CRIMINAL PROCEDURE AMENDMENT (TRIAL BY JUDGE ALONE) BILL 2017

Introduction and First Reading

Bill introduced, on motion by **Hon Aaron Stonehouse**, and read a first time.

Second Reading

HON AARON STONEHOUSE (South Metropolitan) [9.11 am]: I move —

> That the bill be now read a second time.

The Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 seeks to introduce an element of personal choice into our legal system. It seeks to streamline elements of our criminal justice system, and it does so on the back of strong support from lawyers, advocates, and judges. It seeks, first and foremost, to ensure that justice remains at the heart of our legal determinations here in Western Australia.

I may not be a lawyer, but I am a committed advocate for personal choice. It is a part of my Liberal Democrat DNA. Although I cannot boast any legal training, I have always taken a keen interest in our legal system, an interest that has increased exponentially since I became a legislator. I hope that my colleagues on both sides of this house would say that I am consultative—I certainly strive to be—so, as a new member, I was keen to consult widely within the legal community to discover what we as legislators might do to increase personal choice, streamline legal processes and ensure that justice remains front and centre in all our legal determinations. Almost without fail, I was told that the first and simplest change that needed to be made was a relaxation of the law regarding trial by judge alone.

Given that this is my first private member's bill, I trust honourable members will indulge me if I take a moment to explain what this bill is not. It is not an attack on the concept of trial by jury. I recognise and embrace that concept. It is one of the cornerstones of our judicial system and should be available to anyone who requests it. Thomas Jefferson referred to trial by jury as one of the principal anchors by which government was to be held to the principles under which it was established, after all. However, in the modern era, I do not hold that trial by jury is necessarily the best option in every case, nor does the law hold it to be. Where we differ is in the degree of flexibility allowed.

We all read the news and stay abreast of current affairs, so members will be more than aware of the prominent cases in recent years that have necessitated trial by judge alone. To the best of my knowledge, there have been two such cases in recent months—that of the man accused of the murder of Hayley Dodd, and the sexual assault trial of the last of those known as the Evil 8. The defence lawyers for each of those accused made successful pleas to have those trials heard by a judge alone, on the grounds that their clients were unlikely to receive a fair trial at the hands of a jury because there had simply been too much prejudicial media coverage in each case for anyone to argue otherwise. The law as it currently stands allows for that. It is not a right, though. If I find myself in court on a serious charge, facing a potential life sentence behind bars, and my legal team says to me, "Aaron, a jury isn't likely to be very supportive; you're a politician after all. What 12 average citizens can sympathise with a politician?" I do not have the right to request a trial by judge alone. At present, that is open to me only if I can argue that justice would not be served by a jury trial, and that is a pretty high bar to clear. Valerie French, the retired Cottesloe barrister, judge and magistrate, arguably put it better than I can. In an article in *Reform* she stated —

> I have spent many years presiding over jury trials as a District Court judge and conducting trials as a 'judge alone' while a magistrate and a Children's Court judge. I know what system I would choose if I were charged with a serious offence that put my liberty at risk. Simply put, if I were guilty I would take my chances with a jury as I would have nothing to lose. If I were innocent, I would not put my fate in the hands of a committee of 12 people who do not have to give any reasons for their decision or be in any way accountable for what has happened in the jury room.

Mrs French went on in that article to make some extremely salient points in regard to the modern jury trial. She pointed out that jury trials take longer than trials by judge alone, they may be subject to substantial delays, they may be aborted by an unwise or inadvertent comment in court, and the spectre of a hung jury, and with it the threat of a second trial, hangs over them.

She also pointed out that the old dictum that a person should be judged by a jury of his or her peers is open to a good deal of argument in the modern context. The selection process, with its associated challenges, can —

> … leave a pool of people who appear to be the unemployed, the disinterested or—more dangerously—the very resentful at being press ganged into service.

She might also have asked what exactly people mean when they use the term "peers."

Richard Dawkins, writing in 1997, would seem to have been of much the same mind as Mrs French, noting that he had had what he called the misfortune to have served on no fewer than three juries himself. If charged with a serious crime, he stated categorically —

> If I know myself to be guilty, I'll go with the loose cannon of a jury, the more ignorant, prejudiced and capricious the better. But if I am innocent … please give me a judge.

This bill before us today seeks to address these concerns and more. It does so by taking a leaf from a number of government bills currently before us in that it seeks to reverse the onus of proof. If an accused requested a trial by judge alone, the court would be obliged to adhere to that request unless it was clearly not in the interests of justice for it to do so.

