

Majority Verdict

Legislation – *Jury Act 1995*

56 Discharge or death of individual juror

- (1) If, after a juror has been sworn—
 - (a) it appears to the judge (from the juror's own statements or from evidence before the judge) that the juror is not impartial or ought not, for other reasons, be allowed or required to act as a juror at the trial; or
 - (b) the juror becomes incapable, in the judge's opinion, of continuing to act as a juror; or
 - (c) the juror becomes unavailable, for reasons the judge considers adequate, to continue as a juror;

the judge may, without discharging the whole jury, discharge the juror.

- (2) If a juror dies or is discharged before the trial begins, the judge may direct that another juror be selected and sworn.

57 Continuation of trial with less than full number of jurors

- (1) If a juror dies or is discharged after a trial begins, and there is no reserve juror available to take the juror's place, the judge may direct that the trial continue with the remaining jurors.
- (2) However, a civil trial can not continue with less than 3 jurors and a criminal trial can not continue with less than 10 jurors.
- (3) The verdict of the remaining jurors has the same effect as if all the jurors had continued present.

59 Verdict in criminal cases for particular offences must be unanimous

- (1) This section applies to the following criminal trials on indictment—
 - (a) a trial for any of the following offences—
 - (i) murder;
 - (ii) an offence against the Criminal Code, section 54A(1) if, because of the circumstances of the offence, the offender is liable to imprisonment for life, which can not be mitigated or varied under the Criminal Code or any other law;
 - (iii) an offence against a law of the Commonwealth;
 - (b) a trial before a jury consisting of only 10 jurors when it gives its verdict.

- (2) For subsection (1)(b), it does not matter that at any time before its verdict was given the jury consisted of more than 10 jurors.
- (3) The verdict of the jury must be unanimous.
- (4) However, if on the trial of an offence mentioned in subsection (1)(a)(i) or (ii)—
 - (a) the jury is unable to reach a unanimous verdict; and
 - (b) the defendant is liable to be convicted of another offence not mentioned in subsection (1)(a)(i) or (ii);

in relation to the conviction for the other offence, section 59A applies as if the defendant were originally charged with the other offence.

59A Verdict in criminal cases for other offences

- (1) This section applies to a criminal trial on indictment other than the following trials—
 - (a) a trial for an offence mentioned in section 59(1)(a); or
 - (b) a trial before a jury as mentioned in section 59(1)(b).
- (2) If, after the prescribed period, the judge is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation, the judge may ask the jury to reach a majority verdict.
- (3) If the jury can reach a majority verdict, the verdict of the jury is the majority verdict.
- (4) For the definition in subsection (6), *prescribed period*, paragraph (a), the periods mentioned in subparagraphs (i), (ii) and (iii) are the periods reasonably calculated by the judge.
- (5) A decision of the judge under subsection (4) is not subject to appeal.
- (6) In this section—

majority verdict means—

- (a) if the jury consists of 12 jurors—a verdict on which at least 11 jurors agree; or
- (b) if the jury consists of 11 jurors—a verdict on which at least 10 jurors agree.

prescribed period means—

- (a) a period of at least 8 hours after the jury retires to consider its verdict, not including any of the following periods—
 - (i) a period allowed for meals or refreshments;

- (ii) a period during which the judge allows the jury to separate, or an individual juror to separate from the jury;
 - (iii) a period provided for the purpose of the jury being accommodated overnight; or
- (b) the further period the judge considers reasonable having regard to the complexity of the trial.

Commentary

The *Criminal Code and Jury and Another Act Amendment Act* No 50 of 2008, which was assented to on 19 September 2008, makes provision for the taking of majority verdicts in criminal trials, except those covered by section 59 *Jury Act*.

By section 59 unanimous verdicts are still required in trials on indictment for the following offences:

1. murder (section 59(1)(a)(i));
2. an offence against section 54A(1) (*Demands with menaces on agencies of government*) of the *Criminal Code* which has mandatory life imprisonment as a penalty (section 59(1)(a)(ii));
3. Commonwealth offences (given section 80 of the Commonwealth Constitution).

Additionally, a unanimous verdict is required where the jury consists of only 10 jurors when it gives its verdict (section 59(1)(b)) notwithstanding that at a time before its verdict was given the jury consisted of more than 10 jurors (section 59(2)).

