOMMENDATION 2

INTRODUCTION

4.1 In the previous chapter, the Commission recommended that the system of unanimity should be retained rather than introduce verdicts in criminal trials based on the vote of a majority of jurors. We acknowledge that there are disadvantages associated with the requirement that jury verdicts be unanimous: the primary one being the higher incidence of hung juries. In this chapter, we discuss a range of strategies designed to reduce the rate of hung juries while keeping the requirement of unanimity.

4.2 The decision to retain unanimous verdicts for criminal jury trials in New South Wales is based not only on a consideration of the strengths and weaknesses of unanimity as opposed to majority verdicts, but also in recognition of the lack of local information on the reasons why juries hang. Consequently, the Commission recommends that further research should be conducted in NSW along the lines of the New Zealand study discussed throughout this Report.

STRATEGIES FOR REDUCING HUNG JURIES

Overview

4.3 Jurors in a criminal trial are expected to complete an enormously difficult task. They must listen to days, sometimes even weeks, of evidence and legal argument. They must attempt to rid their minds of any preconceived ideas that could lead to bias or prejudice and consider only the material presented to them in court. Then they must discuss and assess the evidence to reach full agreement on the most appropriate verdict. This task is particularly daunting considering that most jurors will not have served on a jury before or have received any legal training.

4.4 A number of studies have attempted to analyse how jurors comprehend evidence and judicial instructions. They suggest methods that may help jurors to improve their understanding and analysis of the information, hopefully leading to more productive deliberations and fewer disagreements. Some of those studies have been conducted regarding juror comprehension generally, while others have focused specifically on hung juries. The findings centre on three main areas, namely:

the information needs of jurors during the trial to help them understand adequately the law and the facts in each case;

- how jurors structure their deliberations once they enter the jury room; and
- the instructions given to juries experiencing difficulty reaching a decision.

4.5 Research has repeatedly found that weak evidence, lack of structure during deliberations, and jurors' concerns about the fairness of the law in particular cases, are significant contributors to hung juries.¹ The BOCSAR 2002 study noted that:

[I]t might be argued, of course, that the introduction of majority verdicts, at least, would help reduce the incidence of hung juries. The evidence we have reviewed provides few grounds for confidence in this conclusion. It is possible that improvements in the instructions to jurors or changes in the way the jury spokesperson is selected would be just as effective, if not more effective, than the introduction of majority verdicts in reducing the incidence of hung juries.²

4.6 Research also recommends that jurors be given better tools to understand the evidence and the law, and guidance on how to conduct deliberations.³ United States studies also consider that jurors should be assisted to participate more actively during the trial by asking questions and receiving clear written information setting out the evidence and the relevant law. This should enhance their ability to understand, remember and correctly use the information presented to them, hopefully leading to greater agreement as to the most appropriate verdict.⁴

4.7 Further, Australian and overseas research has found that the directions given by judges to juries who report having difficulty reaching a decision, may not be as effective as they could be. Research in New Zealand suggests that judges should encourage deadlocked juries to ask for help in relation to the particular issues on which they disagree.

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1. Hannaford-Agor, Hans, Mott and Munsterman (2002) at 86.
 2. BOCSAR 2002 study at 11.
 3. Hannaford-Agor, Hans, Mott and Munsterman (2002) at 86.
 4. P Ellsworth and A Reifman, "Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions" (2000) 6 *Psychology, Public Policy and Law* 788-821 at 813.

4.8 It is worth noting that, even if all of these strategies were implemented, they would not be successful in completely eliminating hung juries. They may help where juries hang unnecessarily because of confusion or misunderstanding about the law or the evidence. However, juries will still hang where jurors deliberate enthusiastically, but cannot agree in good conscience on the interpretation of the facts. As we noted in Chapter 3, in these circumstances, it is preferable in the interests of justice that the trial concludes with a hung jury rather than an unsafe verdict. Nor will the strategies discussed in this chapter solve the problem of the “rogue” juror, to whom no amount of instruction or explanation will overcome his or her recalcitrance.

Current practice in NSW

4.9 The Criminal Trial Courts Bench Book (“the Bench Book”), prepared by the Judicial Commission of NSW, guides Supreme Court and District Court Judges as to appropriate trial procedure. It is not mandatory for judges to adhere exactly to the Bench Book. However, most judges more or less follow the suggested directions.⁵ The Bench Book states that judges usually give the jury general advice at the beginning of the trial.⁶ Once the jury has been empanelled, the judge will inform them that they need to choose a foreperson to act as a spokesperson during the trial should the jury need to speak to the judge, or should the judge wish to communicate with the jury.⁷

4.10 Judges will explain the charge or charges alleged against the accused, the fact that the accused has pleaded not guilty to the charge or charges, and, therefore, that the prosecutor must prove the accused’s guilt beyond a reasonable doubt. The judge will inform the jury of their general rights and responsibilities, stressing that they alone are to determine whether the facts

5. The extent to which judges in Australia and New Zealand follow their various versions of the Bench Book is the subject of a current study: see JRP Ogloff, J Clough, J Goodman-Delahunty, and W Young, *The Jury Project: A Survey of Australian and New Zealand Judges* (Australian Institute of Judicial Administration, 2005). For the Commission’s views on the Bench Book and adherence to it, see para 4.59-4.64.

6. *Criminal Trial Courts Bench Book* at 1-510. See also the Suggested Direction at 1-520: (www.jc.nsw.gov.au/ctcbb/Agreement%20for%20Use%20internet%20only.htm).

