10 May 2021

Mr Paul McKnight
Deputy Secretary
Law Reform & Legal Services
Department of Communities and Justice
By email: policy@justice.nsw.gov.au

Dear Mr McKnight

Jury reforms

Legal Aid NSW welcomes the opportunity to make a submission to the Department of Communities and Justice on the jury reforms as part of the Indictable Process Review. This submission provides feedback both on the issues paper for the statutory review of the majority verdicts amendments (**Issues Paper**), and the consultation paper on improving the operation and management of juries (**Consultation Paper**).

We provide responses to the specific consultation questions below.

Statutory review of the operation of the majority verdicts amendments

Question 1: Do the policy objectives of the majority verdict legislation remain valid?

According to the Issues Paper, "the key policy objective of the majority verdict amendments is to ensure criminal proceedings do not result in a hung jury due to a 'rogue juror'".[1] It provides that the amendments "avoid the inconvenience, cost and delay of a hung jury for criminal justice system participants, additional trauma for victims, and any reduction in public confidence in the criminal justice system associated with the failure of one juror to not perform their role properly in criminal proceedings".[2]

Trial by jury is a fundamental aspect of our criminal justice system, and any amendments must be evidenced and justified. As expressed by the High Court:

[1] Department of Communities and Justice, *Issues Paper – Jury Reforms: Statutory Review of the Majority Verdicts Amendments* (2021) 4.
[2] Ibid.

> The guarantee of section 80 of the Constitution was not the mere expression of some casual preference for one form of criminal trial. It reflected a deep-seated conviction of free men and women about the way in which justice should be administered in criminal cases. That conviction finds a solid basis in an understanding of the history and functioning of the common law as a bulwark against the tyranny of arbitrary punishment. In the history of this country, the transition from military panel to civilian jury for the determination of criminal guilt represented the most important step in the progress from military control to civilian self-government....
>
> The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people. The random selection of a jury panel, the empanelment of a jury to try the particular case, the public anonymity of individual jurors, the ordinary confidentiality of the jury's deliberative processes, the jury's isolation ... from external influences and the insistence upon its function of determining the particular charge according to the evidence combine ... to offer some assurance that the accused will not be judged by reference to sensational or self-righteous pre-trial publicity or the passions of the mob.[3]

For the reasons below, Legal Aid NSW submits that there is a lack of evidence to support the policy objectives of the majority verdict legislation, and therefore that the amendments should not be retained.

First, there is no evidence to support the view that 'rogue jurors' are the problem behind hung juries. To the contrary, in its 2005 report on majority verdicts, the NSW Law Reform Commission (**NSWLRC**) said:

> 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.[4]

The Issues Paper has not presented any further evidence or data to contradict this this view.

Second, there is a lack of evidence to demonstrate or suggest that the majority verdict amendments have resulted in fewer hung juries since their introduction in NSW. The challenges with obtaining relevant information are acknowledged in the Issues Paper.[5] There appears to be limited available data on jury deliberations in NSW, including the number of *Black* directions issued, and the number of verdicts that were unanimous or by majority following a *Black* direction.[6] That said, it is surprising that data from the

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[3] *Kingswell v R* [1985] HCA 72, 47.
[4] NSW Law Reform Commission, *Majority Verdicts* (Report 111, August 2005) 53.
[5] Department of Communities and Justice, *Issues Paper – Jury Reforms: Statutory Review of the Majority Verdicts Amendments* (2021) 5.
[6] *Black v The Queen* (1993) 179 CLR 44 at 51. Under the directions, a judge should encourage the jurors to deliberate further and consider the evidence and the opinions of other jurors. However, if

Office of the Director of Public Prosecutions could not be obtained in relation to the proportion of hung juries overall for the purpose of this review.

On the contrary, a 2002 report by the Bureau of Crime Statistics and Research (**BOCSAR**) suggests that there is little correlation between majority verdicts and a lower level of hung juries. At the time, South Australia and Western Australia had majority verdicts but did not have a much lower level of hung juries than Queensland (which at the time had a unanimous jury requirement).[7] In its 2005 report, the NSWLRC said:

> 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.[8]

A number of initiatives and procedural reforms have been introduced in NSW since 2006 that have reduced court delays and mitigated the risk of trauma to victims, resulting in even less justification for retaining majority verdicts. One of the reforms that has had the greatest effect in reducing the District Court backlog is the early appropriate guilty plea (**EAGP**) reform, which commenced in April 2017. The EAGP reforms have transformed the way in which serious criminal matters are managed in the court system by refocussing activity from the District Court to the Local Court. Data indicates that the EAGP reform resulted in 14% fewer trial matters in the first 12 months of operation, compared with the previous year.[9]

There have also been reforms that aim to mitigate the risk of re-traumatisation for victims, who may have to give their evidence again, in the event of a retrial. Reforms to the *Criminal Procedure Act 1986* (NSW) were passed in 2005 to enable a video and/or audio recording of a complainant's evidence from an earlier trial to be played in retrials,[10] thereby sparing the complainant from having to attend court to give that evidence again.

