LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON LEGAL AFFAIRS

INQUIRY INTO MAJORITY VERDICTS BY JURIES IN THE AUSTRALIAN CAPITAL TERRITORY

NOVEMBER 1991

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TERMS OF REFERENCE

On 26 February 1991 the Assembly agreed to the resolution that the Committee inquire into and report on:

1) The benefits or otherwise on the administration of justice in the ACT if majority verdicts in jury trials were introduced.

2) What should constitute a majority verdict in both civil and criminal proceedings.

3) The circumstances in which majority verdicts would apply.

4) The circumstances in which courts in Australian States and Territories have recourse to majority verdicts and the effect of majority verdicts in the administration of justice in those States and Territories.

5) Any other aspects of jury trials which the committee considers to be of concern to the community.

1 INTRODUCTION

1.1 The issue of whether majority verdicts should apply in jury trials has generated a good deal of debate and study in Australia and overseas in recent years.

1.2 Law Reform Commissions in Canada and New South Wales reported on the matter in 1982 and 1986 respectively. The Queensland Law Reform Commission reported on juries in criminal trials in 1985 and the Law Reform Commission of Victoria released a background paper on jury trials in 1985.

1.3 Five Australian States and Territories have provision for majority jury verdicts for civil or criminal trials or for both. However, there has been no work done as to the benefits or otherwise in terms of the administration of justice of adopting a system of majority verdicts in the ACT. Apart from civil cases where majority verdicts do in fact apply in the ACT, the law of the Territory requires that a unanimous verdict apply in criminal jury trials.

1.4 At this stage of the development of the ACT, the committee considered it appropriate that it examine the issues pertaining to both unanimous and majority verdicts with a view to determining whether the ACT jury system ought to conform with those Australian States and Territories which function with majority verdicts. In this regard it is noteworthy that these are all the smaller States with which the ACT could be expected to have rather more affinity than the larger States of NSW, Victoria and Queensland which function with unanimous jury verdicts.

1.5 However, it should be noted that under section 34 of the Australian Capital Territory (Self–Government) Act 1988, the power of the ACT Legislative Assembly to legislate to replace or amend the Juries Ordinance does not devolve to the Assembly until 1 July 1992. Until that date, the Commonwealth has responsibility for the Supreme Court of the ACT and retains the power to legislate on matters relating to the operations of the Court.

1.6 Where there is not a unanimous jury verdict and a new trial becomes necessary, this more often than not means further trauma for victims, witnesses and defendants. A fresh trial is also a costly process for all those concerned and for the community. A major appeal of the majority verdicts system is the potential for significantly reducing the degree of trauma for individuals and the overall costs of trials.

1.7 However, it is vitally important that justice be done and that it be seen to be done through the jury system. In its inquiry, the committee therefore canvassed opinion across a wide spectrum of the community including the law, law enforcement agencies, interest groups and individuals. Committee members also discussed the issues with those familiar with the jury systems operating in other States.

1.8 The inquiry also provided an opportunity for the committee to consider a number of other matters relating to trial procedures, and these are covered in section 10 of the report.

1.9 A public hearing was held on 16 August 1991. A list of submissions received is given in appendix 1, and a list of persons who gave evidence in public hearing is given in appendix 2.

2 BACKGROUND

2.1 In the ACT all juries in criminal trials must render a unanimous verdict of either acquittal or conviction. Selection, empanelling and other aspects of juries in the ACT is regulated by the ACT Juries Ordinance 1967. The Ordinance does not prescribe the basis upon which jury verdicts are to be given in criminal trials, so that the common law requirement that the verdict must be unanimous applies in the Territory.

2.2 The Juries Ordinance provides that where at a criminal trial a period of 6 hours has elapsed since the jury retired and the judge is satisfied, after examination of one or more of the jurors, that the jurors are not likely to agree, the judge may discharge the jury. This has the effect of ending the trial and, unless the Crown decides to drop the case, the accused must stand trial again.

2.3 The Juries Ordinance also allows for majority verdicts in civil cases in that if there is no agreement after six hours, a verdict of 3 out of 4 jury members may be entered. However there have been no civil jury trials in the ACT to this time.

2.4 There is provision in the ACT Ordinance for the number of jurors in a trial to be reduced by illness or other sufficient cause, but the number of jurors cannot be reduced to less than ten.

2.5 South Australia, Western Australia, Tasmania, the Northern Territory, England, Scotland and at least six States in the United States of America have all abrogated the common law rule of unanimity in jury verdicts. In these jurisdictions, majority verdicts are acceptable in criminal trials.

2.6 In New South Wales, Victoria and Queensland, as well as in New Zealand, Canada and most of the States in the USA, a jury must render a unanimous verdict in criminal trials.

Historical Aspects of Juries

2.7 The jury system originated in England in about the 12th century and arose from the gathering together of "12 lawful men and true" to inform visiting justices of anyone accused or notoriously suspect of murder, robbery or theft in the local area. An accusation would lead to the person accused being put to trial by ordeal, in which the accused was subject to various tortures which, if successfully endured, proved innocence.

2.8 By the 15th century, modes of trial such as ordeal, compurgation and battle had been replaced by the jury trial, which became the established form of trial for both criminal and civil cases at common law.[1] For jurors the ordeals were almost as rigorous. Jurors were required to sit in a room without "drink, meat, fire or candle" until they entered a verdict.

2.9 Originally, in some very old English case law, there was no necessity for a jury to bring in a unanimous decision.[2] In most cases, a majority verdict was taken. A jury decision required that at least twelve were agreed. If a lesser number was agreed, more jurors were added until twelve jurors could be found of the same opinion. The requirement of unanimity is explained historically by the insistence that no person should be condemned unless twelve persons concurred in finding the accused guilty.[3] According to Sir Patrick Devlin, the rule that a jury verdict must be unanimous was clearly settled in a case in 1367.[4]

2.10 Some 200 years ago Jeremy Bentham suggested a method of majority verdicts based upon three balloting balls given to each of the twelve jurymen (jurors were all men until very recent times). The balls were to be coloured black– to denote conviction, white– for acquittal and the remaining ball to be coloured half black and half white– to denote uncertainty. Jurors would deposit the ball expressive of their state of opinion in a common box. The defendant would stand acquitted if more than one white ball were found in the box, or if there were less than seven black ones.

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1 The New Encyclopaedia Britannica. Macropaedia: Knowledge in Depth 1974, 15th ed, vol 22, p485

2 Downie, D M 1970, 'And is that the verdict of you all?', Australian Law Journal, Vol 44, p483

3 The Hon Mr Justice H V Evatt 1936, 'The jury system in Australia', Australian Law Journal, Vol 10 Supplement, pp54–5

4 Sir Patrick Devlin 1966, Trial by Jury, Methuen, London, pp48–9

3 JURY DELIBERATIONS

3.1 Juries are required to deliberate privately and, at least within the jury room, the manner as to how they reach their decisions are not observed. Accordingly, much of the opinion about jury room behaviour and the influences which determine jury outcomes are speculative and largely based on anecdote and subjective judgements as to how "ordinary" people react when charged with the responsibility of assessing the guilt or innocence of an accused person in a trial. As the committee was informed, even if a jury member recounted what happened in the jury room, there is no certainty that his or her recollection was correct and, anyway, the whole system depends on the jury being protected from subsequent inquiry into its deliberations.[5]

3.2 A substantial number of people are precluded from jury service by reason of their professions and occupations. Yet many of those excluded from jury service, and particularly legal practitioners, are probably in the best position to properly judge evidence and certainly are those with the greatest interest in knowing how juries function. The committee noted that expert evidence it received on the way juries operate in the jury room was without exception based on secondary sources. No written records are kept of jury deliberations.

3.3 The question arises as to whether many juries simply bring in a verdict for the sake of making a decision in the necessary time, without really considering the issues of the case. It is argued this is especially so where only one member of the jury disagrees with the others.[6]

3.4 Supporters of majority verdicts in criminal trials point to the fact that society accepts majority rule in very many of its institutions. People are frequently prepared to have their views over-ridden by the contrary views of a larger group, provided they are given a proper opportunity to persuade the majority and provided usually that their dissents are recorded. In legal matters, this is now generally the way of resolving deadlock in civil juries as well as disagreement at the appellate level in civil and criminal cases.[7]

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5 Transcript, p15

6 New South Wales Law Reform Commission 1986, The Jury in a Criminal Trial, Criminal Procedure Report, para 9.25

7 ibid, para 9.30

3.5 Others say that the concept of the majority in most democratic institutions fails to recognise the very sensitive and special nature of the decision which a jury in criminal matters is called upon to make. A jury is required to make a determination as to guilt. The fact that appeal courts are sometimes divided in their views is put forward as clear evidence of the acceptability of majority decisions within the criminal justice system. However, Appeal courts, do not make judgements as to guilt. They decide whether trials have been fairly conducted in accordance with the law. They do not usually act as a collective of judges in the same way that a jury is a cohesive group. If an appeal court is divided, it is divided on a matter of law.[8]

3.6 The committee accepts that there is a concern that a minority in a criminal jury may cease to be listened to once the availability of majority verdicts becomes well known and that the minority vote will have reduced value.[9]

3.7 While there may be a risk that the views of the jurors in the minority will be ignored, the effect majority verdicts have on jury deliberations is unclear, primarily because of the secrecy under which juries operate.[10] Under the present system the majority is forced to take some account of minority views. However, in reaching a unanimous verdict one of three things can happen:

- in some cases all members of the jury will agree;
- in some cases there will be dissenters who will be persuaded to the majority view by reason; or
- in some cases the dissenters will be persuaded or forced to swallow their discontentment and agree with the majority.

3.8 A fourth alternative is that the jury will not agree. It was pointed out to the committee that in the first two instances majority verdicts have no effect, and the third is in effect a majority verdict. The only time majority verdicts would make a difference would be where a jury cannot agree, and then only when those that disagree are in a very small minority. It was put to the committee that the fear that minority views will be ignored, whilst being legitimate, is no more legitimate than fears that under the present system, minority views will be overborne by the majority.[11]

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8 ibid, para 9.48

9 ibid, para 9.41

10 Submission No10, p3

11 Submission No10, p3

3.9 A jury is presumed as a matter of law to have acted responsibly and in accordance with the directions they have been given by the trial judge. This is the case irrespective of whether a majority or unanimous verdicts system applies. This is in one sense an irrebuttable presumption because courts of criminal appeal will not admit evidence which deals with the deliberations of the jury.[12]

Incidence and Implications of Jury Disagreements

3.10 In the period 1987/88 to 1989/90 there were 118 trials conducted in the ACT involving 133 defendants. In four cases, or 3.4 per cent, there was disagreement. This figure is consistent with that indicated by the survey of jury disagreements conducted by the New South Wales Law Reform Commission (NSWLRC) in 1985.[13] The NSW Director of Public Prosecutions, told committee members that the incidence of hung juries in NSW was now running at about five per cent of all trials and that after retrials jury disagreements were of the order of 2.7 per cent. The Director had no direct information as to jury splits in these cases, but from anecdotal information was of the opinion that had a majority verdict system been in operation in NSW, the incidence of jury disagreement would have been considerably lower than the five per cent in initial trials.