7. *Criminal Trial Courts Bench Book* at 1-520: Suggested Direction – advice/instruction to the jury on empanelling.

support a verdict of guilty or not guilty. The Bench Book also provides that the judge may tell the jury that they are free to ask the judge questions, either orally or in writing, about the evidence, the trial procedure, or the interpretation of the law.⁸

4.11 The jury will be told that they must not make any inquiries regarding aspects of the case that would change their role from impartial observers to investigators. The judge may also advise the jury that they must not bring computers or mobile phones into the courtroom.⁹

4.12 Many of these directions will be repeated in more detail during the summing up, which occurs after all of the evidence for both sides has been presented. During the summing up, judges will explain the burden of proof, and any other legal elements which require clarification. They will also summarise the Crown case, and the defences argued by the counsel for the accused. If they choose, judges may express an opinion to the jury regarding the facts. However, they must make it clear that the jury are free to disregard that view if it does not accord with their own.¹⁰

4.13 The *Jury Act 1977* (NSW) states that any “directions of law to a jury by a judge or coroner may be given in writing if the judge or coroner considers that it is appropriate to do so”.¹¹ It has now become fairly common practice in NSW for judges to give written directions to juries briefly setting out the relevant law and evidence.¹² The Bench Book provides that any written directions must be shown to counsel for both sides, with an opportunity for them to comment on the content, before the directions can be given to the jury.¹³

4.14 The *Jury Act 1977* (NSW) also provides that a “copy of all or any part of the transcript of evidence at a trial or inquest may, at the request of the jury, be supplied to the members of the jury if the judge or coroner considers that it is appropriate and

8. This should be done in open court with consent of counsel for both sides: see Glissan and Tilmouth, *Australian Criminal Trial Directions* (Butterworths 2003) at 7-1200.

9. *Criminal Trial Courts Bench Book* at 1-520: Suggested Direction – advice/instruction to the jury on empanelling.

10. See *Criminal Trial Courts Bench Book* at 7-020 (Suggested Direction - Summing Up)

11. *Jury Act* s 55B.

12. See *R v Savvas* (1989) 45 A Crim R 38 at 38.

13. *Criminal Trial Courts Bench Book* at 7-010.

practicable to do so”.¹⁴ Consequently, the provision of a transcript is discretionary and not supplied to the jury as a matter of course. Jurors may not necessarily be aware in advance that a copy of the transcript will not be provided at the close of evidence.

4.15 There is nothing in the Bench Book either to encourage or prevent judges giving further guidance to the jury on:

the role of the foreperson and the type of skills he or she should possess; or

- the most effective way to structure deliberations, eg, suggesting that they adopt an evidence-driven approach.

4.16 There is also nothing to prevent jurors from discussing matters arising from the trial before the formal deliberations begin. Ex-jurors have reported discussing the issues between themselves at morning tea and lunch breaks during the trial.¹⁵ However, there is no procedure in NSW setting out how those discussions should be structured to guard against jurors prejudging the verdict.

Jurors’ general information needs during the trial

4.17 This section discusses the findings from research, in Australia and overseas, on how jurors comprehend the information presented to them during a trial, and the effectiveness of measures designed to assist that understanding.

Juror comprehension

4.18 One of the greatest difficulties faced by juries is the comprehension and assimilation of complex legal and factual information. It is one thing to understand the law, and another to understand the evidence, but to put both together in a coherent manner is a difficult task.

4.19 Studies have investigated the effect of trial complexity on juror comprehension and performance, including the impact of trial procedures, such as jurors taking notes and asking questions, access by jurors to transcripts, and the quality, format and timing

14. Jury Act s 55C.

15. K Auty and S Toussaint (eds), *A Jury of Whose Peers? The Cultural Politics of Juries in Australia* (University of Western Australia Press, 2004) at 21.

of judicial instructions.¹⁶ The study noted the different types of trial complexity: namely, complexity of evidence, of information in large quantities, and of law. Jurors assessed their comprehension and performance differently depending on the type of complexity involved in a trial. Jurors surveyed reported greater difficulty reaching a verdict as the quantity of information increased, and less confidence that they had correctly interpreted the judge's instructions.¹⁷ However, they also found the prosecuting attorney to be more helpful. Where the complexity of the evidence was an issue, jurors reported confidence that they had been well informed, but also experienced greater difficulty in deciding how to vote. Finally, where trials involved complex legal argument, jurors reported finding the defence attorney less helpful, and again felt less confident that their verdict was based on a complete understanding of the judge's instructions.¹⁸

Juror note taking and question asking

4.20 Research has been conducted specifically into whether jurors who take notes and ask questions during a trial have a greater ability to recall and understand evidence. In the study discussed above, procedural innovations, such as juries asking questions of witnesses, were found not to affect the fairness or rationality of jury decisions in complex cases.¹⁹ In fact jurors reported that, of all trial procedures, asking questions was consistently beneficial in aiding their comprehension.²⁰

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16. L Heuer and S Penrod, "Trial Complexity: A Field Investigation of its Meanings and its Effects" (1994) 18(1) *Law and Human Behaviour* 29-51. This study consisted of a field experiment in which jurors were permitted to take notes and ask questions in some trials, but not in others. To test whether the success of juror note taking and question asking was affected by trial complexity, some judges were asked to allow jurors to take notes and ask questions only in complex trials, where others were asked to allow this in their next jury trial, regardless of length or complexity.
 17. Heuer and Penrod, "Trial Complexity: A Field Investigation of its Meanings and its Effects" (1994) at 41-42.
 18. Heuer and Penrod, "Trial Complexity: A Field Investigation of its Meanings and its Effects" (1994) at 42.
 19. Heuer and Penrod, "Trial Complexity: A Field Investigation of its Meanings and its Effects" (1994) at 49.
 20. Heuer and Penrod, "Trial Complexity: A Field Investigation of its Meanings and its Effects" (1994) at 49.