However, if on the trial of an offence mentioned in section 59(1)(a)(i) or (ii), the jury is unable to reach a unanimous verdict and the defendant is liable to be convicted of another offence not mentioned in those provisions, then in relation to the conviction for the other offence, section 59A (which allows for a majority verdict) applies as if the defendant were originally charged with the other offence: section 59(4).

In the case of a jury unable to reach a majority verdict on murder, see the ruling of Davis J in *R v Peniamina* [2021] QSC 250.

A “majority verdict” is defined as a verdict –

where the jury consists of 12 jurors, on which at least 11 jurors agree, or

where the jury consists of 11 jurors, on which at least 10 jurors agree:
section 59A(6).

If the jury can reach a majority verdict, the verdict of the jury is the majority verdict: section 59A(3).

Where a majority verdict is allowed, section 59A(2) allows a judge to ask a jury to reach a majority verdict in a criminal trial if, after the prescribed period, the judge is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation.

Accordingly, in respect of those charges and trials to which section 59A applies, two preconditions are required to be met before a judge may give directions as to the returning of a majority verdict, the first being that the “prescribed period” must have elapsed and the second that the trial judge is satisfied “that the jury is unlikely to reach a unanimous verdict after further deliberation”: section 59A(2).

As a majority verdict may only be taken where the preconditions have been satisfied, a trial judge must turn his or her mind to the terms of section 59A and the evidence relevant to the preconditions. No *a priori* rules can be laid down as to what will constitute sufficient materials for their satisfaction: *R v McClintock* [2010] 1 Qd R 354, [48].

The trial judge ought to make a clear finding as to each of the preconditions required before the giving of a direction that a majority verdict will be permitted: *Hanna v R* (2008) 73 NSWLR 390, [71]. In *R v Muto and Eastey* [1996] 1 VR 336 at 343 the Victorian Court of Appeal observed in respect of similar Victorian legislation (section 47 of the *Juries Act* 1967): “As a general rule the judge should not explain to the jury the conditions laid down by s 47 or comment on the exercise of his or her own discretion, but we acknowledge that there may be cases in which it is desirable to tell the jury something of the way in which the section operates or to answer questions that the jury may have.”

The “prescribed period” is defined in section 59A(6) as “a period of at least eight hours after the jury retires to consider its verdict”, or such “further period the judge considers reasonable having regard to the complexity of the trial”. In some jurisdictions no legislative guidance is given as to the calculation of the minimum statutory period: see *R v VST* (2003) 6 VR 569. However section 59A(6)(a) specifies the periods that are excluded from the eight hour period. Accordingly, the eight hour period does not include any of the following periods:

1. a period allowed for meals or refreshments;
2. a period during which the judge allows the jury to separate, or an individual juror to separate from the jury;
3. a period provided for the purpose of the jury being accommodated overnight.

Caution must be exercised in calculating the eight hour period. Arrangements should be put in place for keeping a record of the time periods excluded by section 59A(6)(a) in the calculation of the eight hour period.

In *RJS v The Queen* (2007) 173 A Crim R 100 Spiegelman CJ questioned the practice of recalling the jury once the minimum statutory period had passed, irrespective of any indication of difficulty in reaching a verdict. Such an approach was also disapproved of in *Rusovan v The Queen* (1994) 62 SASR 86; see also *R v K* (1997) 68 SASR 405 at 413; *R v Harrison* (1997) 68 SASR 304.

As to the requirement that there must be satisfaction that the jury is unlikely to reach a unanimous verdict after further deliberation, “the most certain way of ascertaining the [unlikelihood of a unanimous verdict] is to question the jury about the prospect of unanimity. Another would be to give a *Black* direction after the expiration of the prescribed period and wait a further reasonable time (which the judge must assess). If

there is still no verdict the existence of the requirement might be inferred”: See *R v McClintock* [2010] 1 Qd R 354, [41]. As to the latter course of first giving a *Black* direction, see *Hanna v R* (2008) 73 NSWLR 390; [2008] NSWCCA 173 at [23]; *RJS v The Queen* at [25] and *Doklu v The Queen* (2010) 208 A Crim R 333. See also *R v Millar (No 2)* (2013) 227 A Crim R 556; [2013] QCA 29. Counsel should also be invited, in the absence of the jury, to make submissions before the discretion to allow a majority verdict is finally exercised: *RJS v R* at [25]; *R v Muto & Eastey* at 342; *R v K* (1997) 68 SASR 405 at 413. The judge should not be told details of voting figures and if so informed should not disclose that detail to the prosecution or defence: See *R v Millar (No 2)* (2013) 227 A Crim R 556; [2013] QCA 29, [27].