Furthermore, the majority verdict amendments remain inconsistent with the requirement of unanimity in trials for Commonwealth offences,[11] and therefore

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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. The judge must not pressure or induce jurors to accept the view of the majority or to compromise their views in any way. Nor should a judge warn a jury that failure to reach agreement would result in "public inconvenience and expense": see NSW Law Reform Commission, *Majority Verdicts* (Report 111, August 2005) 4.

[7] Joanne Baker, Adrian Allen and Don Weatherburn, NSW Bureau of Crime Statistics and Research, *Hung Juries and Aborted Trials: An Analysis of Their Prevalence, Predictors and Effects* (Report, March 2002) 6.

[8] NSW Law Reform Commission, *Majority Verdicts* (Report 111, August 2005) 53.

[9] Law Society of NSW Specialist Accreditation Conference, *Criminal Law Stream* (23 November 2020) 6.

[10] *Criminal Procedure Act* 1986 (NSW) s 306B.

[11] *Cheatle v R* [1993] HCA 44.

contribute to an undesirable situation of 'different grades of justice' at the federal and state levels.[12]

We support the recommendation by the NSWLRC that the system of unanimity should be retained.[13] We agree that:

> 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.[14]

The issues associated with hung juries would more appropriately be addressed through research into the adequacy and improvement of strategies to assist the process of jury comprehension and deliberation, as recommended in the NSWLRC report.[15] We would also welcome the Department's consideration of the NSWLRC's 2012 report on jury directions in criminal trials, which recommended that the NSW Government consider the ways in which improved criminal trial management could enhance jury decision-making.[16] There may be other recommendations in this report that may improve jury deliberations.

If majority verdicts are retained, we submit that there is insufficient evidence to support any further softening of the status quo. Any proposals to further dilute the role of juries must be supported by relevant data. Given the potential of such reforms to infringe upon a defendant's right to a fair trial and due process, and in the absence of a bill of rights in NSW, such reforms should be approached with utmost caution and be supported by evidence.

Question 8: Should the Act prescribe the minimum period for jury deliberations before a majority verdict can be returned?

Question 9: What is the appropriate minimum period for jury deliberations, if any?

According to the Issues Paper, concerns have been raised that requiring a jury to continue to deliberate beyond the point of firm disagreement is inefficient and problematic, and that decreasing or removing the minimum 8-hour jury deliberation period[17] (the '8-hour rule') would reduce unnecessary costs in some cases.[18]

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[12] Anthony Gray, 'A Guaranteed Right to Trial by Jury at State Level' (2009) 15(1) *Australia Journal of Human Rights* 97, 106.
[13] NSW Law Reform Commission, *Majority Verdicts* (Report 111, August 2005) viii.
[14] Ibid 54.
[15] Ibid viii.
[16] NSW Law Reform Commission, *Jury Directions in Criminal Trials* (Report 136, November 2012) Recommendation 7.1(2).
[17] *Jury Act 1977* (NSW) s 55F(2)(a).
[18] Department of Communities and Justice, *Issues Paper – Jury Reforms: Statutory Review of the Majority Verdicts Amendments* (2021) 4.

We submit that the 8-hour rule should be retained. In our view, jury deliberation is the most crucial stage of the trial. In the experience of our solicitors, the *Black* direction issued to juries that are experiencing difficulty reaching agreement, coupled with the 8-hour rule, is sufficient and effective. Together, they act as important safeguards to ensure that a majority verdict is only available once the jury has had reasonable time to consider its verdict and is unlikely to reach a unanimous verdict. We note that 8 hours is the minimum period of time required for jury deliberation; what the court considers "reasonable" will depend on the nature and complexity of the case.[19] Decreasing or removing the 8-hour rule would undermine the purpose of the *Black* direction.

In our view, any savings to be gained from decreasing or removing the 8-hour rule would be marginal, as so few cases would be affected. Jury trials represent a very small proportion of the total number of criminal trials in NSW, with the vast majority of cases being dealt with in the Local Court. In 2019, only 3.5% of all defendants with a finalised court appearance in NSW were in the Supreme Court or District Court (4,838 out of a total 138,215).[20] Of these, 878 matters proceeded to a defended hearing/trial (representing 18.1% of higher court criminal cases, or 0.6% of criminal cases overall).[21]

Further, any expansion of majority verdicts will not affect trials involving Commonwealth offences, which, in our experience, are generally longer and more complex and require more jury deliberation time. Trials for Commonwealth offences do not permit majority verdicts. Therefore, we submit that the proposed amendments to majority verdicts would not necessarily have the intended impact on reducing the trial backlog in higher courts, as suggested in the Issues Paper.

Improving the operation and management of juries

Question 2: Should the Jury Regulation 2015 and/or the Act be amended to expand the power for courts to empanel extra jurors? If so, how?

Yes. We agree with the Consultation Paper that this would reduce the risk of a trial being aborted.[22]

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[19] *Jury Act 1977* (NSW) s 55F(2)(a).