4.21 Another study by the same authors²¹ tested the hypothesis that jurors who took notes and asked questions during the trial would be more likely, particularly during longer trials, to remember and comprehend salient points of evidence than their counterparts who remained silent and passive. The study found that neither the supposed advantages nor the disadvantages of jury note taking were supported by the results. For example, jurors who took notes did not report superior recall of the evidence or greater satisfaction with the verdict than other jurors.²² On the other hand, note taking accurately reflected the evidence, and did not interfere with the jury's ability to keep up with the trial. Nor did the notes distort the evidence by favouring the prosecution or the defence, distract or unduly influence other jurors, or become too time consuming.²³

4.22 In trials in which jurors were allowed to question witnesses, jurors directed their questions in writing initially to the judge following the direct and cross-examination of the witness. If the judge considered the questions appropriate, they could be put to the witness, subject to the agreement of counsel.²⁴ The study found an increased understanding of facts and issues among jurors in trials where jurors' questions were put to witnesses.²⁵ However, other supposed advantages, such as the ability to get to the truth, alerting counsel to issues that need more explanation, and increasing overall satisfaction with the trial outcome, were not supported by the study.²⁶ As with note taking, none of the

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21. That study examined 160 civil and criminal trials across 33 states, and included a judicial questionnaire completed by 103 judges. The average trial length was 10 days for civil trials and 6 days for criminal trials: L Heuer and S Penrod, "Juror Notetaking and Question Asking During Trials" (1994) 18(2) *Law and Human Behaviour* 121-150. This study builds upon an earlier one conducted by the same authors using a smaller sample: see L Heuer and S Penrod, "Increasing Jurors' Participation in Trials" (1988) 12(3) *Law and Human Behaviour* 231-261.
 22. Heuer and Penrod, "Juror Notetaking and Question Asking During Trials" (1994) at 136-137.
 23. Heuer and Penrod, "Juror Notetaking and Question Asking During Trials" (1994) at 137-140.
 24. Heuer and Penrod, "Juror Notetaking and Question Asking During Trials" (1994) at 129.
 25. Heuer and Penrod, "Juror Notetaking and Question Asking During Trials" (1994) at 142-143.
 26. Heuer and Penrod, "Juror Notetaking and Question Asking During Trials" (1994) at 143-144.

perceived disadvantages of juror questioning were found. That is, jurors did not ask inept or harmful questions (despite not knowing the rules of evidence), did not interfere with counsels' strategy, did not begin to see their role as advocates rather than neutral observers, and the questions did not appear to have a prejudicial effect. Nor were counsel reluctant to object to questions from a juror being put to a witness, and jurors did not report being embarrassed when an objection was made to their questions.²⁷

4.23 Overall, the results “mildly support the proposition that juror questions aid jury decision making and provide a strong basis for rejecting a host of postulated disadvantages of both the note taking and question-asking procedures”.²⁸ However, questions from jurors will be most helpful if the judge instructs the jury of the best way to approach the task. The New Zealand study recommended that juries should routinely be reminded of their right to submit questions to the judge, which may be put to the witness, for the purpose of clarifying the evidence.²⁹

4.24 As noted earlier, judges in NSW may advise the jury that they may put any questions they wish to the judge, usually through the spokesperson. Juries may or may not be given guidance as to the procedure for asking questions, or the type of questions that might be appropriate.³⁰ So far as note taking is concerned, the practice differs from court to court. Some judges tell juries that they may take notes, while others prefer jurors to listen to the evidence without being distracted by taking notes.³¹ Some Australian ex-jurors have reported that they would have liked more information about how to make their notes relevant, having found it a strain to deal with the large volumes of conflicting

27. Heuer and Penrod, “Juror Notetaking and Question Asking During Trials” (1994) at 144-148.

28. Heuer and Penrod, “Juror Notetaking and Question Asking During Trials” (1994) at 148-149.

29. NZLRC Report 69 at para 368.

30. A recent survey of Australian judges found that 54% of respondents discussed with jurors whether or not they may ask questions. Of those, fewer than half (43%) gave jurors any information about how those questions should be asked: see Ogloff, Clough, Goodman-Delahunty and Young at 8 and 11.

31. Ogloff, Clough, Goodman-Delahunty and Young found that 71% of Australian judges who responded to their survey instructed the jury that may take notes, with less than half (43%) providing any additional guidance on note taking: at 8-9.

information.³² The extent to which jurors wish to take notes may be related to the availability of a transcript of the trial proceedings.³³

Judicial instructions to juries

4.25 The clarity and nature of instructions given by judges to juries is a crucial factor in the extent to which, if at all, jurors comprehend the relevant law and evidence. While such understanding is essential in all jury trials if decisions are to be soundly based, it is particularly significant in preventing hung juries. It is fairly well agreed upon amongst commentators and researchers that, while jurors are competent fact-finders, on the whole they have a great deal of difficulty understanding the law or judge's instructions.³⁴ Given the overwhelming responsibility placed on jurors, the unfamiliarity of their surroundings, and the air of intimidating ritual that often surrounds the law and its trappings, this is hardly surprising. Juror comprehension of judicial instructions is also affected by the judges' concern to avoid appealable errors that could result in a retrial. While this is a well-founded concern, it is clear that "procedures which are optimal to avoid appealable error may not be the same as procedures which are optimal for the understanding and efficient performance of the jury".³⁵

4.26 Common sense indicates that the instructions judges give to juries should be straightforward and in clear, simple English.³⁶ Research has also suggested that the timing and format in which the instructions are given can affect how well jurors understand them.³⁷ An interesting finding occurred in the New Zealand study. While a high proportion of jurors (over 80%) reported that they found the judge's summing up clear and helpful,³⁸ jurors in a

32. Auty and Toussaint (eds) at 16-17.

33. See para 4.41-4.42.

34. See Darbyshire, Maughan and Stewart at 25; Devine et al at 698; M Knox, *Secrets of the Jury Room: Inside the Black Box of Criminal Justice in Australia* (Random House, Sydney, 2005) at 299; VL Smith, "When Prior Knowledge and Law Collide: Helping Jurors to Use the Law" (1993) 17 *Law and Human Behaviour* 507-536 at 510; JRP Ogloff and VG Rose, "The Comprehension of Judicial Instructions" in N Brewer and KD Williams (eds) *Psychology and the Law: An Empirical Perspective* (The Guilford Press, New York, 2005) at 438.

35. Ogloff, Clough, Goodman-Delahunty and Young at 2.

36. Ogloff and Rose in Brewer and Williams (eds) at 427-429 and 438.

37. See para 4.32-4.40.

38. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 7.3.

similarly high proportion of cases (72%) demonstrated a misunderstanding of the law.³⁹ This indicates that judicial clarity alone may not be enough to help jurors understand the legal concepts involved in a trial.

