

# MAJORITY VERDICTS ARE WE ALL FOR IT?

*Published in New Zealand Lawyer Magazine*

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There is nothing that matches that moment of nervous anticipation when the jury returns to deliver their verdict. Even when the trial has gone well, you still have a kernel of fear. If the trial has gone badly, even when the trial has gone very badly indeed and you are braced for the verdict, there is still a kernel of hope in your heart. Will they say “Guilty”, or “Not Guilty” or “We can't agree / We don't know”? No matter what has gone on during the trial, there is still a possibility of surprise with the jury's verdict. No one can honestly say they know what a jury will decide.

This fascinating unpredictability has apparently irritated someone in regard to the “We can't agree / We don't know” category of verdicts. The Law Commission has reported that in New Zealand, 8.2% of jury trials end with a hung jury. This is somehow deeply unacceptable - so unacceptable that the Commission has proposed we change our jury system. Instead of having 12 good men and women labour, debate and agree on a verdict, the Law Commission is proposing that we should introduce majority verdicts. No longer will 12 have to agree on a verdict - so long as 11 agree, that will be the verdict of the jury as a whole.

The first question I find myself asking when faced with a proposed law change is “Why?”. What problem is this change designed to address? It appears the Commission perceives several problems in the current system and it obviously believes that introducing majority verdicts would solve them.

## **The “rogue” juror**

It appears the Law Commission is concerned about the cost of retrials which come about through the intractable behaviour of an occasional rogue juror, the individual who no matter what the evidence demonstrates cannot be persuaded to alter their personal view on what the verdict should be.

The Commission cannot tell us how many of the unacceptable 8.2% of hung jury verdicts are due to the actions of a rogue juror. The Law Commission looked at five jury trials that resulted in a hung jury. In one of those, there was one person who was identified as a rogue juror. This was on the basis that the juror was reported to have refused to consider a guilty verdict, but then made little attempt to participate in jury deliberations and was unable or unwilling to articulate any rational argument in favour of a not guilty verdict. The rogue juror was not interviewed. If the Law Commission have undertaken or had access to any other research on this issue, it does

not include it in its report.

Australian research shows that around 33% of hung juries were hung as a result of one rogue juror (New South Wales Bureau of Crime Statistics and Research, July 1997). If we apply the same statistic to New Zealand's 8.2% of hung juries, we can expect majority verdicts to affect the outcome of 2.7% of our trials.

I don't know of any other significant change to our legal system that was proposed on the basis of a potential problem that might affect 2.7% of all cases.

### **Jury tampering**

Supporters of the majority verdict system often argue that unanimous verdicts create an incentive to intimidate or corrupt jurors; to engage in jury tampering. This makes sense. If obtaining control of one juror (by promise or threat) could dictate the outcome, the attraction would be obvious. Crown prosecutors advised the Law Commission that jury tampering was unusual in New Zealand. In other words, the Crown doesn't believe it really happens. It does not appear that the Commission can point to any evidence of jury tampering (or any evidence of a higher rate of hung juries) in cases where powerful, wealthy or intimidating people are involved. No numbers or percentages are given as to how often it is even suspected that jury tampering had any effect on a jury verdict. In spite of this, the Law Commission has gone on to state in its report that awareness of possible instances of jury tampering was "a significant factor" in the Commission's recommendation to change to majority verdicts. Majority verdicts, it appears, are now being proposed by the Commission to solve a problem we do not actually have any evidence to say exists in this country.

### **Protecting the minority juror**

Unanimous verdicts are accused of causing the attrition of minority jurors, or, as the Law Commission puts it, "the wearing down of minority jurors by gradual exhaustion". Majority verdicts, it is contended, will spare the poor abused minority juror of this unwanted attention. The problem is that introducing majority verdicts can only spare one juror of the 12. Where there is a minority of two or three, there is likely to be the same pressure applied to all. The only difference is that it will cease when one or two succumb, rather than all of them. In recognising this point, the Law Commission states: "the effect of introducing majority verdicts may not be to do away with attrition but rather only to reduce the amount of it required to produce a verdict." Is the Commission trying to reduce the amount of effort required by the bully to get his or her own way?

If the Law Commission were really concerned about the mental health of jurors, locked in small rooms with people who are attempting to coerce them, it would be relatively simple to introduce a system whereby any juror who feels they are being subjected to unacceptable treatment, in any form, can complain and obtain effective intervention.

## **Majority verdicts not a solution**

I find the Law Commission's report on majority verdicts deeply problematical. It raises far more questions than it answers. Why is a potential 8.2% rate of hung juries considered to be such a problem that it justifies proposing the introduction of majority verdicts? Jury trials frequently involve complex, emotional issues and require people who were not present to decide what actually happened. Being a juror is not an easy job and it is not a foolproof system. But why is an 8.2% "fail" rate sending us off in a frenzy to consider a major change to the jury system as we know it? What is the Law Commission's goal? Does it believe it can prevent any hung juries at all?

I have always understood that the fundamental principle of a jury trial is, if the Crown wants a conviction it must present evidence which is good enough to persuade 12 people the accused is guilty. It doesn't matter what any of us think or "know" or believe in our heart of hearts to be true. Apparently the Law Commission does not agree.

Given the lack of research and inconclusive theories on which the Commission is proposing this law change it is difficult to see this proposal as having any motivation other than financial. Retrials do cost money. They do take up Court resources that could otherwise go to another case. Is it just a coincidence that this proposal is being made now, in the same year that the Government tried to make the civil justice system more "cost effective" by introducing huge increases in filing and Court hearing fees? At the same time when the Government is proposing, in the face of strenuous opposition, to get rid of depositions? Is our system of justice to be determined by a theory of potential financial savings?

Every time there is fundamental change, consequences follow. Some consequences will be good and some will not. I cannot see that the Law Commission has seriously turned its mind to consider what will be the potential negative consequences of this decision. In the area of jury trials, we are dealing with people whose liberty is invariably at stake. They are the ones who will bear any negative consequences that will flow from this proposed change. The fact that the Law Commission apparently has not even seriously looked at this aspect of the change concerns me greatly.

I don't think anyone seriously believes every jury always reaches the right decision. There can be no doubt that a unanimous verdict requires more certainty than a majority verdict. Why then would we agree to introduce a jury system that is potentially less certain than the one we already have?

The standard of proof in criminal trials is supposed to be high. The Government has agreed it will not convict and punish a person where there is reasonable doubt as to whether he or she committed the offence. While there may be debate as to whether one standout juror amongst 12 constitutes reasonable doubt, why not accept that more than one does constitute reasonable doubt? If that is the case, why hasn't the Law Commission proposed allowing majority verdicts for acquittals? If an 11:1 majority verdict satisfactorily meets the prosecution's burden of proof, why not accept that any other split in the decision satisfactorily defeats it and is the same as a not

guilty decision?

Most trial lawyers are familiar with the palpable dissatisfaction that results from a hung jury. Retrials are costly, and exact a considerable toll on all participants. This does not justify the implementation of a fundamental change to our jury system that appears, at best, to address a very small percentage of problem cases and may, at worst, create a monster of uncertainty far greater than the one it was designed to slay.

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