3.11 Disagreement in jury trials usually leads to the added costs, both emotional and financial, of a retrial. As one submission put it "one benefit of majority verdicts is to avoid the expensive and time consuming process of a retrial where there would otherwise have been a hung jury, in circumstances where there was a clear majority either for a guilty verdict or a not guilty verdict."[14] A view put to the committee was that in today's economic climate the community cannot afford the luxury of hearing some trials twice, particularly in long running trials and that the judicial system is already under extreme pressure to speed up the legal processes.[15] It was submitted to the committee that the concern about the issue of retrials is heightened in long running criminal cases. With the judicial system already under strain it could be asked whether the justice system can afford the luxury of hearing some matters twice.[16]

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12 R v Gallagher [1986] VLR 219 at 249

13 Submission No9, p2

14 Submission No7, p2

15 Submission No4, p1

16 Submission No10, p2

3.12 Whatever the delay, the administration of justice suffers. It was put to the committee that the ideal situation from a witness's point of view is to have that witness produce the evidence and give the evidence when it is fresh in his or her memory and then enable that evidence to be tested through cross examination as appropriate. A concern for some years has been that the delay between actual allegations arising and the ultimate decision that the jury makes is too great.[17] This situation is of course exacerbated when a retrial becomes necessary.

3.13 Paul Byrne, Commissioner in Charge of the NSWLRC reference on the jury in a criminal trial, has stated it is true that where there is a disagreement, a retrial may be considered necessary. Often however, this is not done because the inability of the jury to agree on a verdict demonstrates such a weakness in the prosecution case as to make a retrial inadvisable.[18]

3.14 Retrials occur in the ACT almost without exception. All cases in which there was disagreement in 1988, 1989 and 1990 were retried. In one instance of disagreement in 1987 the Crown declined to proceed with the prosecution. On retrial, one accused was found guilty and three accused were acquitted. This is compared to Victoria where 29% of cases in 1977, 1979 and the first six months of 1980 were not retried.

3.15 The joint Legal Aid and Public Defender submission quotes Lord Devlin as saying "The evil caused by disagreements is not great. When they occur, they can sometimes be grievous to the parties concerned and they are always expensive, but they are not numerous enough to create a general problem. The sense of satisfaction obtainable from complete unanimity is itself a valuable thing and it would be sacrificed if even one dissentient were overruled."[19]

3.16 The ACT Law Office contended that the argument that jury disagreements are innately unsatisfactory is unconvincing as it starts from the premise that it is vital to reach a conclusion in every trial. The Law Office view was that it would be extraordinary, given the nature of a jury that there were not occasional disagreements, because juries are intentionally chosen from a panel representing a wide ranging variety of backgrounds in the community. Even if there were no verdict at the original trial, a conclusion will ultimately be achieved through a retrial or the Crown deciding to drop the case.[20]

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17 Transcript, p28

18 Byrne, P 1989, 'Majority verdicts in criminal trials', Australian Law Journal, vol 63, p271

19 Devlin, op cit, p57

20 Submission No3, p2

3.17 The committee accepts that there will always be a small number of cases in which twelve individuals drawn at random from a community will not be able to agree. However, the committee sees no particular advantage to the community or to the administration of justice of a system which allows for hung juries when by any reasonable yardstick, and by practical application in other jurisdictions, a (large) majority of jurors in a trial are capable of reaching agreement.

3.18 The Commonwealth Director of Public Prosecutions (CDPP) expressed the view that the introduction of majority verdicts (in the ACT) would lead to some savings in both time and resources as there would be a reduction in the number of retrials. The CDPP said majority verdicts would not eliminate the problem of jury disagreements but only assist in reducing the number of disagreements (leading to either retrial or the dropping of the case), and went on to say that as the percentage of jury disagreements in the ACT historically has been very low, any savings that will result in both time and resources from the reduction in the number of retrials are likely to be insubstantial. [21]

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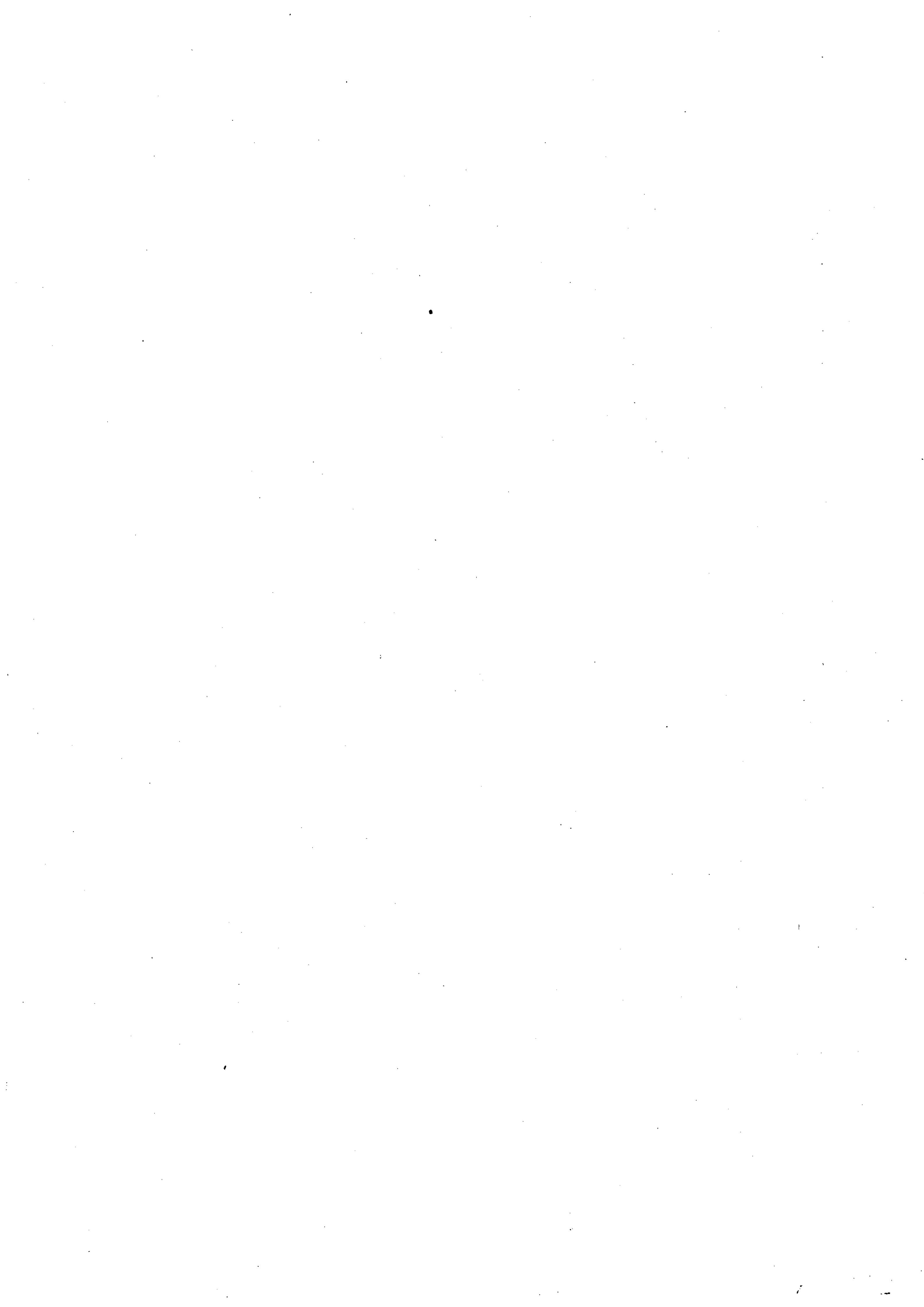
[21] Submission No9, p2



4 EXPERIENCE WITH MAJORITY VERDICTS

4.1 Submissions by and discussions with law officers and practitioners in those States and Territories with provision for majority verdicts indicate that majority verdicts systems have operated effectively in those jurisdictions. The committee received no information from those States and Territories about perceived drawbacks in the operation of majority verdicts or the quality of justice. The fact is that majority verdicts have operated successfully in South Australia for 64 years; Tasmania for 55 years; Western Australia for 31 years and the Northern Territory for 11 years.[22]

4.2 Because of the nature of the jury system, information about the numbers of verdicts returned on a majority basis in the jurisdictions concerned is not readily available. To the extent that figures could be assessed, the Northern Territory Office of the Director of Public Prosecutions advised the committee that at June 1991 it was aware of three majority verdicts so far that calendar year. Two were guilty by majority and one not guilty by a majority.[23]

4.3 The committee was advised by a person who appeared as Counsel in jury trials in Tasmania over some 10 years both as Counsel for the Crown and as Counsel for the defence and later appeared in Western Australia over three years that, in his experience, Counsel for both the prosecution and the defence favour the majority verdict provisions in those States.[24]

4.4 In contrast to Australian jurisdictions, jury findings in English courts are required to state the number of jurors who agree and disagree with a verdict. Accordingly, figures are available on the experience in that country following the introduction of majority verdicts in 1967. At that time the rate of jury disagreements was in the region of 4 to 5 per cent of all trials. After 1967 the figures for juries reaching verdicts by majority are revealing. In 1968 there were majority verdicts in 7.7 per cent of cases, in 1969 this increased to 8.3 per cent and in 1970 to 9.1 per cent. Later figures show a 13 per cent majority verdict rate. They also indicate that hung trials, that is, those where a unanimous verdict or the required statutory majority verdict cannot be obtained, now constitute 2 to 3 per cent of all trials.[25] These figures indicate that without majority verdicts, the incidence of hung juries could now have been as high as 16 per cent.