4.27 Research indicates that juries do not passively absorb information during the trial and pull the evidence together only at the end. The “story model” theory of jury comprehension assumes that jurors bring with them their prior knowledge based on life experience. Jurors listen to the evidence presented in the trial and construct a narrative story based on how the evidence converges with their view of the world to reach the appropriate verdict.⁴⁰ The initial legal framework that jurors adopt when they are constructing their “story” is very important to the way that evidence is evaluated and understood.⁴¹ Consequently, it is crucial that the judge explain the relevant law to the jury as early and as clearly as possible.

4.28 The nature of the jury system is that each juror will draw on his or life experience in determining the credibility of witnesses and deciding facts. However, relying on preconceptions of the *law* on which to construct a “story” and reach a decision can be dangerous. Jurors may begin to construct their version of events not only on the law they hear presented at the trial, but based on their belief of what the law is or should be. For example, many jurors think they know what a robbery or a rape is, or understand, for example, the importance of establishing “intent” in murder and manslaughter charges. However, the beliefs held by each individual juror may not accurately reflect the correct elements of the law, promoting the risk of questionable verdicts. Nor may the preconceived views accord with the beliefs held by their fellow jurors, increasing the likelihood of disagreements during deliberations.

39. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 7.12.

40. Y Tinsley, “Juror Decision-Making: A Look Inside the Jury Room” (2001) *The British Criminology Conference: Selected Proceedings* www.britsoccrim.org at 6; N Pennington and R Hastie, “Practical Implications of Psychological Research on Juror and Jury Decision-Making” (1990) 16 (1) *Personality and Social Psychology Bulletin* 90; and P L Hannaford, V P Hans, N L Mott and G T Munsterman, “The Timing of Opinion Formation by Jurors in Civil Cases: An Empirical Examination” (2000) 67 *Tennessee Law Review* 627 at 630.

41. See Darbyshire, Maughan and Stewart at 22.

4.29 Juror preconceptions about legal concepts are often fostered by television programs, predominantly from the United States. While those programs may fleetingly resemble aspects of American law, they do not reflect the law as it stands in NSW. Personal accounts from ex-jurors inevitably compare and contrast their experiences to John Grisham novels, or to movies such as “*Twelve Angry Men*”, or programs like “*Law and Order*”.⁴² A growing trend in America is known as the “CSI effect”, where jurors are conditioned through television to expect crimes to be solved by sophisticated forensic evidence, and refuse to convict without it.⁴³

4.30 Research has shown that judicial instructions explaining relevant legal concepts, but ignoring that jurors may have their own understanding of those concepts, will not be enough to override jurors’ existing preconceptions about the law.⁴⁴ Further, while it is helpful for judges and the justice system to recognise that such prejudices may exist, it is not sufficient to point out to jurors that they must disregard their preconceived ideas.⁴⁵ Studies have shown that jury bias about legal concepts will persist unless additional instructions are given specifically to revise those preconceptions. For example, judges may need to describe what an offence does *not* mean in addition to giving the legal definition of the elements it does contain. This has been shown in a series of experiments in the United States that revealed juror preconceptions about the charge of kidnapping (eg that a ransom must be demanded to constitute the offence, that the victim is generally a child, and must be taken to another location, etc). Improvements in decision accuracy were only achieved when the judge spelt out that kidnapping need not be for monetary gain, can be perpetrated against adults, and the victim need not be taken to another location. Following this, the standard instructions setting out the elements of the offence were given.⁴⁶

42. See, eg, Auty and Toussaint (eds) at 13 and 19; and Knox at 10 and elsewhere.

43. JE Starrs, “The CSI Effect” (2004) 28(3) *Scientific Sleuthing Review* 1.

44. See VL Smith, “Prototypes in the Courtroom: Lay Representations of Legal Concepts” (1991) 61 *Journal of Personality and Social Psychology* 857-872; Smith (1993); and NJ Finkel and JL Groscup, “Crime Prototypes, Objective versus Subjective Culpability, and a Commonsense Balance” (1997) 21(2) *Law and Human Behaviour* 209-230.

45. In NSW, a brochure sent out to prospective jurors warns them against expecting the trial to be like something they have seen on television: see Knox at 10.

46. See Smith (2003) at 529-535.

4.31 Tailoring instructions in this way in order to meet juries where they are, has been found to be effective in other studies. For example, the use of “pattern” instructions in the United States (or general, standard form instructions such as those found in the Bench Book), have not been found to be particularly successful,⁴⁷ especially in cases involving legally complex issues. In those cases, jurors are better served by clear language instructions specifically addressed to the particular issues at hand.⁴⁸

Timing of instructions

4.32 As discussed above, providing jurors with a clear and comprehensive set of instructions at the start of the trial creates the framework within which juries reach their ultimate decision. Personal accounts from ex-jurors note that there is a general lack of information from the judge at the outset of the trial setting out the nature of the role of the jury and the types of decisions they need to make.⁴⁹ This is reported to be an issue, even in short trials. Others have endorsed this, suggesting that the judge’s opening statement should be summarised in writing.⁵⁰ That summary should explain the legal terms that constitute the offence in the indictment, and clearly give meaning to other concepts such as “beyond reasonable doubt” and “burden of proof” at the start of the trial.⁵¹

4.33 The New Zealand study noted that there were widespread misunderstandings about relevant legal issues (such as the meaning of “intent” or “beyond reasonable doubt”) that significantly influenced jury deliberations in 35 of the 48 cases they examined.⁵² An account from one Australian ex-juror noted

47. Ogloff and Rose in Brewer and Williams (eds) at 439.

48. Heuer and Penrod, “Trial Complexity: A Field Investigation of its Meanings and its Effects” (1994) at 50.

49. See Auty and Toussaint (eds) at 4.

50. See Knox at 297.

51. See Knox at 297. Ogloff, Clough, Goodman-Delahunty and Young found that 70% of Australian judges who responded to their survey indicated that they provide some outline of the legal concepts that are likely to arise in the trial. However, there were considerable differences between the types of concepts mentioned: at 14.

52. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 7.13-7.17; W Young, C Cameron, & Y Tinsley, “An inside look at jury decision-making” (2000) 12 *Judicial Officers Bulletin* at 27. See also Darbyshire, Maughan and Stewart at 27.

that confusion among jurors over the meaning of “reasonable doubt” may have led to compromise verdicts on several charges.⁵³

4.34 Other studies also supported the idea of instructing jurors on important aspects of the law before the trial, so that they will understand the legal framework that should define their verdict choices *before* they hear the evidence.⁵⁴ The recent New Zealand study found that:

[jurors] did not always absorb the outline of the law provided by the Crown Prosecutor in his or her opening address and as a result they heard the evidence without an understanding of the nature and meaning of the key legal elements of the offence. This meant that they failed to interpret the evidence with those elements in mind.⁵⁵

4.35 Consequently, that study suggested that the judge should give preliminary directions to the jury about the essential elements of the charges before the prosecution case commences.⁵⁶ The study noted that judges may sometimes be limited in the amount they may be able to say in their preliminary remarks, particularly if the defence has elected not to divulge its case.⁵⁷

4.36 It has also been suggested that the judge’s opening remarks should include advice to the jury on the best way of resolving any disagreements that may occur during deliberations, and also letting the jury know that they have the option to hang.⁵⁸

Written instructions

4.37 In addition to the timing of instructions to the jury, the form in which those instructions are conveyed is equally important. It is well documented that information received aurally is more difficult

53. Auty and Toussaint (eds) at 22-23. That account noted that an explanation of what was meant by “beyond reasonable doubt” was sought after the jury had been deliberating for one day, but no helpful reply was offered.

54. Ellsworth and Reifman at 814; Auty and Toussaint (eds) at 48; Ogloff and Rose in Brewer and Williams (eds) at 431-432 and 439.

55. Y Tinsley, “Juror Decision-Making: A Look Inside the Jury Room” (2001) *The British Criminology Conference: Selected Proceedings* www.britsoccrim.org at 6.

56. NZLRC Report 69 at para 304-308.

57. NZLRC Report 69 at para 308.

58. Ogloff, Clough, Goodman-Delahunty and Young at 12; Knox at 299.

to remember than printed material.⁵⁹ Written materials are more easily comprehended and recalled.

4.38 Commentators have suggested the use of a juror notebook, containing a list of witnesses (with photos), copies of key documents and a copy of the final instructions.⁶⁰ Researchers in New Zealand found that 62.2 % of jurors surveyed would have found a written summary of the law useful. They suggested that juries should be provided with a written summary of the legal elements of the charge and definitions of relevant legal terms. It is thought that the provision of such materials would lead to a better application of the law.⁶¹

4.39 Others have endorsed the view that it should be standard practice to provide judicial instructions and the summing-up in writing.⁶² Written directions on the law would “help understanding, reduce deliberation time, cut down on later disputes over what the judge said, and increase juror satisfaction”.⁶³ While many judges in NSW do provide juries with written instructions or “road maps”, it is apparently not standard across all courts. According to the recent survey of judges conducted by Ogloff, Clough, Goodman-Delahunty and Young, 82.6% of NSW respondents indicated that they provided the jury with written assistance about the summing up.⁶⁴

4.40 More innovative measures are being used in other jurisdictions to assist jurors to comprehend the law and evidence. For example, audio-visual presentations (including illustrated instructions and computer-animated conceptualisations of legal terms) and flow charts accompanying written instructions have been shown to improve juror comprehension.⁶⁵ The use of written and visual aids in New Zealand has increased since being

59. Darbyshire, Maughan and Stewart at 35.

60. B M. Dann, “Learning Lessons and Speaking Rights: Creating Educated and Democratic juries” (1993) 68 *Indiana Law Journal* 1229.

61. Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 7.59-7.60.

62. Knox at 299.

63. Knox at 248.

64. at 24.

65. F Dattu, “Illustrated Jury Instructions: A Proposal” (1998) 22 *Law and Psychology Review* 67; N Brewer, S Harvey and C Semmler, “Improving Comprehension of Jury Instructions with Audio-Visual Presentation” (2004) 18 *Applied Cognitive Psychology* 765-776; Ogloff and Rose in Brewer and Williams (eds) at 435-438.

recommended by the Law Commission.⁶⁶ Studies have also investigated the use of “decision trees” to help focus jurors’ attention on the questions they need to ask themselves and answer in order to reach a verdict.⁶⁷

Access to transcripts

4.41 As noted above, the Jury Act enables jurors to request a copy of the transcript of the trial.⁶⁸ However, the Act also confers discretion on the judge to refuse such a request. Some judges may allow part of the transcript, or their summing-up, to be provided to the jury, while others do not.⁶⁹ Presumably, the decision to refuse to issue a transcript would be done on the basis that it was too lengthy, would encourage jurors to rely on the transcript rather than listen to the evidence as presented in court, and could be prejudicial if only part of the evidence is read out of context.⁷⁰ There does not appear to be any consistent practice in NSW on this point.

4.42 The refusal to provide a written transcript of evidence may come as a shock to jurors who were relying on it as a memory aid during deliberations. This is a particular concern where jurors have not received judicial instructions about taking notes.⁷¹ In one account by a former juror, a request for a transcript was denied (only the summing up was provided), despite the fact that the case involved ten charges heard over more than five days.⁷² Ex-jurors have suggested that either written or video recordings should be provided to jurors wherever possible.⁷³ Failing that, jurors should be told in advance that they will not be given a transcript of evidence, so that they can take detailed notes.⁷⁴

66. NZLRC Report 69 at para 359.

67. Ogloff, Clough, Goodman-Delahunty and Young at 23; Ogloff and Rose in Brewer and Williams (eds) at 435-436.

68. Jury Act s 55C.

69. Ogloff, Clough, Goodman-Delahunty and Young found that only 40% of Australian judges surveyed (as opposed to 88% of judges in New Zealand) told the jury whether or not they would be provided with a copy of the transcript: at 10.