Information as to the jury’s interim votes and voting pattern are not relevant to the exercise of the discretion under section 59A(2), what is relevant includes the length and complexity of the trial as well as the time already spent deliberating: *Smith v The Queen* (2015) 255 CLR 161; 89 ALJR 698; [2015] HCA 27 at [49] and [53].

As to combining a majority verdict with a *Black* direction: see “Jury Failure to Agree” Direction No 52 and *R v Millar (No 2)* (2013) 227 A Crim R 556; [2013] QCA 29. Having given a *Black* direction, it may not be inappropriate for the trial judge to inform the jury about the possibility of lawfully returning a majority verdict and the circumstances in which that might occur: *R v BCG* [2012] QCA 167 at [20].

As to whether a reference to the existence of majority verdicts should be made in the summing up: see “General Summing Up Directions” Direction No 24.

In respect of a charge where a judge has given directions to the jury that a majority verdict may be returned, the speaker, after indicating that a verdict has been reached, should be asked whether the verdict is unanimous or not. (Whether the verdict is a unanimous one or by majority may become relevant where it is contended that an error has occurred in the exercise of the discretion to take a majority verdict).

In England and Wales before a majority verdict can be accepted a statement is required in open court as to the details of the verdict: see section 17(3) *Juries Act* 1974 (UK); Practice Direction [1967] 3 All ER 137; *R v Pigg* [1983] 1 All ER 56.

In Victoria no express provision is made, but the approach recommended in *R v Muto & Eastey* at 343 is that if there has been a majority verdict direction, the jury should be asked whether the verdict is “the verdict of not less than 11 [or as the case may be] of you.”

When taking a verdict after giving a majority direction, care must be given to ensuring that it can be established that:

1. the jury have been unable to reach a unanimous verdict;
2. the jury have reached a majority verdict;
3. what the verdict is;
4. all members of the jury agree it is a majority verdict.¹

¹ To take the verdict where a majority verdict direction has been given to the jury.

Suggested Direction – Where the charge is one where a majority verdict is permitted

Under our law a majority verdict is permitted in certain circumstances where a defendant has been charged with [specify the offence]. Those circumstances have now arisen.

A majority verdict means a verdict on which 11 of you are agreed [where the jury consists of 12 jurors] [or where 10 jurors agree where the jury consists of 11 jurors]. So, if you cannot all agree on a verdict, the verdict of 11 of you [or 10 as the case may be] may be taken as the verdict of the jury.

Shortly I shall ask you again to retire and resume your deliberations. With further deliberations you may find that you are able to deliver a unanimous verdict or you may find that you are able to deliver a majority verdict on which 11 of you are agreed. In either case you should inform the bailiff that you have reached a verdict.

When you return after having reached that verdict, the procedure will be a little different from that which I outlined to you before you first retired. Your speaker will be asked by the associate whether you have reached a verdict

Associate: *“Speaker, have the members of the jury reached a verdict on which all 12 are agreed?”*
If the speaker says “yes”, the associate confirms what the speaker has said with the rest of the jury: *“So says your speaker, so say you all?”* (wait for the jury to assent).

The associate then proceeds to take the verdict in the usual manner, ie:

Associate: *“Members of the jury, do you find the defendant (Name) guilty or not guilty of ... (short form of charge)?”* Turn to the Judge and repeat the verdict given by the speaker.

Associate: *“So says your speaker, so say you all?”* (wait for the jury to assent)

If the speaker says “no” when asked if the jury are unanimously agreed on a verdict:

Associate: *“Speaker, have the members of the jury reached a verdict on which 11 are agreed (where the jury consists of 12 jurors) (or where 10 are agreed where the jury consists of 11 jurors)?”*

If speaker says “yes”, the associate confirms what the speaker has said with the rest of the jury:

Associate: *“So says your speaker, so say you all?”* (wait for the jury to assent)

Associate: *“Speaker, do 11 (or 10 as the case may be) members of the jury find the defendant (Name) guilty or not guilty of ... (short form of charge)?”* Turn to the Judge and repeat the verdict given by the speaker.

Associate: *“So says your speaker. Do you all agree that 11 of you have reached that verdict?”* (wait for the jury to assent).

Repeat this for further counts where majority verdict direction given for each accused.

Endorse the indictment with the date and verdict. If the accused is found not guilty, the Judge discharges him or her.

on which all 12 are agreed. If the answer is “Yes”, the procedure will then be as I originally told you.