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22 Submission No10, p5

23 Submission No7, p1

24 Submission No11, p2

25 Submission No10, p2

4.5 The committee noted comments by the NSWLRC that in order to reduce a small number of jury disagreements there had been a significant increase in the number of majority verdicts.[26] The New South Wales Law Reform Commission (NSWLRC), following a study in 1986 put the view that majority verdicts are unsatisfactory, a view which flows from the assertion that majority verdicts will diminish the rights of the accused person and thus lack the legitimacy of unanimous verdicts.

4.6 However, the committee noted that except for the Northern Territory, majority verdicts in the Australian jurisdictions which provide for such verdicts do not apply in cases of murder and other particularly serious offences which, by their nature, are most likely to attract widespread public attention.[27]

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26 NSWLRC Report, op cit, para 9.46

27 Submission No10, p3

5 THE CIRCUMSTANCES IN WHICH MAJORITY VERDICTS APPLY

5.1 In Western Australia, where a jury in a criminal trial, which is not a trial for an offence punishable with strict security, life imprisonment or for the offence of murder, has retired to consider its verdict and remained in deliberation for at least 3 hours and has not then arrived at a unanimous verdict, the decision of not less than 10 of the jurors shall be taken as the verdict. If after the jury has deliberated for 3 hours 10 or more of the jurors have not agreed upon their verdict, the jury may be discharged from giving a verdict unless in the opinion of the Judge or Chairman it is desirable that the jury should deliberate further, and is so directed. (Juries Act 1957, s41).

5.2 The Juries Act in South Australia provides that where a jury in a criminal inquest, which is not an inquest for a capital offence, has retired to consider its verdict, and remained in deliberation for at least 4 hours, and all the jurors are then unable to agree upon their verdict, the decision of 10 of the jurors shall be taken as the verdict of all. If after 4 hours deliberation 10 of the jurors are unable to agree upon their verdict the jury may be discharged from giving a verdict. In addition, the Juries Act provides that where in any inquest for a capital offence in which the jury may bring in a verdict of manslaughter, the jury has remained in deliberation for 4 hours and 10 of the jurors agree that the accused is guilty of manslaughter, the verdict of 10 of the jurors that the accused is guilty of manslaughter shall be taken as the verdict of all the jurors. (Juries Act, s57)

5.3 In Tasmania, if a jury has remained in deliberation for 2 hours in any criminal proceedings, without reaching a unanimous decision as to their verdict, but 10 of them have agreed as to a verdict, the decision of those 10 jurors shall be taken and entered as, and shall be, the verdict of the jury (Jury Act 1899, s48). This section does not apply to a verdict that the accused is guilty of treason, murder, or a crime punishable by death or any special finding upon which the accused would be convicted of such a crime.

5.4 The Northern Territory Criminal Code provides (s368) that where upon a trial a period of not less than 6 hours has elapsed since the jury retired and the jurors are not unanimously agreed upon their verdict the court shall, if the jury consists of 11 or 12 jurors and 10 of those jurors are agreed upon a verdict to be given, take and enter that verdict as the verdict of the jury, or if the jury consists of 10 jurors and 9 of those jurors are agreed upon a verdict to be given, take and enter that verdict as the verdict of the jury. Before 1982, in all trials for capital offences in the Northern Territory, if a period of not less than 6 hours had elapsed since the jury retired, and the jurors were not unanimously agreed upon their verdict, the Court could discharge the jury. This was repealed in 1982.

5.5 The Crown Court in England is not allowed to accept a verdict of guilty by a less than unanimous jury unless the foreman of the jury has stated in open court the number of jurors who respectively agreed to and dissented from the verdict. In addition, no court shall accept a verdict from a less than unanimous jury unless it appears to the court that the jury have had such period of time for deliberation as the court thinks reasonable having regard to the nature and complexity of the case, and the Crown Court shall in any event not accept such a verdict unless it appears to the court that the jury have had at least 2 hours for deliberation. As noted previously, a majority is comprised of not less than 10 jurors out of 11 or twelve or 9 jurors where there are 10. (English Juries Act 1974, s17).

5.6 A system of majority verdicts also exists in Scotland. However, there are major differences between the ACT and Scottish law which make comparisons of the respective situations of little relevance. For example, the jury in the Scottish criminal process consists of 15 people, there are three possible verdicts in the Scottish criminal system (guilty, not guilty, not proven) and a jury in Scotland cannot fail to reach a verdict. A majority verdict in Scotland means that at least 8 jurors out of 15 must vote for either acquittal or conviction.[28]

5.7 The committee found support for not extending majority verdicts to trials for treason or murder should such a system be adopted by the ACT.[29]

Recommendations

5.8 **The committee recommends that should a majority verdicts system be adopted in the ACT:–**

(a) it apply to all criminal trials except for those involving a capital offence, and

(b) the law provide for a majority verdict to be considered only after the jury has failed to reach unanimity after three hours deliberation.

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28 Findlay, M and Duff, P 1988, The Jury Under Attack, Butterworths, Sydney, pp41, 43

29 Submission No10, p6

6 THE NUMBERS CONSTITUTING A MAJORITY VERDICT

6.1 In Western Australia, the decision of not less than 10 of the jurors can be taken as the verdict in a criminal trial (Juries Act 1957, s41).

6.2 In South Australia the decision of 10 jurors can be taken as the verdict of all jurors in any criminal inquest not being an inquest for a capital offence (Juries Act 1927–1974, s57).

6.3 In Tasmania the decision of 10 jurors shall be taken and entered as the verdict of the jury except where the accused is guilty of treason, murder, or a crime punishable by death (Jury Act 1899 as amended in 1966, s48(2)).

6.4 In the Northern Territory, the verdict of 10 of the jurors is taken as the verdict if the jury consists of 11 or 12 jurors, and the verdict of 9 of the jurors is taken as the verdict if the jury consists of 10 jurors (Criminal Code, s368).

6.5 The English criminal justice systems differs to that in Australia, but for the purposes of comparison, in England, the verdict of a jury in proceedings in the Crown Court or the High Court need not be unanimous if, in a case where there are not less than 11 jurors, 10 of them agree on the verdict, and in a case where there are 10 jurors, 9 of them agree on the verdict (Juries Act 1974, s17).

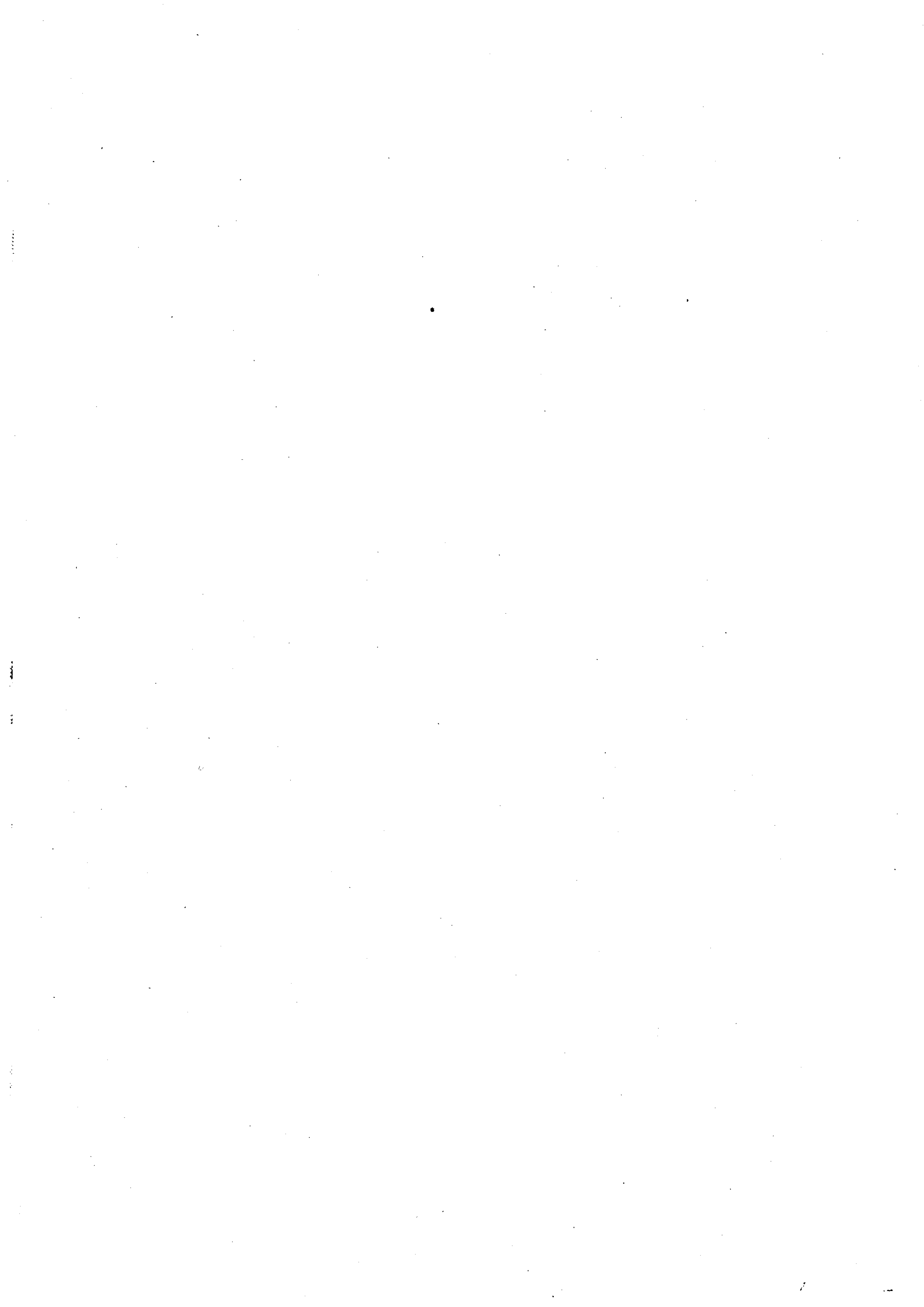
6.6 Opinion expressed to the committee as to the appropriate majority for a verdict in criminal trials varied between the agreement of at least 10 out of the 12 jurors[30] and 11 out of 12.[31] Proven practice in Australian and English jurisdictions indicates that a common view held by 10 out of 12 jurors would be an acceptable majority.