70. Where judges refuse juries access to the transcript, jurors are generally told that they may have aspects of the evidence read or played back to them if they wish: Ogloff, Clough, Goodman-Delahunty and Young at 10.

71. See para 4.24.

72. Auty and Toussaint (eds) at 20.

73. Knox at 298.

74. Knox at 298.

Pre-deliberation discussion

4.43 Traditionally, jurors have been directed to take the role of passive fact finder during the trial. However, the assumption that jurors commence deliberations without having formed a view as to the appropriate verdict is increasingly seen to be “at best, wishful thinking on the part of judges and lawyers and, at worst, a complete legal fiction”.⁷⁵

4.44 In NSW, there is nothing to stop jurors discussing the case with each other before the conclusion of the trial. These discussions, when they occur, are generally informal ones held over lunch or coffee breaks. A more formal approach to pre-deliberation discussions has been taken in America, providing an opportunity to gain more of an insight into the timing of opinion formation by jurors. The State of Arizona changed its Rules of Civil Procedure to permit pre-deliberation discussion. Rule 39(f) provides that jurors in civil trials may discuss the evidence amongst themselves prior to the formal deliberations commencing, but only in the jury room, and only in the presence of all jurors. Further, jurors were instructed that they must refrain from forming a judgment about the outcome of the case until the deliberations commence.⁷⁶

4.45 Proponents of pre-deliberation discussions are of the view that conducting discussions during the trial would assist juror comprehension and recollection of evidence, making verdict choice faster and easier. Opponents fear that this may promote prejudgment. Research into civil juries in Arizona has revealed that pre-deliberation discussions do assist jurors to clarify points of confusion and test their recall about the evidence, which is particularly beneficial in long and complex trials, and those involving expert testimony.⁷⁷ On the other hand, jurors also frequently ignored the prohibition on discussing the case only when all jurors were present, and some expressed early opinions as to verdict. However, in just over half of those cases, those early opinions changed during deliberations, somewhat negating the fear that early discussion would inevitably lead to intractable opinions as to verdict. This finding has been confirmed in other research showing that over 95% of jurors changed their minds at least once,

75. Hannaford, Hans, Mott and Munsterman (2000) 67 *Tennessee Law Review* 627 at 630.

76. See S Seidman Diamond, N Vidmar, M Rose, L Ellis and B Murphy, “Inside the Jury Room: Evaluating Juror Discussions During Trial” (2003) 87(2) *Judicature* 54.

77. See Seidman Diamond, Vidmar, Rose, Ellis and Murphy at 56 and 57.

with more than 20% changing their minds as a result of pre-deliberation discussions, and nearly 40% altering their opinion during final deliberations.⁷⁸

4.46 The researchers suggested that the negative aspects of pre-deliberation discussions could be minimised by providing written as well as oral instructions to juries outlining the conditions under which they are permitted to discuss the case prior to deliberations commencing, and by selecting an interim foreperson to preside over pre-deliberation discussions.⁷⁹

Structuring jury deliberations

Guidance to juries on how to deliberate

4.47 Some commentators in the United States have called for reforms to the actual deliberation process. One of the first jury reform projects, which took place in Washington D.C in 1989, recommended that guidance should be given to juries about how to structure their deliberations. In particular, the project recommended that juries be encouraged to discuss the law and evidence before they take any votes: that is, adopt an evidence-driven approach.⁸⁰ The New Zealand study endorsed this recommendation.⁸¹

4.48 Since this study, 42.9% of judges in New Zealand reported that they provide advice to juries on approaches they may wish to take during deliberations. This compares with just 26.1% of NSW judges who responded to the survey.⁸² Guidance on how to deliberate effectively is seen as necessary in Australia as well:

Most jurors would appreciate a simple written guide on the difference between poll-driven and evidence-driven deliberations, on the value of secret and open ballots, and on basic conflict-resolution techniques.⁸³

78. Hannaford, Hans, Mott and Munsterman (2000) at 637-638.

79. Seidman Diamond, Vidmar, Rose, Ellis and Murphy at 58.

80. Ellsworth and Reifman at 816. See para 2.31-2.33 for a discussion of the distinction between evidence and poll-driven approaches to jury deliberation.

81. NZLRC Report 69 at para 391.

82. Ogloff, Clough, Goodman-Delahunty and Young at Table 5.

83. Knox at 299.

Selecting a foreperson

4.49 An issue related to providing juries with guidance on the best way to conduct deliberations is giving them better information on the role of the foreperson in guiding those discussions. The New Zealand study found an effective foreperson to be crucial in ensuring productive deliberations, particularly in long and complex trials.⁸⁴ As noted earlier, these trials are more likely than others to result in a hung jury.⁸⁵

4.50 The New Zealand study revealed an overall lack of understanding of the role of the foreperson. Australian ex-jurors have also commented on the arbitrary nature in which the foreperson is selected.⁸⁶ In one case, a juror was appointed foreperson because she happened to be sitting in the seat nearest the judge after being empanelled.⁸⁷ Jurors would appear to receive little, if any, information on the type of skills and qualities a foreperson should possess.⁸⁸ The New Zealand study suggested that juries in general, and the foreperson in particular, should be given extensive advice (in writing and in the judge's preliminary remarks) as to the best way to structure deliberations, including the foreperson's role in guiding discussions and dealing with disagreements.⁸⁹

4.51 The study also discussed the timing of foreperson selection. Jurors are encouraged to select a foreperson as soon as possible after the swearing in process. While early dissemination of information to jurors about the role of the foreperson is desirable, there are advantages to delaying the actual selection of the foreperson until later in the trial. By then, the jurors would be more acquainted with each other and better able to select the person with the most suitable skills. Until a foreperson is appointed, one juror could act as an interim spokesperson. This suggestion has been made in relation to NSW trials as well.⁹⁰

84. NZLRC Report 69 at para 387-391; and Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 6.23-6.34.

85. See para 2.3 and para 2.5.

86. Auty and Toussaint (eds) at 11.

87. Auty and Toussaint (eds) at 11.

88. Ogloff, Clough, Goodman-Delahunty and Young found that only 17% of Australian judges who responded to the survey (as opposed to 74% of New Zealand judges), gave guidance to the jury as to the sort of person they might choose as foreperson: at 8 and 12.