If the answer is “No”, your speaker will be asked whether you have reached a verdict on which 11 of you are agreed. If the answer is “Yes”, the procedure will then be for the associate to ask your speaker if 11 members of the jury find the defendant guilty or not guilty. The speaker will announce the verdict of the majority. The associate will then ask you all to confirm that that is the verdict of 11 of you.

If 11 of you have not agreed on a verdict, or if you have not informed the bailiff within a reasonable time that you have reached a verdict, I shall then consider what course to take.

Suggested Direction – Where an offence in respect of which a majority verdict is not allowed is charged with one where a majority verdict is allowed

In respect of the charge of [eg Commonwealth drug or fraud offence] your verdict, whether guilty or not guilty, must be unanimous and no majority verdict is permitted. However, while your verdict on that charge must be unanimous, in respect of the charge of [eg State drug or fraud offence] a majority verdict is permitted in certain circumstances. Those circumstances have now arisen.

A majority verdict means a verdict on which 11 of you are agreed [where the jury consists of 12 jurors] [or where 10 jurors agree where the jury consists of 11 jurors]. So, if you cannot all agree on a verdict, the verdict of 11 of you [or 10 as the case may be] may be taken as the verdict of the jury.

Shortly I shall ask you again to retire and resume your deliberations. With further deliberations you may find that you are able to deliver a unanimous verdict in relation to the charges or in relation to the charge of [specify charge where majority verdict allowed] you may find that you are able to deliver a majority verdict on which 11 of you are agreed. Inform the bailiff when you have reached your verdicts.

When you return after having reached your verdicts, in relation to the charge of [specify charge where majority verdict allowed], the procedure will be a little different from that which I outlined to you before you first retired. Your speaker will be asked by the associate whether you have reached verdicts on which all 12 are agreed. If the answer is “Yes”, the procedure will then be as I originally told you.

If the answer is “No”, in relation to the charge of [specify charge where majority verdict allowed] your speaker will be asked whether you have reached a verdict on which 11 of you are agreed. If the answer is “Yes”, the procedure will then be for the associate to ask your speaker if 11 members of the jury find the defendant guilty or not guilty. The speaker will announce the verdict of the majority. The associate will then ask you all to confirm that that is the verdict of 11 of you.

If 11 of you have not agreed on a verdict, or if you have not informed the bailiff within a reasonable time that you have reached a verdict, I shall then consider what course to take.

Suggested Direction – where an offence in respect of which a majority verdict is not allowed, such as murder, is charged in circumstances where section 59(4) applies to allow a majority verdict to be taken on a lesser offence

In respect of the charge of [eg murder] your verdict, whether guilty or not guilty, must be unanimous and no majority verdict is permitted. However, while your verdict on that charge must be unanimous, in respect of the charge of [eg manslaughter] a majority verdict is permitted in certain circumstances. Those circumstances have now arisen.

A majority verdict means a verdict on which 11 of you are agreed [where the jury consists of 12 jurors] [or where 10 jurors agree where the jury consists of 11 jurors]. So, if you cannot all agree on a verdict in respect of the charge of [eg manslaughter], the verdict of 11 of you [or 10 as the case may be] may be taken as the verdict of the jury.

Shortly I shall ask you again to retire and resume your deliberations.

When you return your speaker will be asked whether you have been able to reach a unanimous verdict in respect of the charge of [murder] and then you will all be asked to confirm what your speaker has said. If you have reached a unanimous verdict, your verdict will be taken in the manner I previously indicated.

If you have reached a unanimous verdict of not guilty on that charge, you will be asked through your speaker whether you have been able to reach a verdict on the charge of [manslaughter]. Your speaker will then be asked whether the verdict is a unanimous verdict (that is one on which all 12 jurors are agreed). If the answer is “Yes”, your verdict will be taken in the manner previously indicated.

If the answer is “No”, your speaker will be asked whether you have reached a verdict on which 11 of you are agreed. If the answer is “Yes”, the procedure will then be for the associate to ask your speaker if 11 members of the jury find the defendant guilty or not guilty. The speaker will announce the verdict of the majority. The associate will then ask you all to confirm that that is the verdict of 11 of you. If 11 of you have not agreed on a verdict, or if you have not informed the bailiff within a reasonable time that you have reached a verdict, I shall then consider what course to take.

Suggested Direction – where defendant charged with murder

Davis J’s majority verdict direction to the jury in *R v Peniamina* is attached to the decision at [2021] QSC 250.