Recommendation

6.7 **The committee recommends that should a majority verdicts system be introduced in the ACT, the verdict of not less than 10 jurors be taken as the verdict of the jury where a unanimous verdict cannot be obtained.**

30 Submission No10, p6

31 Submission No9, p2



7 MAJORITY VERDICTS – SCOPE FOR CHANGE

7.1 Perhaps the most compelling reason why majority verdicts should be considered for the ACT is the fact that they have been operating in three States and the Northern Territory for between 11 and 64 years, and that reports by the NSW and Victorian Law Reform Commissions were unable to fault the administration of justice in those States and the Territory.

7.2 It was put to the committee that "in today's economic climate the community cannot afford the luxury of hearing some trials twice, particularly in long running trials. The Judicial System is already under extreme pressure to speed up the legal processes. With the introduction of majority verdicts a more streamlined and effective Judicial System will be achieved."[32]

7.3 It is argued that the concept of a majority verdict more correctly reflects the views of the community, by the mere fact that when twelve people from different backgrounds come together it is very rare that all will be of the same opinion on any given topic. It is argued that this position is heightened when the matter is a complex and technical argument involving debate from opposite viewpoints.[33]

7.4 It was also argued that the rights of the accused are maintained and adequately protected in a majority verdict decision with a potential expensive retrial being avoided.[34]

7.5 The committee noted a view that the desirability of the unanimity rule was more apparent when there were many capital offences and the death penalty was carried out. It was pointed out that the United Kingdom's Criminal Justice Act 1967, s13, allowing majority verdicts, was preceded by less than two years by the Murder (Abolition of Death Penalty) Act 1966, which virtually abolished the death penalty. This submission noted that the staunchest defenders of unanimous jury decisions came from times when the death penalty still applied.[35]

7.6 As mentioned in section 8 of this report, the reason for the introduction of majority verdicts in the United Kingdom in 1967 was to prevent one or two bribed or intimidated jurors from preventing conviction. There is also evidence that bribery and intimidation has occurred in NSW.

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[32] Submission No4, p1

[33] Submission No4, p1

[34] Submission No4, p1

[35] Submission No10, p5

7.7 Proponents of majority verdicts argue that majority verdicts will reduce the extent of corruption by ensuring that a person who is minded to interfere with the jury will have to approach more than one juror and thereby run a greater risk that the corruption will be detected. The NSWLRC although coming down on the side of unanimous verdicts in 1986, did not exclude the possibility that majority verdicts would minimise the potential for corruption of jurors.[36]

7.8 One of the major arguments in favour of majority verdicts is that they might overcome the problem of the perverse juror, that is to say one who is not prepared to reach a verdict based solely on an impartial assessment of the evidence. The Australian Federal Police (AFP) observed that this is another example of the difficulties in getting twelve people to agree. The AFP noted that it is hard to know whether the perverse juror exists, although one suspects he may do so on occasions. If a perverse juror does cause a disagreement and subsequent retrial to occur, they cause an additional burden on the justice system, and majority verdicts would result in a saving in court time.[37]

7.9 In summary, the principal argument against majority verdicts put to the committee is that the very notion of a majority verdict undermines the ancient and fundamental principle that the prosecution must prove the guilt of an accused beyond all reasonable doubt. This view holds that majority verdicts of guilty, in the absence of proven corruption (of a juror), imply that in the mind of at least one juror there is a reasonable doubt and that doubt weakens the validity and certainty of verdicts[38], would be in all likelihood less acceptable to the community at large, are of their very nature a second best solution and may cause a disaffected minority of jurors to take their complaints to the media.[39]

7.10 The committee noted that the NSWLRC at the time of its 1986 report was conscious of the attacks being made upon the jury system and was most reluctant to countenance anything that would encourage disaffected jurors speaking out and undermining the finality and essential validity of verdicts.[40]

7.11 However, as the committee noted previously, these fears are themselves speculative. They have not been evident or realised in any way in those Australian and other jurisdictions which have majority verdicts systems. Indeed, the committee observes that the very reservations causing concern to the NSWLRC were in fact based upon activities relating to the unanimous verdicts system operating then and since in NSW. Accordingly, the committee would take the view that much of the opposition to

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[36] NSWLRC Report, op cit, para 9.27

[37] Submission No10, p4

[38] Submission No3, p3

[39] Submission No3, p3 and Submission No5, p6

[40] NSWLRC Report, op cit, para 9.39

majority verdicts from legal quarters appears to be based upon a naturally conservative approach to any changes that may be contemplated to the legal system, which is suspicious of reform and prefers the comfort of familiar procedures irrespective of apparent deficiencies with it.

7.12 Another argument advanced against majority verdicts is that disagreement rates amongst juries, in criminal proceedings, are so low that this does not warrant changing the present system of unanimous verdicts.[41] The committee sees this as little more than an excuse by some within the profession for not giving full and serious consideration to the benefits of a majority verdict system.

7.13 The NSWLRC has argued that introduction of a rule allowing the verdict of 11 or 10 jurors to be taken as the jury's verdict would not eliminate the possibility of the jury's verdict being a compromise. If the requirement that twelve jurors must agree on a verdict encourages compromise, the Commission felt there was nothing to say that a requirement that 11 jurors agree would not also result in a compromise.[42]

7.14 While the NSWLRC concluded that the more substantial problem is the threat to certainty and acceptability posed by a majority verdict, it nevertheless accepted that sometimes a jury's inability to agree to convict or acquit may itself be the focus for criticism of a particular trial and thereby of the system of criminal justice. It considered that it must also be conceded that a majority whose clear belief is frustrated by what they may consider to be an irrational minority could themselves depart the courts frustrated and disaffected by the system.[43]

7.15 Another opinion expressed to the committee was that the assertion that majority verdicts will diminish the rights of the accused and thus lack the legitimacy of unanimous verdicts is a subjective one. The committee was told that it may well be an accurate view, but there is no empirical support for it. The argument is that a conviction pursuant to a majority verdict would serve to fan, rather than quieten, the public debate about the correctness of jury verdicts. If this is so, it is a very important factor, given the attention that some recent criminal trials have received.[44]

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41 Submission No10, p1

42 NSWLRC Report, op cit, para 9.26

43 ibid, para 9.40

44 Submission No10, pp2,3

7.16 However, it was again pointed out that majority verdicts currently exist in the United Kingdom, some States of the United Sates of America, and three States and one Territory of Australia. In those Australian jurisdictions the majority verdict is limited so that it does not apply in cases of murder and other particularly serious offences, which, by their nature, are most likely to attract wide spread public debate. The view was put that this, and the fact that majority verdicts have operated in those jurisdictions successfully, tends to rebut this central argument of the opponents to majority verdicts.[45]

7.17 Two members of the committee (Mr Collaery and Mrs Grassby) are of the view that there is no need at present for majority verdicts to apply in ACT jury trials. The Presiding member of the committee (Mr Stefaniak) considers that on balance there is a case for a majority verdicts system in the ACT, and that the Government should ask the Commonwealth Government to amend the ACT Juries Ordinance to provide for this. (See additional comments in appendix 3).

Recommendations

7.18 **The committee recommends that the Government:–**

(a) **review the operations of the ACT courts over the past five years to ascertain the financial costs to the administration of justice in the ACT where jury disagreements lead to retrials or dropped cases, and**

(b) **consider the implications for the quality of evidence and the administration of justice where retrials became necessary because of jury disagreements.**

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[45] Submission No10, p3

8 UNANIMOUS VERDICTS – THE STATUS QUO

8.1 Unanimity in jury verdicts has been part of the common law for many centuries and is viewed as a basic feature of the common law relating to trial by jury.

8.2 A submission to the committee cited the case of Newell v R (1936) 55 CLR 707 where at 713 Evatt J stated "... trial by jury has been universally regarded as a fundamental right of the subject, and unanimity in criminal issues has been regarded as an essential and inseparable part of that right, not a subordinate or merely procedural aspect of it ...". At 712 Dixon J, referring to the majority verdict legislation in Tasmania which in Newell's case had been applied retrospectively, stated that the legislation "should not be construed as depriving a prisoner standing in peril at the time of their enactment of so important a thing as his protection from conviction except by a unanimous verdict."[46]

8.3 This submission further commented: "That unanimity of jury verdicts is at the heart of the right to trial by jury could not be more clearly stated than has been stated by Hewart CJ in R v Armstrong [1922] 2 KB 555 at 568: "It may be that some jurymen are not aware that the inestimable value of their verdict is created only by its unanimity, and does not depend upon the process by which they believe that they arrived at it." and "Whatever the composition of a British jury may be, experience shows that its unanimous verdict is entitled to respect.""[47]

8.4 The requirement of proving a person guilty beyond reasonable doubt provides a reason to retain unanimous verdicts. The committee has considered this matter in more detail later in this report in chapter 9.

8.5 In the view of the Commonwealth Director of Public Prosecutions, the unanimity rule promotes mature deliberation.[48] The committee noted also that the Canadian Law Reform Commission has observed[49] that many people argue that the jury's strength is the fact that its verdict is the result of the interaction of twelve individuals. The Commission said that the unanimity requirement reduced the risk that innocent people will be convicted by increasing the accuracy of jury fact–finding. It stated that a jury is assumed to be an accurate fact–finder because it brings to bear on the decision making process the collective experience and recall of twelve persons, and

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[46] Submission No5, p1

[47] Submission No5, p2

[48] Submission No9 p2

[49] Law Reform Commission of Canada 1980, The Jury in Criminal Trials, Working Paper 27, p27

because the deliberative process in which they engage encourages a give–and–take by which ideas and arguments are tested, refined, confirmed or rejected.

8.6 The Canadian Law Reform Commission said the unanimity requirement would appear to be necessary to ensure that these attributes of jury decision making are present. According to the Commission, empirical research relating to the jury's deliberative process suggests, first, that minority views are more likely to be expressed and considered under the unanimity rule and, second, that the quality of discussion is superior. From these findings, the Commission concluded the greater likelihood of an accurate decision under the unanimity rule can be inferred.