89. NZLRC Report 69 at para 287-289 and 388-390.

90. Knox at 296.

4.52 However, as the New Zealand Report pointed out, the foreperson's role is more than that of spokesperson. He or she also needs to be a leader: guiding jurors in their discussions and identifying and advising the court of any problems.⁹¹ Consequently, the New Zealand study recommended that the foreperson should continue to be selected early in the trial. However, jurors should be given more information on the role of the foreperson, and the type of skills and experience that could assist the foreperson to fulfil his or her role most effectively. The New Zealand study also found that the selection of a foreperson often happens under pressure and occurs very quickly (the average time being less than four minutes). Hence, in addition to more information, the study recommended that jurors be given more time early in the trial to select a foreperson, perhaps during an adjournment.⁹²

Directions given to deadlocked juries

4.53 As the Commission noted in Chapter 1, judges in Australia generally deliver the *Black* directions, named after a High Court case of the same name, to juries who have deliberated for some time, but are having difficulty reaching agreement. Under the directions, a judge would direct a jury as follows:

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

91. NZLRC Report 69 at para 290-293.

92. NZLRC Report 69 at para 294-299.

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.⁹³

4.54 The actual impact of the *Black* directions on juries is unclear. Studies on aspects of the jury system which have touched on juror reaction to the directions have shown mixed results. Some jurors found the directions provided good guidance in reaching a decision, while others interpreted them as a judicial rebuke for their inability to make a decision.⁹⁴ Some jurors were of the view that the directions provided “leverage” for those in the majority to coerce minority jurors into assent, suggesting that some jury members may place “undue weight” on those parts which “exhort the jury to reach a unanimous verdict and insufficient weight on those parts which stress the need for each juror to be sure in his or her own mind that the verdict is the right one”.⁹⁵ This is despite the comments made by Deane J in *Black v The Queen*, to the effect that

[a] juror who conscientiously holds out against a majority and thereby prevents unanimity has not failed properly to ‘do what (he or she was) chosen to do’. To the contrary, he or she has done no more than discharge his or her duty to both the accused and society. Any suggestion that a minority juror should democratically submit to the view of the majority is antithetical to the jury process under the common law of this country.⁹⁶

93. *Black v The Queen* (1993) 179 CLR 44 at 51-52.

94. See Chesterman, Chan, and Hampton at para 420-426. See also Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 8.6-8.14.

95. Chesterman, Chan, and Hampton at para 426.

96. (1993) 179 CLR 44 at 56

4.55 Similar findings have occurred in overseas studies. In the New Zealand study, some jurors interpreted the equivalent New Zealand version, known as the *Papadopoulos* directions, as encouraging them to reach a compromise verdict.⁹⁷ In the United States, research has found that the *Allen* directions seemed less effective than previously, and were being increasingly criticised as “unduly coercive on holdout jurors.”⁹⁸

4.56 The secrecy surrounding juror deliberations makes it difficult to know whether or not the *Black* directions provide a focus for juries who may be having difficulty in reaching a decision, or merely encourage uncertain jurors to capitulate. Personal accounts from ex-jurors have revealed confusion over the meaning and intent of the *Black* directions.⁹⁹ Judges can provide further clarification for jurors on matters of law and evidence. However, as noted in the New Zealand study, such clarification is “unlikely to be helpful unless there is a clear indication of the nature of the jury’s difficulties”.¹⁰⁰ In the absence of direct questions from jurors, judges may be reluctant to enquire as to the nature of the difficulties being experienced by the jury, so as not to be seen to be influencing them towards a particular verdict.

4.57 The New Zealand study considered the question of how judges can better assist juries who may be having problems reaching agreement by clarifying the law and identifying relevant evidence, and how juries can be reminded that this help is available should they wish to ask for it.¹⁰¹ The study recommended that the *Papadopoulos* directions be amended to encourage juries to consider the particular areas where they disagree, and include a reminder to the jury that they may ask the judge questions about the evidence and the law, and the meaning of any legal concepts.¹⁰²

4.58 A recent Australian study raised the issue of whether judges should advise juries on effective dispute resolution techniques in their opening remarks, before any actual disputes arise. The study

97. See Young, Cameron and Tinsley, Preliminary Paper 37(2) at para 9.7. See also para 3.23-3.26 of this Report for a discussion of compromise verdicts.

98. See Hannaford-Agor, Hans, Mott and Munsterman (2002) at 83. See also SE Sundby, *A Life and Death Decision: A Jury Weighs the Death Penalty* (Palgrave MacMillan Press, New York, 2005).

99. Auty and Toussaint (eds) at 13.

100. NZLRC Report 69 at para 393.

101. NZLRC Report 69 at para 394.

102. NZLRC Report 69 at para 395.

noted that the current practice of waiting until disagreements occur before issuing the *Black* directions runs the risk that the deliberations have become dysfunctional by the time the jury notifies the judge of the dispute.¹⁰³

The Commission's views

4.59 The strategies discussed above may go some way to reducing the incidence of hung juries. Some of them are already being implemented in courts in NSW and are provided for in the Bench Book. In many ways, however, the Bench Book and the research studies raise more questions than they settle. The Commission considers that the Bench Book provides sound guidance to judges on how to ensure that juries understand their role as fact finders in a criminal trial.