[20] NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics January 2015 – December 2019: Table 1 NSW Higher, Local and Children's Criminal Courts January 2015 – December 2019* (Report, 2020).

[21] NSW Bureau of Crime Statistics and Research, *NSW Higher Criminal Courts January 2012 – December 2019: Number of Defendants Whose Principal Offence or Most Serious Unproven Offence was a Commonwealth Offence vs. State Offence by Outcome of Court Appearance, Year and Jurisdiction* (Report, 2020).

[22] Department of Communities and Justice, *Consultation Paper – Jury Reforms: Improving the Operation and Management of Juries* (2021) 5–6.

Consideration should also be given to the Victorian Law Reform Commission's 2014 report on jury empanelment, which recommended that courts be provided with further guidance about factors to take into consideration in deciding whether additional jurors should be empanelled, in contrast with the rigid NSW guidelines that only allow additional jurors to be empanelled when it is expected that a trial duration will go beyond a set period.[23] Specifically, the report recommended that:

> To regularise the empanelment of additional jurors there should be statutory criteria guiding the discretion to empanel additional jurors. These should include:
> - the length of the trial
> - the nature of the trial
> - any other factor that may impact on juror attrition.[24]

Question 3: Should the Act be amended to give the court authority to empanel a new juror where an empanelled juror is discharged at an early stage of a trial? If so, what is the latest stage this could occur?

No. We are concerned about the potential risks associated with empanelling a new juror at any stage after the judge's opening remarks. The Crown's opening is a key part of the trial as there is a procedural fairness aspect to holding the Crown to the case upon which it has opened. We query whether there is any data to support the need for change.

We suggest that more information be provided to a jury early on in the process, to reduce the risk of a jury member discharging at a later stage.

Question 7: Should the Act be amended to protect part-time workers?

Yes.

Question 8: Should the Act be amended to extend the categories of persons excluded from jury service for life?

Question 9: If so, persons convicted of which particular offence or category of offences should be excluded?

No. We oppose the expansion of the existing categories of persons who are excluded from jury service. We also oppose the current exclusion of persons from jury service for 10 years after serving a prison sentence of 3 months or more.

Diversity and inclusion in the composition of juries are important. As expressed by the High Court, "the relevant essential feature or requirement of the institution was, and is, that the jury be a body of persons representative of the wider community".[25] In its report on jury empanelment, the Victorian Law Reform Commission adopted the Parliamentary Law Reform Committee's articulation of the representative principle

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[23] Victorian Law Reform Commission, *Jury Empanelment* (Report 27, May 2014) 96.
[24] Ibid Recommendation 15.
[25] *Cheatle v The Queen* (1993) 177 CLR 541, 560.

that juries should be "an accurate reflection of the composition of society, in terms of ethnicity, culture, age, gender, occupation, socio-economic status."[26]

We are concerned that expanding the current categories of excluded persons would disproportionately impact on Aboriginal and Torres Strait Islander people, who are underrepresented on juries and overrepresented as criminal defendants.[27] The Australasian Institute of Judicial Administration has observed that one of the reasons for the low proportion of Aboriginal and Torres Strait Islander jurors in NSW is the extensive disqualification provisions that currently apply to people with criminal histories.[28]

Expanding the categories of excluded persons may also disproportionately impact on people with disability, who are more likely to have contact with the criminal justice system than people who do not have a disability.[29] In 2018, Human Rights Watch reported that almost 50% of Australian prisoners had a disability compared with 18% of the Australian population.[30]

While it is not unlawful under domestic law to discriminate in the area of civic duties, including jury duty, consideration should be given to the implications under human rights treaties, including the *International Covenant on Civil and Political Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on the Rights of Persons with Disabilities*.

Thank you for the opportunity to provide a submission on the jury reform consultation papers. Should you require any further information, please contact Meagan Lee, Senior Law Reform Officer, on [redacted] or [redacted], or at [redacted]

Yours sincerely

Brendan Thomas
Chief Executive Officer

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[26] Parliament of Victoria, Law Reform Committee, *Jury Service in Victoria* (Final Report, December 1997) vol 3, 7 [1.20]; Victorian Law Reform Commission, *Jury Empanelment* (Report 27, May 2014) 9; Victorian Law Reform Commission, *Inclusive Juries – Access for People Who Are Deaf, Hard of Hearing, Blind or Have Low Vision: Consultation Paper* (December 2020) 38.
[27] NSW Law Reform Commission, *Jury Selection* (Report 117, September 2007) 12.
[28] M Findlay, *Jury Management in New South Wales* (Australian Institute of Judicial Administration Inc, 1994) 5.
[29] Eileen Baldry, 'Disability at the Margins: Limits of the Law' (2014) 23(3) *Griffith Law Review* 370, 377; Law Council of Australia, *People with Disability, The Justice Project Final Report – Part 1* (Report, 2018) 18.
[30] Human Rights Watch, *'I Needed Help, Instead I Was Punished': Abuse and Neglect of Prisoners with Disabilities in Australia* (Report, 2018) 2.