8.7 The view was put to the committee that the unanimity rule enhances the likelihood that the jury's verdict will be accepted by the accused and the general community.[50] This point was also dealt with by the Canadian Law Reform Commission which stated that the maxim, "justice must not only be done but must be seen to be done" embodies an ultimate value in the criminal justice system. The Commission saw public acceptance of and confidence in jury verdicts is an important reason for retaining juries. The Commission felt that the unanimity requirement, like the "proof beyond reasonable doubt" standard, had an important symbolic value in informing people that the State has taken all possible safeguards to ensure that innocent persons are not convicted.[51]

8.8 It must be noted that in the great majority of cases there is agreement. The NSWLRC considered that the existence of a small number of juries which cannot agree is an indication that jurors generally perform their task conscientiously.[52] The Morris Committee in England said "the absence of a certain number of disagreements would itself be disturbing, since in the nature of things 12 individuals chosen at random are unlikely always to take the same view about a particular matter, and the existence of disagreements may, therefore, be evidence that jurors are performing their duties conscientiously."[53]

8.9 The NSWLRC also considered jury disagreement not always an inappropriate result as it may well reflect the difficulty of the case rather than the perversity of some jurors. The Commission considered that it may well be that the evidence presented is capable of persuading some jurors to reach one conclusion and at the same time it may have persuaded other jurors to reach an opposite conclusion.

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50 Submission No9 p2

51 CLRC Working Paper, op cit, p30

52 NSWLRC Report, op cit, para 9.16

53 Departmental Committee on Jury Service 1965, Report (Lord Morris of Borth–y–Gest, Chairman), Cmnd 2627, HMSO, London, para 357

8.10 A majority of the NSWLRC in 1986 considered that the argument that the unanimity rule forces compromises among jurors tended to overlook the importance of the directions which are usually given to a jury if the jurors have indicated that they are having difficulty reaching agreement. The judge usually explains to the jury that it is their duty to agree if they can honestly and conscientiously do so.[54]

8.11 Because jurors rarely reveal the process of deliberation in the jury room, observers cannot, however, know how often, if at all, compromises occur.

8.12 Paul Byrne has said that in many cases the nature of the charge and the unavailability of an alternative means that there is simply no room for compromise in the verdict.[55]

8.13 The Commonwealth Director of Public Prosecutions put the view that a cogent argument for retention of the unanimity rule can be found in the fact that even in those Australian jurisdictions where the rule has been abolished, nevertheless it has been retained for murder and certain other very serious offences. If it has been considered that the greater degree of certainty the unanimity rule entails is desirable for such serious offences, it seems to the Commonwealth DPP wrong in principle that something less should suffice for other, less serious, offences.[56]

Criticisms of Unanimous Verdicts

8.14 The major criticisms of unanimous verdicts are that they:

- force juries to reach compromise verdicts
- lead to the added costs of a retrial in the event of a disagreement
- cause trauma for those involved, and especially the victims in certain cases such as rape, where a retrial is necessary
- allow for the corruption of jurors
- allow an individual juror to hold out against other jurors for reasons unconnected with the case
- are undemocratic
- cause a high rate of acquittals.

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[54] NSWLRC Report, op cit, para 9.25

[55] Byrne P, op cit, p271

[56] Submission No9, p2. This is echoed by the NSWLRC in their Report, op cit, para 9.44

8.15 The Law Reform Commission of Victoria (LRCV), in a paper published in 1985 stated that research supported the assertion that "The truth is, that verdicts are often the result of the surrender or compromise of individual opinion."[57]

8.16 The LRCV went on to say that subtle pressures both internally by the group and externally by the trial judge are exercised if the decision making process is slow. The judge may admonish the jury to reach an agreement by a certain "give and take"[58] and to stress the desirability of coming to a decision,[59] provided no juror compromises his or her honestly held opinion in doing so.[60]

8.17 According to the LRCV, however, unanimity may be more apparent than real. Lone voices are silenced and it is not surprising that hung juries are (relatively) uncommon.[61] The views of psychologists quoted in the LRCV report were that a tendency towards uniformity arises in any group situation. When an individual's opinion is reinforced by others who agree, a snowballing effect is created in which a dissenting view becomes more and more difficult to maintain as the majority view increases. The bigger the group the more difficult it becomes to value and preserve an individual, honestly held opinion.[62] The LRCV commented that the requirement for unanimity could mean that, though in practice unanimous, members of the jury adhere to internal, dissenting views. It could also mean that minds are unfairly changed in the jury room through pressure.

8.18 One submission to the committee commented that "clearly a jury under the present system in the ACT experiences implicit and explicit pressures to reach unanimity. Jurors may be expressly and properly encouraged by the trial judge to come to a group decision and individuals may be discouraged from maintaining a dissenting view of the facts upon pressure of overnight or weekend lock–up or any number of less significant reasons."[63] One legal practitioner told the committee that in his experience he thought some juries had reached unanimity when told that they might be locked up overnight or through the weekend.[64] Another submission pointed out that, as the NSWLRC has recognised, the law allows considerable pressure to be placed on juries to encourage them to reach a unanimous verdict.[65]

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57 Law Reform Commission of Victoria 1985, The Role of the Jury in Criminal Trials, Background Paper No1, p74

58 R v. Walhein (1952) 36 Criminal Appeal Reports 167

59 R v. Olholm and McPherson [1925] VLR 377

60 R v. Cartledge [1956] VLR 225

61 LRCV Background Paper, op cit, p75

62 Schachter, S 1951, 'Deviation, Rejection and Communication' 46 Journal of Abnormal Psychology, pp190–207, quoted in LRCV Background Paper, op cit, p113, fn 69

63 Submission No5, p5

64 Transcript, p52

Interference with Jurors

8.19 There is a belief that the rule requiring unanimity can encourage interference with jurors.[66] The committee was told that, while it is not clear how much of a threat corruption of jurors poses to our criminal system, the introduction of majority verdicts would be an added safeguard because of the added risk to a would be suborner in approaching two or three jurors.[67] The reason given for the introduction of majority verdicts in the UK in 1967 was to prevent one or two bribed or intimidated jurors from preventing conviction.[68] If one juror can be corrupted, through bribery or intimidation, the remainder of the jury, the argument goes, is rendered powerless[69] and that juror can frustrate the whole proceedings if unanimous verdicts are required.[70] The same argument applies to perverse or eccentric jurors.

8.20 The NSWLRC in 1985 said that there was some evidence that bribery or intimidation of jurors had occurred in NSW.[71] The judgment of the NSW Court of Criminal Appeal in Hill[72] reveals that one juror was offered money by telephone during the course of the trial. That attempt was discovered because the juror involved informed the court.

8.21 On the other hand, the Legal Aid Commission and the Public Defender stated that they had seen no examples of organised crime suborning or influencing a jury so that an accused is not convicted. They further believed it unlikely to occur given the comparatively high education level and socio–economic base of potential jurors in the ACT. These witnesses said that to approach a sufficient number of jurors to ensure "a friend" on the jury would almost of necessity involve the matter coming to light. In any event unless all twelve jurors are successfully interfered with and remain silent concerning the interference the most that could be expected from such interference would be a jury disagreement, unless there was evidence capable of leading to an acquittal in any event.[73]

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65 Submission No10, p3, quoting NSWLRC Report, op cit, p140

66 NSWLRC Report, op cit, para 9.27

67 Submission No10, p4

68 Duff, P and Findlay M 1982, 'The jury in England: practice and ideology', International Journal of the Sociology of Law, vol 10, p253, quoted in NSWLRC Report, op cit, para 9.27

69 NSWLRC Report, op cit, para 9.27

70 Submission No3, p2

71 New South Wales Law Reform Commission 1985, The Jury in a Criminal Trial, Criminal Procedure Discussion Paper, para 9.9

72 R v Hill, NSW Court of Criminal Appeal, 28 February 1980 (unreported)

73 Submission No5, p3

8.22 The ACT Law Office said there was no available data to support or disprove the argument that the corruption of one member of a jury acts to invalidate the unanimous process or to illuminate the incidence of corruption. It advised that from a logical point of view corruption must be rare because there is little to be gained from bribing or intimidating a juror as it would not achieve an acquittal but only a retrial. The Law Office view was that a better way of dealing with corrupt jurors, if corruption was ever proved to be a problem, would be to screen potential jurors more carefully and to be more vigilant in pursuing any interference with jurors.[74]

Perverse Jurors

8.23 The committee noted that problems arise with perverse jurors. Deputy–Commissioner Mudge of the Victoria Police in 1985[75] is recorded as having stated that occasionally people who claim to have served on juries recount their experience. Such recitals have included situations where, although eleven jurors were satisfied as to guilt, they eventually concurred in a verdict of not guilty because one juror, from the outset, for reasons unconnected to the facts of the case, refused to convict. The Deputy–Commissioner stated that, in a radio talk–back programme, one caller claimed to have served on a jury in a murder trial in which another juror made it clear from the start of the trial that he was not prepared to convict, as he said he could not return to his job if he did so. The trial was said to have ended in disagreement.

8.24 One witness before the committee who was closely involved in an ACT trial, but not as a juror, was advised by a juror that disagreement resulted because of another juror's stated bias in favour of accused persons with psychiatric disorders and a bias against the police. This witness commented that one person can illogically hang out because of personal bias, as it was in this case, costing thousands (of dollars), wasting precious court time and adding more stress to families and everyone concerned.[76]

8.25 The NSWLRC considered that the impact of the perverse juror is blunted by the power to order a retrial in a case where the jury at the first trial has failed to agree. If the jury at the first trial has disagreed because of the actions of a single perverse juror, it

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[74] Submission No3, p3

[75] Victorian Bar, Shorter Trials Committee 1985, Report on Criminal Trials, Written for the Committee by Peter A Sallmann, p200

[76] Submission No1, p1

is highly unlikely that there will be another perverse juror amongst the twelve chosen for the jury on the second trial.[77] This view found support with the Commonwealth Director of Public Prosecutions.[78] However, the view was put to the committee that the power to order a retrial can hardly be a justifiable argument for unanimity.[79]

Acquittal Rates

8.26 It is also argued that unanimous verdicts are a cause of high acquittal rates. It was put to the committee that this is difficult to substantiate or rebut because of the secrecy provisions surrounding the decision making of juries.[80] The NSWLRC considered that this is an unprovable assertion. It acknowledged that unanimity probably does prevent some convictions which would occur in a majority verdict system, but it is wrong to say that it results in acquittals in cases where there would be a conviction if majority verdicts were allowed.[81]

8.27 The acquittal rate in ACT Supreme Court trials in 1989 and 1990 was approximately 28%. In both 1989 and 1990 there were 11 acquittals each year out of 37 and 39 jury trials respectively.