What would this achieve? First and foremost, from my perspective, it would increase personal choice. It would also acknowledge the increasing difficulty that the courts have empanelling a jury and sequestering it from undue media influence over the course of a trial. I am a child of the internet age, but that age has made jury reliability more and more difficult to maintain. Having consulted widely with lawyers from a range of practices, as well as with judges, both serving and retired, I am also convinced that this bill would save our courts time. A jury trial is often a long and drawn-out process. It cannot be adjourned in the way that a judge-alone trial can, and returned to in a few days' time once other matters have been settled. Importantly, I believe that it will cut down on appeals. Not only are juries not required to give their reasons, they are required by law not to give them. The deliberations in the jury room remain secret. Judges, on the other hand, are required to give their reasons, which makes them less likely to err. Trials under this amendment therefore have the potential to be quicker and more reliable. They would add a layer of transparency to the proceedings of the court that is currently lacking, and would introduce a right to choose.

It would be remiss of me to suggest that every legal professional I spoke to was in favour of this reform, but I have to say that only one spoke strongly against it. That individual, a serving judge, chose not to go on the record, so I will not do him the discourtesy of naming him here. However, he expressed a concern that this reform had the potential to increase the burden on judges, especially in the District Court. When the judge decides that he wants to go on the record, I will be very happy to debate him point by point, but since I do not have that opportunity, I will simply take a moment here to refute his basic premise. Let us look at an average jury trial of five days' duration. The better part of one of those days is wholly taken up empanelling, instructing and then addressing the jury. That presumes that no issues arise that require additional jury instruction, such as internet indiscretions and the like. By comparison, a judge-alone trial can take evidence in written rather than oral form, and does not need to concern itself with a day spent choosing, instructing, and addressing a jury. That is a day or more that can then be spent by the judge writing his reasons. The vast majority of lawyers—judges included, and some very senior judges amongst them—have told me that a day should be more than enough time for a judge to get his or her reasons down on paper.

The following description of a trial in the UK, where judge alone legislation had only just been introduced, might be worth consideration. One of the sources directly involved in the case, comparing it with the more usual jury format, observed that —

> "The whole dynamic is different."

There was no need to read out all of the 18 charges, as would happen in the case of a jury. It was also observed that —

> During the trial, witnesses and barristers were encouraged at times to speed through evidence, skipping over areas that the judge did not feel were relevant.
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> With no jury to impress with flourishes of wit or rhetoric, some of the more colourful moments that can adorn a jury trial were not seen.
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> Verdicts were in the hands of a judge interested only in evidence and the law, uninterested in attempts by defendants to show off their lighter side, or by barristers to sound clever.
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> …
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> For counsel, there was no need for finely-crafted closing speeches designed to impress or mystify, but instead a series of final submissions.
>
> Unlike a jury, which would have to sit and listen to their speeches, the judge was able to engage with the lawyers and challenge their points.

During the trial, unlike a jury that must sit mute even though some may be anxious to ask questions to seek clarification, the judge was able to intervene, and did on occasion, to seek clarification of matters arising during the course of evidence.

I am sure that there will be exceptions, as there always are, but in the normal run of things, I simply cannot see how this streamlined system can be said to bring to bear additional pressure upon some of our brightest and most agile legal minds. Nor do I accept the oft-heard argument that the community at large is more likely to accept a jury's verdict than it is of a judge sitting alone. I think we can all find examples in recent years when community voices have been raised against each type of outcome. I also find it hard to go past the pithy words of our current Chief Justice, who observed in the course of Arthurs v the State of Western Australia —

> … the proposition that "the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge" appears to be an assessment of a sociological nature, unsustained by any empirical evidence.

We already accept that there are occasions when a trial by judge alone is the most appropriate way forward. The legislation to make that so passed through his house. This bill seeks to make that option more easily available by removing the hurdles that many applicants find they need jump over to achieve it. I urge members, and particularly those such as me who lack a professional legal background, to canvass lawyers in their own communities, and to take soundings. I think they will find, as I did, very broad support for this amendment. I also hope that the government will do likewise, and will offer this bill its support.

Pursuant to Legislative Council standing order 126(1), I advise that this bill is not a uniform legislation bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the government of the state is a party. Nor does this bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the commonwealth.

I commend the bill to the house and table the explanatory memorandum.

[See paper 992.]

Debate adjourned, pursuant to standing orders.