4.60 However, the extent to which the measures it contains are applied consistently by judges in NSW is not clear. Nor is it clear whether the Bench Book goes far enough in facilitating effective communication and understanding between all trial participants. Another unknown factor is the extent to which the directions given by judges are actually understood and applied by juries. Since juries deliberate in secret and are prevented, in most jurisdictions (including NSW), from discussing their deliberations after the trial has concluded, it is not possible to ascertain definitively whether or not juries actually understand the evidence put before them. Nor is it possible to know the number of verdicts delivered, or juries that have hung, based on a misunderstanding of the law or the evidence. Personal accounts and anecdotal evidence, however, suggest that jurors need more information put to them in a clear and accessible form.

4.61 The survey of judges recently conducted by Ogloff, Clough, Goodman-Delahunty and Young under the auspices of the Australian Institute of Judicial Administration, goes some way to bridging the gap between theory and what is actually occurring in practice. However, as the study acknowledges, more research needs to be done. Only judges were surveyed, and only a small number of NSW judges responded. For example, the study gives rise to questions such as:

What objections do judges have to jurors having access to transcripts?

103. Ogloff, Clough, Goodman-Delahunty and Young at 12.

What do jurors feel about having access to transcripts, and would it affect their attitude to taking notes?

- **Would jurors like to be able to question witnesses, and how should this be managed?**
- **Would jurors like to be given more guidance on how to structure more effective deliberations (eg the difference between poll-driven and evidence-driven approaches)?**
- **Should judges provide jurors with “decision trees”, or a list of questions they need to consider in reaching their verdict? If so, would judges have any objection to this?**
- **Would jurors like more time to select a foreperson, and more guidance from the judge on the type of skills that person should have?**
- **Should judges provide instructions about the legal aspects of the particular case and how to apply the evidence to the law *before* the trial begins?**
- **Should judges provide juries with more information on how to resolve disputes? If so, what sort of information should be provided and when should it be given to juries (eg at the start of the trial or only after a dispute arises?) What objections to this would judges have?**
- **Do jurors sufficiently understand the directions given to them by judges? What more information do they need?**
- **Are jurors provided with enough written material? What other format for receiving information would jurors find helpful?**
- **What do judges really think of the Bench Book? What improvements could be made?**

Was adequate information presented early enough in the trial to give jurors a context in which to develop their views?

Did jurors feel that they were able to ask the judge to clarify any matters of law, evidence or trial procedure?

Did jurors discuss trial issues with each other during the trial, and, if so, did those discussions help them to understand and recall the evidence better?

4.62 We are of the view that further empirical research needs to be conducted to address these and other questions. That research

should involve all participants in a trial, especially actual jurors, including those who have served on hung juries. Due to the secrecy of jury deliberations, much of the information we have as to how juries work, and why they hang in some cases but not in others, is based on studies involving simulated juries, or on deeply based assumptions. We noted at paragraph 2.50-2.54 the danger of extrapolating the findings of mock jury studies and applying them to real jury deliberations. The same danger applies to elevating assumptions about jury decision-making to the level of fact and using this as the basis for legal reform.

4.63 We believe that until a comprehensive study is conducted in NSW to determine the existing practices in NSW jury trials, and what improvements need to be made, no major overhaul of the jury system should be attempted. As the BOCSAR 2002 study pointed out, there is an assumption underlying the call for majority verdicts that “juries hang as a result of the make-up of the jury or what transpires in the jury room”.¹⁰⁴ The facts are 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.¹⁰⁵

4.64 Furthermore, there has been no systematic review in jurisdictions that have majority verdicts as to whether the decisions are soundly based. The focus to date has been solely on numbers of hung juries in jurisdictions with majority verdicts as opposed to unanimity. It would be extremely beneficial if the empirical research recommended here could be conducted in conjunction with a jurisdiction that has introduced majority verdicts.

RECOMMENDATION 2

The Commission recommends that empirical studies should be conducted into the adequacy, and possible improvement, of strategies designed to assist the process of jury comprehension and deliberation.

104. BOCSAR 2002 study at 2.

105. BOCSAR 2002 study at 11.

Appendix

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LIST OF SUBMISSIONS

**P J Alcorn, TC Beirne School of Law, University of Queensland
(received 4 January 2005)**

**Dr J Anderson and Ms T Duffy, University of Newcastle School of
Law (13 December 2004)**

Australian Institute of Criminology (15 December 2004)

Mr Justice G Barr (22 October 2004)

His Honour Judge P Berman SC (22 October 2004)

The Hon Justice R O Blanch (2 November 2004)

**Mr N Cowdery AM QC, Director of Public Prosecutions
(19 November 2004)**

Mr Justice T S Davidson (27 October 2004)

His Honour Judge I Dodd (25 October 2004)

Mr Justice J Dunford (28 October 2004)

His Honour Judge M Finnane (15 November 2004)

**Dr D Hamer, School of Law, University of New England
(10 December 2004)**

Mr G Hillier (17 September 2004)

Her Honour Judge P J Hock (27 October 2004)

Mr Justice Hulme (1 November 2004)

Dr F Hum, Monash University (29 November 2004)

Mr Justice Greg James (27 October 2004)

Mr Justice D Kirby (27 October 2004)

Her Honour Judge M Latham (21 October 2004)

Law Society of New South Wales (23 November 2004)

**Mr K B Marslew AM, Enough is Enough Anti Violence Movement
Inc (20 December 2004)**

His Honour Judge T Naughton QC (22 October 2004)

New South Wales Bar Association (15 November 2004)
New South Wales Sentencing Council (17 December 2004)
His Honour Judge J Nicholson (26 October 2004)
His Honour Judge J B Phelan (1 December 2004)
His Honour Judge D Price (2 November 2004)
Redfern Legal Centre (22 December 2004)
His Honour Judge N G Rein SC (3 November 2004)
Mr Justice Studdert (2 November 2004)
Mr Justice B Sully (22 October 2004)
His Honour Judge S Walmsley SC (26 October 2004)
**Warringa Baiya Aboriginal Women's Legal Centre
(21 December 2004)**
**Associate Professor J Willis, School of Law, La Trobe University
(8 November 2004)**
His Honour Judge G D Woods QC (30 November 2004)
P Zahra SC, C Craigie SC and A Haesler SC (25 November 2004)

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