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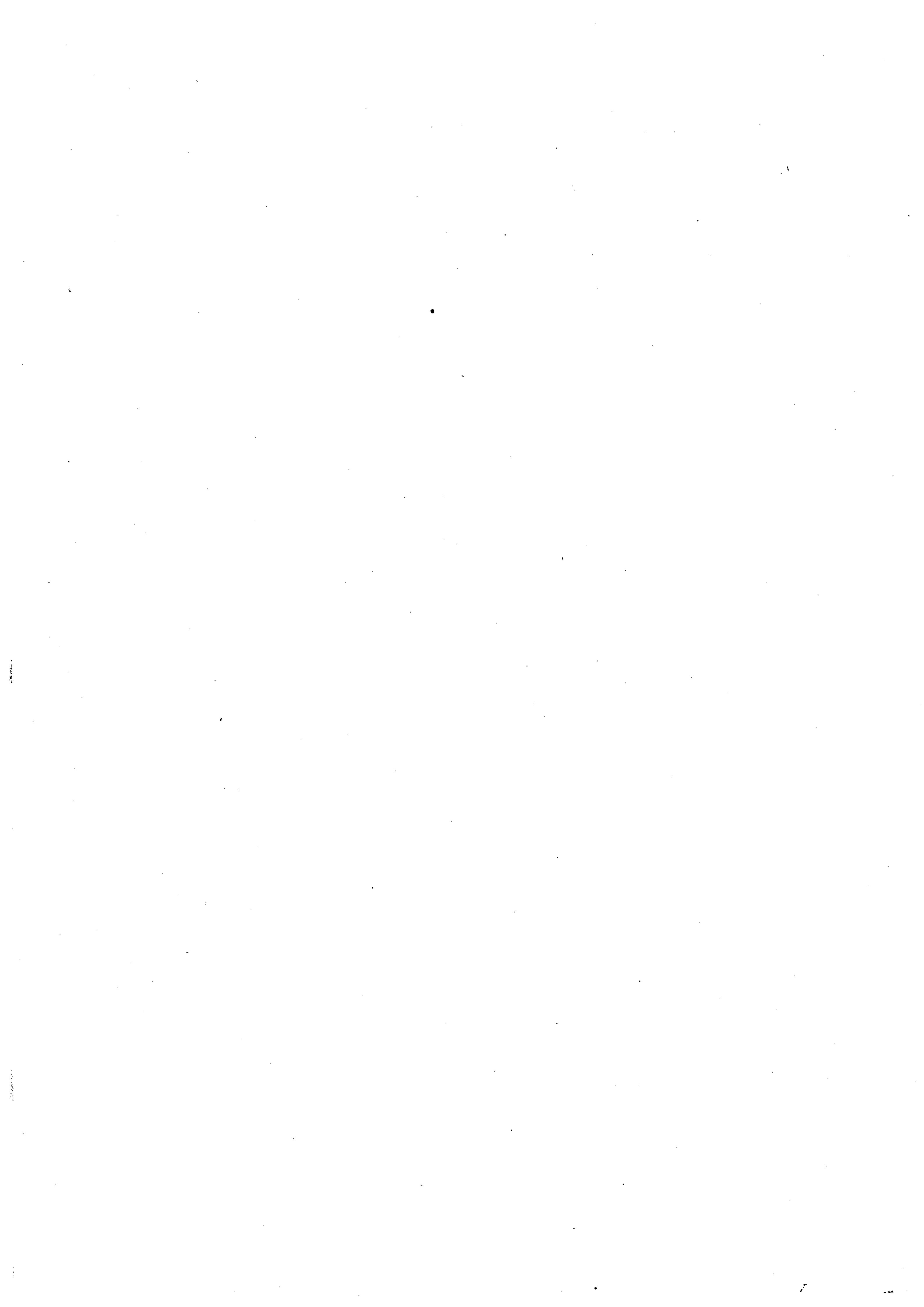
77 NSWLRC Report, op cit, para 9.31

78 Submission No9, p2

79 Submission No10, p4

80 Submission No10, p4

81 NSWLRC Report, op cit, para 9.14



9 THE STANDARD OF PROOF

9.1 On appeal, argument may take place about whether the judge was right to admit or exclude certain evidence or whether the jury was properly instructed on matters of law. But where both judge and prosecutor have acted fairly and in accordance with law, and where the rules of criminal procedure have been observed, the verdict of the jury may only be overturned if it can be placed in the rare category of case in which a properly instructed jury's verdict of guilty can be demonstrated to constitute a miscarriage of justice warranting the interference of an appellate court.[82] Apart from such a case, the Australian system of appeals does not have a mechanism for dealing with errors by juries. The NSWLRC argued that this means that we need to be especially careful to ensure that mistakes are not made at the time the jury makes its decision. The Commission considered that the requirement that the verdict be a unanimous one is of considerable help in ensuring that sufficient care be taken.[83]

9.2 Majority verdicts do not apply in capital cases in the relevant Australian jurisdictions. The NSWLRC saw this as a recognition that, in serious cases, certainty is not merely desirable, it is essential. The NSWLRC therefore considered that all cases which go before a jury are sufficiently serious to warrant certainty, and hence unanimity.[84]

9.3 The committee encountered the argument that unanimous verdicts are undemocratic because they allow a small minority to frustrate the decision of the majority. The NSWLRC considered that this view does not give sufficient weight to the special nature of the determination of guilt and the desirability of certainty in the criminal process.[85]

9.4 It was put to the committee that unanimous verdicts on the existing burden and standard of proof in the context of an adversary trial are and should be a cornerstone of criminal justice, and that it is a logical and philosophically sound corollary to the concept of proof beyond reasonable doubt."[86]

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82 Kingswell v The Queen (1986) 60 ALJR 17 per Deane J at 32

83 NSWLRC Report, op cit, para 9.43

84 ibid, para 9.44

85 ibid, para 9.14

86 Submission No5, p5

9.5 Proof beyond reasonable doubt is a special level of proof, and it is argued that anything less than unanimity will produce uncertainty. It is also argued that a dissenting view necessarily indicates a reasonable doubt.[87] The view was put to the committee that no accused in the ACT should experience the uncertainty and speculation as to the strength of the trial process which less than unanimous verdicts may encourage. No victim of a crime should be left with the uncertainty and speculation as to the real identity of the offender.[88]

9.6 The Legal Aid Office and the Public Defender observed that it is axiomatic that juries can be wrong, and quoted several cases or probable juror error (Chamberlain, Splatt, the recent "Birmingham Six" case). They further said that "We believe that majority verdicts can only increase the risk of wrongful conviction, in that it must weaken the essential emphasis on the concept of proof beyond reasonable doubt."[89]

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87 Devlin, P, op cit, p56, quoted by LRCV, Background Paper, op cit, p74

88 Submission No5, pp5,6

89 Submission No5, p3

10 OTHER ASPECTS OF JURY TRIALS

10.1 It is clear to the committee that there is concern within sections of the community about delays in trial procedures and problems with the complexity of evidence, such that whatever the system of jury trial in the ACT, juries will continue to have difficulties in understanding the issues in a trial let alone be confident of reaching the right verdict on the evidence presented. These concerns were backed up in evidence to the committee by law enforcement and legal practitioners including the ACT Director of Public Prosecutions (ACT DPP) who told the committee that one of the problems with the way the criminal law is applied in Australia has been the ad hoc and piecemeal approach to law reform. He stated there has not been an overview taken of the situation from the moment of arrest right through to the moment of sentence, and that kind of overview is really very necessary.[90] In the light of these views, the committee therefore outlines the concerns and offers possible solutions.

Trial Delays

10.2 Delays in bringing cases to trial impact to an extent on the administration of justice. The ideal situation from a witness's point of view is to have that witness produce the evidence and give the evidence when it is fresh in his or her memory, and for that evidence to be tested through cross–examination as appropriate.[91]

10.3 It was put to the committee by the Australian Federal Police that the delay between the actual allegations arising and the ultimate decision that the jury makes is too great, and generally, with the passage of time, the impact of any subsequent penalty is some detraction of that penalty as a deterrent.[92]

10.4 The committee noted a particular concern with delays in trials involving offences against children. It was put to the committee that in such cases the trial should be expedited to lessen the stress and trauma for the children and all those involved in the case.[93]

10.5 Other factors are relevant too, and the committee was informed that an element of delay will sometimes be in the public interest in that it may allow for matters to quieten down sufficiently to enable the empanelling of an unbiassed jury.[94]

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[90] Transcript, p70

[91] Transcript, p28

[92] Transcript, p28

[93] Submission No1, p2

[94] Transcript, p29

Pre–trial Proceedings

10.6 The process of voire dire not infrequently is a cause for delay in jury trials. It also has the potential for cases to be dismissed on technical grounds through evidence or confessions being made inadmissible. It would appear to the committee that determinations on the admissibility of evidence ought to be resolved wherever practicable by the trial judge prior to the jury being empanelled so as to avoid lengthy legal argument during the trial. The committee found broad support for this concept.

Complexity of Evidence and Trial Procedure

10.7 A number of factors tend to make it difficult for juries. These were outlined by the ACT DPP as

- archaic and convoluted criminal defence concepts. These are explained to the jury, with no legal background, and they are expected to grasp them.
- cases that are too long because there are inadequate procedures to shorten them.
- the arguing of points of law and evidence while the jury waits in a room elsewhere.[95]

10.8 In these circumstances, juries are presented with a series of legal and factual issues that are needlessly complex. The simplification of those matters to the extent to which that is practicable would go a long way towards making it easier for juries to make decisions. The ACT DPP offered the view that there are grounds for reviewing some of the ways in which juries have traditionally been kept in the dark. For example, when a civil case is opened, the judge is very frequently handed a precis of submissions, or at least a precis of the relevant figures and the file. However, very frequently that cannot be done to a jury. Submissions have to be entirely oral.[96]

10.9 Public perceptions of the legal processes are also important in satisfying the community that justice has been done, but the committee is not convinced that the Courts make a significant effort to ensure that its decisions or the reasons for them are understood. The committee noted the concern of a witness of instances where a judge alone can acquit a person, without the matter going to a jury.[97] This person was also concerned that a judge can disallow certain evidence and suggested that a panel of judges should be called to re–evaluate the evidence before a final acquittal.[98]

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95 Transcript, p73

96 Transcript, p74

97 Submission No1, p1

98 Submission No1, p1

Use of Computers, Extra Trial Judges and Expert Advisers

10.10 The committee was informed that in complex trials, particularly fraud cases, it is very difficult for juries to follow the intricacies of financial matters.[99] It was argued that the use of three judges in certain complicated trials,[100] computers in complicated fraud cases and the presentation of that type of evidence, and the resources available to jurors to understand the evidence should be considered[101] or even the empanelling of experts to assist judges[102] would do much to ensure that juries have a proper understanding of the evidence and the issues when considering their verdicts.

Forensic Evidence

10.11 The committee sought opinions from qualified witnesses as to whether the failure of juries to convict in certain cases lay with failed forensics and the simple inability to convince a jury on the basis of forensic evidence.

10.12 A view put to the committee was that there is a great difficulty in the absence of a truly independent forensic organisation in Australia.[103] This witness said that in the scientific medical area it is almost inevitable that the material produced on behalf of the prosecution can be challenged not only on the basis that it has not been carried out properly, but also that the people who do the forensic work are not necessarily independent.[104]

10.13 In the light of these important concerns it would seem to the committee that the introduction of better scientific protocols that would make forensic evidence more useful and persuasive should be instituted for safeguarding, analysing and recording forensic material, desirably with a body recognised as independent of both the prosecution and the defence in trials.

10.14 In this regard, the committee is pleased to note the establishment by the Commonwealth, State and Territory Governments of the National Institute of Forensic Science. The Institute, which had its first meeting on 8 October 1991 will, among other matters, sponsor and support research in forensic science, advise and assist with the development and coordination of forensic services and conduct relevant quality assurance programs. The Institute will operate as a separate entity and independent of any one participating government or agency.[105] However, it is not clear to the

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99 Transcript, p33

100 Transcript, p33

101 Transcript, p74

102 Transcript, p33

103 Transcript, p21

104 Transcript, p21

105 National Institute of Forensic Science media release of 23 October 1991

committee if the functions of the Institute will extend to the provision of independent forensic advice in criminal trials. If the committee's understanding is correct then it considers that the inter-governmental Agreement setting up the Institute should be amended to rectify this situation.

Recording of Interviews with Suspects and Charged Persons

10.15 The committee found general support for improved techniques in the recording of interviews between suspects and the police. It was apparent to the committee that in looking at all the steps necessary to ensure that justice is not delayed, either for a conviction or acquittal, the various procedures outlined in this chapter need to be reviewed and that there are certain advantages to be gained in each of them.

10.16 The committee noted that the Australian Federal Police was considering the video taping of interviews.[106]

Recommendations

10.17 **The committee recommends that the Government:–**

(a) **review ACT trial procedures with a view to instituting measures to reduce delays in bringing cases to trial and that, in particular:**

   (i) **legal and technical issues relating to the admissibility of evidence including confessions be resolved by the trial judge as far as possible before the jury is empanelled,**

   (ii) **where practicable, video taped and recorded interviews be admitted as evidence,**

   (iii) **juries be allowed access to precis of submissions and other relevant material which is normally made available to the judge, and**

   (iv) **juries be allowed greater access to legal argument arising during the course of a trial.**

(b) **take steps to ensure that trials involving children as victims, and especially in sexual assault cases, be given priority in the Court lists and that they be dealt with expeditiously,**

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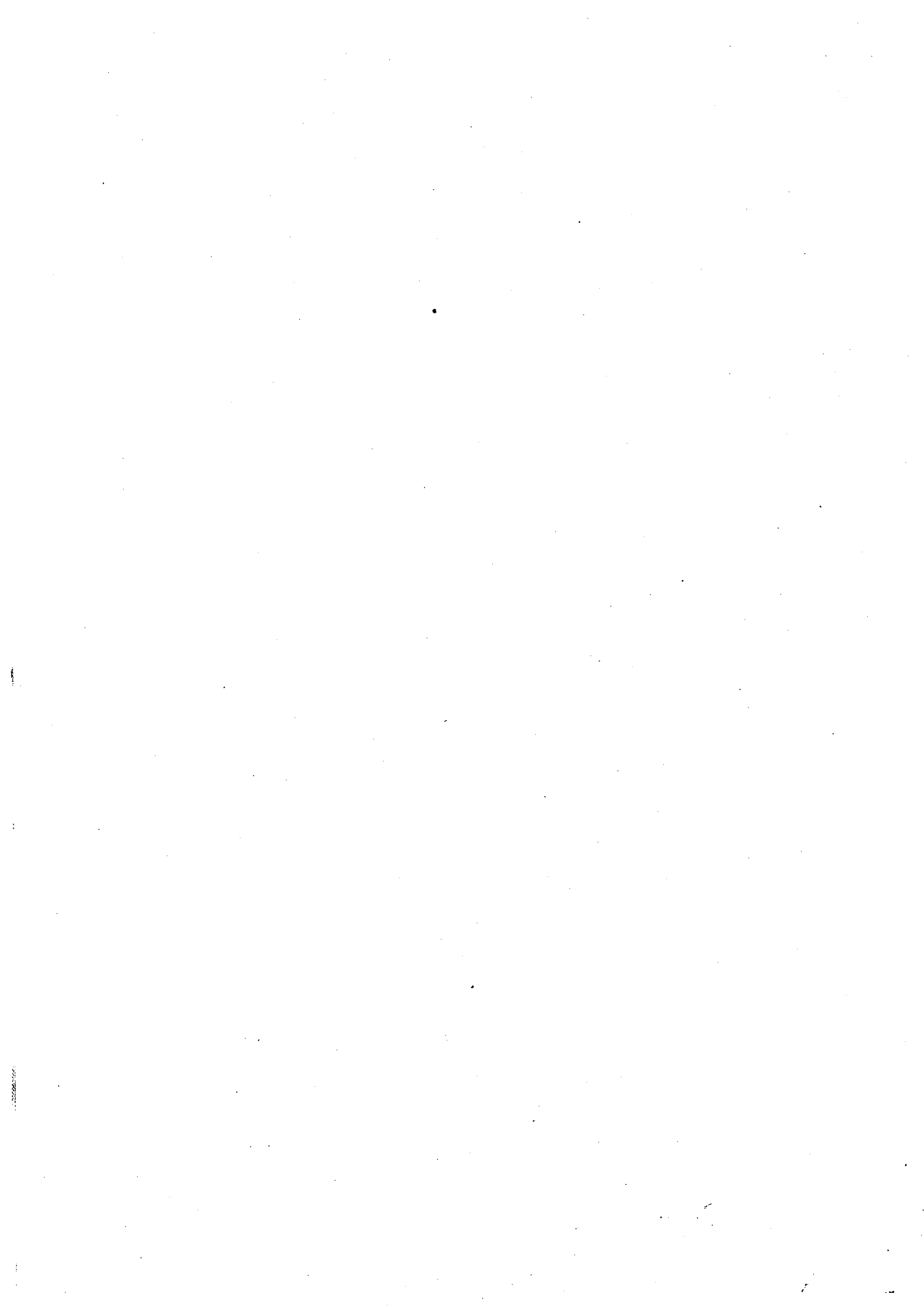
[106] Transcript, p31

(c) discuss with the judiciary concerns that some complex questions of law and the admissibility of evidence are not readily understood by persons with non–legal training, and the need in terms of public confidence in the judiciary to ensure that these matters are properly explained when judgements are given,

(d) consider the use of computers, recourse to expert advisers to judges and juries and the possibility of adding to the Bench additional judges in complex trials particularly those involving fraud,

(e) explore the feasibility of scientific protocols to maintain and preserve the integrity of forensic evidence and to safeguard such evidence, and

(f) as a signatory to the inter–governmental Agreement establishing the National Institute of Forensic Science, seek an amendment of the Agreement to allow the Institute to accredit competent witnesses to provide forensic evidence in criminal trials when requested to do so.



11 SUMMARY OF RECOMMENDATIONS

11.1 That should a majority verdicts system be adopted in the ACT:–

(a) it apply to all criminal trials except for those involving a capital offence, and

(b) the law provide for a majority verdict to be considered only after the jury has failed to reach unanimity after three hours deliberation.

(paragraph 5.8)

11.2 That should a majority verdict system be introduced in the ACT, the verdict of not less than 10 jurors be taken as the verdict of the jury where a unanimous verdict cannot be obtained

(paragraph 6.7)

11.3 That the Government:–

(a) review the operations of the ACT courts over the past five years to ascertain the financial costs to the administration of justice in the ACT where jury disagreements lead to retrials or dropped charges, and

(b) consider the implications for the quality of evidence and the administration of justice where retrials became necessary because of jury disagreements.

(paragraph 7.18)

11.4 That the Government:–

(a) review ACT trial procedures with a view to instituting measures to reduce delays in bringing cases to trial and that, in particular:–

(i) legal and technical questions relating to the admissibility of evidence including confessions be resolved by the trial judge as far as possible before the jury is empanelled,

(ii) where practicable, video taped and recorded interviews be admitted as evidence,

(iii) juries be allowed access to precis of submissions and other relevant material which is normally made available to the judge, and

(iv) juries be allowed greater access to legal argument arising during the course of a trial.

(b) take steps to ensure that trials involving children as victims, and especially in sexual assault cases, be given priority in the Court lists and that they be dealt with expeditiously,

(c) discuss with the judiciary concerns that some complex questions of law and the admissibility of evidence are not readily understood by persons with non–legal training, and the need in terms of public confidence in the judiciary to ensure that these matters are properly explained when judgements are given,

(d) consider the use of computers, recourse to expert advisers to judges and juries and the possibility of adding to the Bench additional judges in complex trials particularly those involving fraud,

(e) explore the feasibility of scientific protocols to maintain and preserve the integrity of forensic evidence and to safeguard such evidence, and

(f) as a signatory to the inter–government Agreement establishing the National Institute of Forensic Science, seek an amendment of the Agreement to allow the Institute to accredit competent witnesses to provide forensic evidence in criminal trials when requested to do so.

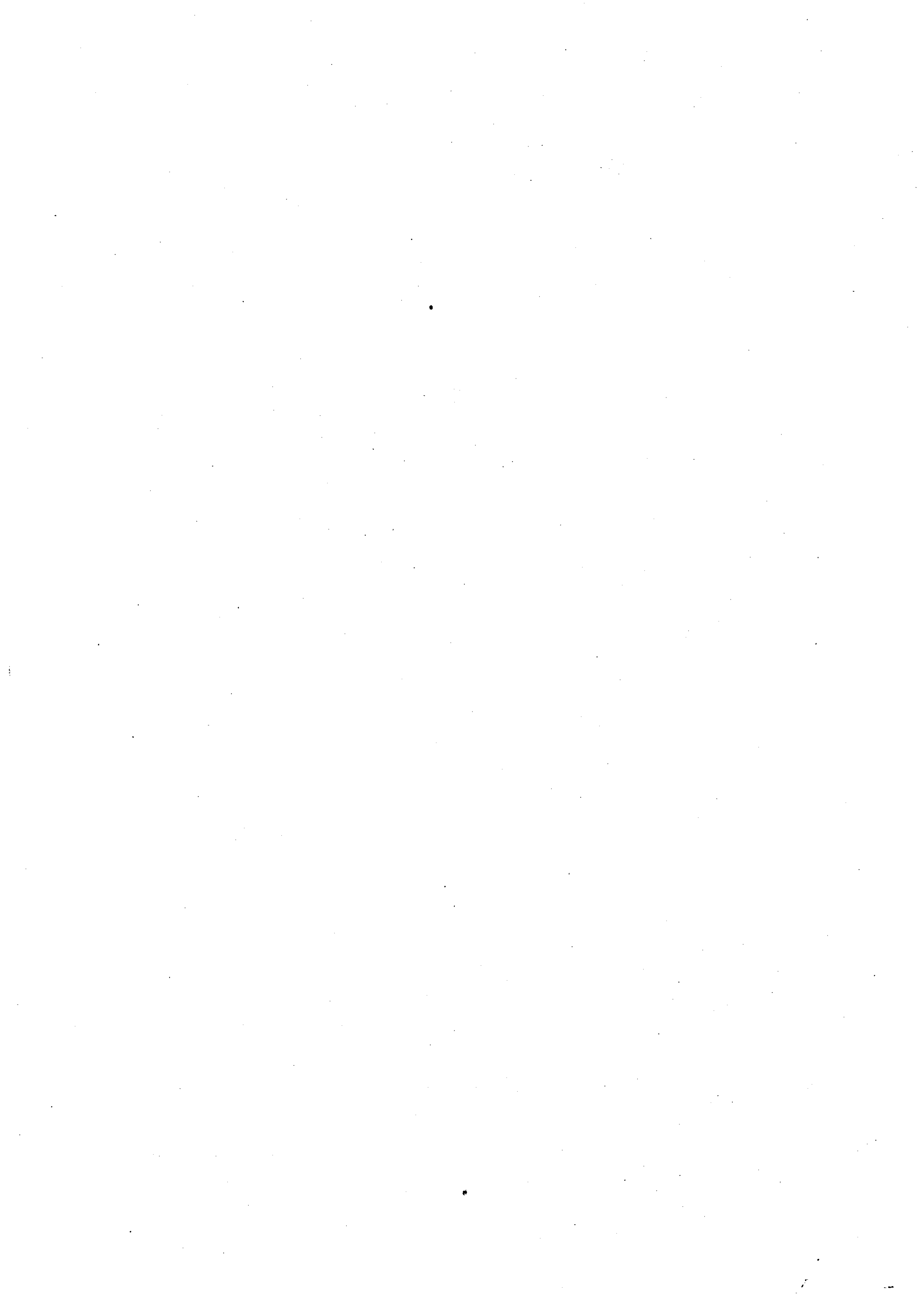
(paragraph 10.17)

Bill Stefaniak, MLA
Presiding Member

APPENDIX 1

LIST OF SUBMISSIONS RECEIVED

1. Mrs Judith Simpson
2. The Australian Capital Territory Bar Association
3. Mr Chris Hunt, Secretary, ACT Department of Justice and Community Services
4. Mr G J Lovell, ACT Branch President, Australian Federal Police Association
5. Mr C J Staniforth, Chief Executive Officer, Legal Aid Office (ACT) and Mr T J O'Donnell, Public Defender
6. Mr Mark Findlay, Director, Institute of Criminology
7. P A Boyce, Solicitor to the Director of Public Prosecutions, Northern Territory
8. Bernard Bongiorno, QC, Director of Public Prosecutions, Victoria
9. Commonwealth Director of Public Prosecutions
10. Australian Federal Police
11. Mr Alastair Hope, Senior Assistant Crown Counsel, Crown Solicitor's Office, Western Australia



APPENDIX 2

LIST OF WITNESSES AT PUBLIC HEARING

Angela Brown, Victims of Crime Assistance League ACT

Brian Slarke " " " " "

John O'Keefe, ACT Attorney–General's Department

Ben Salmon QC, ACT Bar Association

William Stoll, Australian Federal Police

Simon Overland " " "

Laurie O'Sullivan, ACT Council of Civil Liberties

Robert Gresham, Australian Federal Police Association

James Brewster

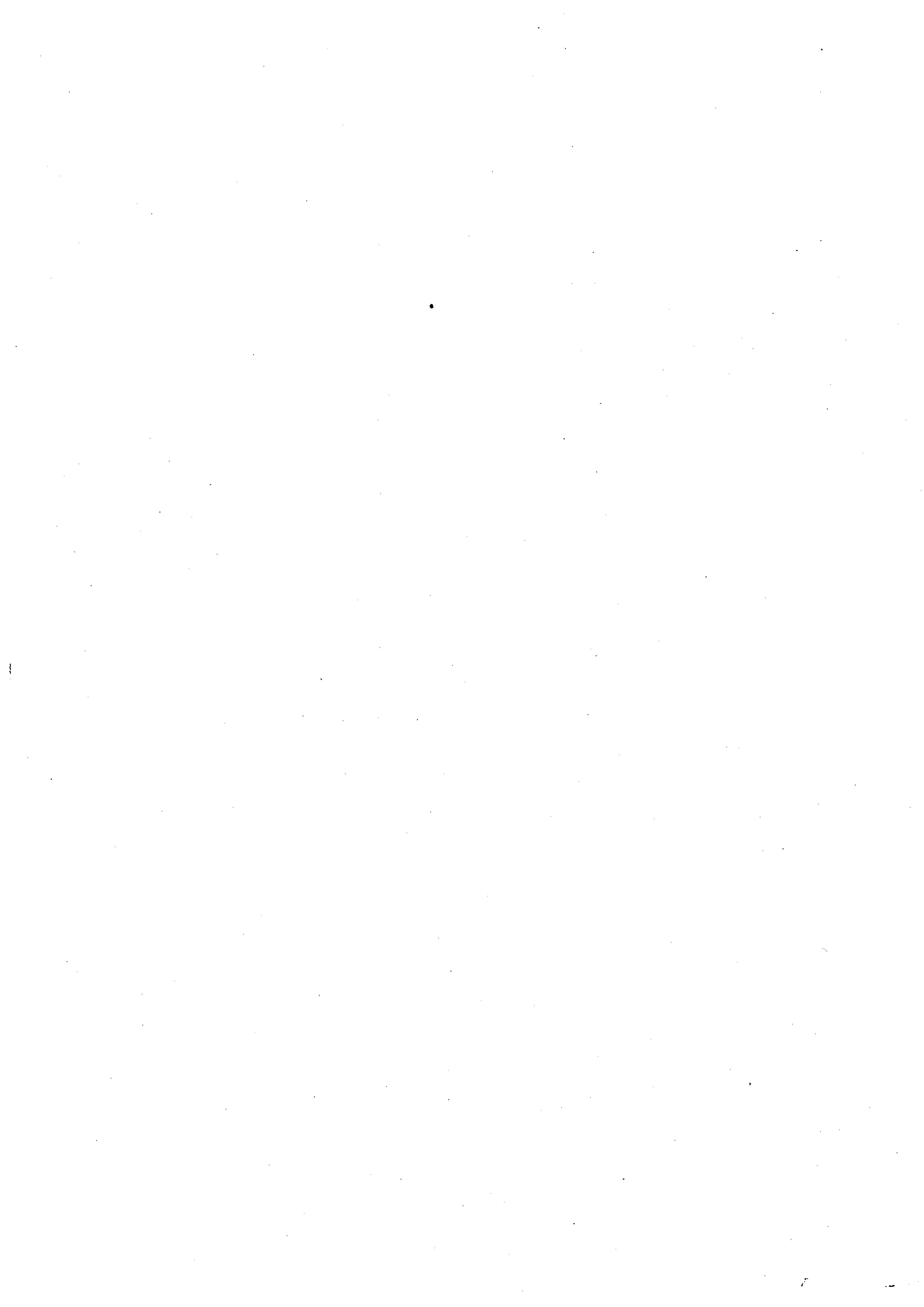
Kenneth Crispin QC, ACT Director of Public Prosecutions

Michael Chilcott " " " "

Christopher Staniforth, Legal Aid Commission

Terrence O'Donnell, Public Defender

The Honourable Justice R S Watson



APPENDIX 3

ADDITIONAL COMMENTS BY BILL STEFANIAK, MLA

Dissenting view

1. I wish to dissent from my two colleagues' view that majority verdicts not be introduced at this stage. From evidence before the Committee (albeit often innuendo) and my own experiences as both a defence and prosecution counsel I believe there is a real problem with a juror who is irrational, illogical or who has a particular profound bias that affects a proper consideration of the facts presented to the jury. The "perverse juror" is equally dangerous to both defence and prosecution. Majority verdicts do alleviate this problem and I believe a 10–2 majority as used in some other Australian States and the Northern Territory should be adopted for the ACT Supreme Court.

2. The potential for intransigence in the jury room under the system of unanimous verdicts and the resulting adverse implications for the administration of justice is such that consideration should be given to the introduction of majority verdicts in ACT jury trials. The success of majority verdicts in other Australian jurisdictions and overseas and the absence in those jurisdictions of the criticisms attaching to unanimous verdicts lends support to my view on this matter.

Additional views

3. All professional witnesses who appeared before the Committee were very keen to see the question of admissibility of evidence in trials in the ACT resolved by the trial judge before the jury is actually sworn in. If nothing else is adopted by the Government from this report, I recommend this should be done so as at 1 July 1992 (ie when the ACT takes over responsibility for the Supreme Court).

4. There has been a number of instances in the ACT Supreme Court of trials being taken away from juries. Whilst this provision should remain for the very rare occasions this is necessary, I believe the jury should be the paramount body judging a Supreme Court trial. I therefore recommend that when the Assembly takes over responsibility for the Supreme Court it changes the Act to give the Crown the right of appeal against a trial judge who takes a case away from a jury. If the appeal is successful there must be provision for a fresh trial.

5. I would suggest the recommendations in 3 and 4 be passed on to the Federal Parliament to address with a view to the introduction of any necessary legislation while it still has control of the Supreme Court. If this does not occur, the Assembly must address this when it has power so to do (ie from 1 July 1992).

APPENDIX 4

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