STANDING COMMITTEE ON LEGISLATION

CRIMINAL PROCEDURE AMENDMENT (TRIAL BY JUDGE ALONE) BILL 2017

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
FRIDAY, 14 FEBRUARY 2020

SESSION THREE

Members

Hon Dr Sally Talbot (Chair)
Hon Nick Goiran (Deputy Chair)
Hon Colin de Grussa
Hon Aaron Stonehouse
Hon Pierre Yang

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Hearing commenced at 2.38 pm

His Honour KEVIN SLEIGHT
Chief Judge, District Court of Western Australia, sworn and examined:

The Honourable PETER QUINLAN
Chief Justice of Western Australia, sworn and examined:

The CHAIR: On behalf of the committee, I would like to welcome you to the hearing. Today's hearing will be broadcast. Before we go live, I would just like to remind you all that if you have any private documents with you, keep them flat on the desk to avoid the cameras. We can now start broadcasting.

I now require you to take either the oath or the affirmation.

[Witnesses took the oath.]

The CHAIR: You will have signed a document entitled "Information for Witnesses". Have you both read and understood that document?

Chief Justice QUINLAN: Yes, I have.

Chief Judge SLEIGHT: Yes.

The CHAIR: These proceedings are being recorded by Hansard and broadcast on the internet. Please note that this broadcast will also be available for viewing online after this hearing. Please advise the committee if you object to the broadcast being made available in this way. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphones and try to talk into them. Ensure that you do not cover them with papers or make noise near them and please try to speak in turn. I am sure you will be very orderly. I remind you that your transcript will be made public. If you wish to provide the committee with details of personal experiences during today's proceedings, you should request that the evidence be taken in private session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Would either of you like to start by making an opening statement?

Chief Justice QUINLAN: I do not need to make an opening statement. I think the matters that I raised, having consulted with the judges of the Supreme Court, were set out in my letter to you, Chair, of 2 December 2019. I would be happy to answer any questions the committee may have.

Chief Judge SLEIGHT: My submissions have already been presented to the standing committee, but I would like to expand, if I may, as an opening by way of giving further explanation of the workload of the District Court so that the standing committee can understand more fully the submissions that I presented in writing. I have some listing spreadsheets here which I do not want to table, but I want to explain them to you and I thought the best way of doing that, if it is acceptable to you, is to give you a limited number of copies—there are four spare copies. If I could show that to you and then just explain to you how the listing process takes place in the District Court.

The CHAIR: This becomes slightly complicated because if you are going to table documents, I think it might be best if we move into private session.

Chief Judge SLEIGHT: Yes.

The CHAIR: Does that meet your concerns for confidentiality?

Chief Judge SLEIGHT: Yes, because the listing document names accused persons and the judges before whom they are listed at the moment, which is not meant to be public.

The CHAIR: That would certainly be appropriate to classify it as private. Can we cease the broadcast, please?

[The committee took evidence in private]

[3.02 pm]

The CHAIR: I will wait for the audience to come back in just in case they need to give you their version of events after the hearing.

We will move now into our questions of which you have copies, I understand. We will move through them starting with the first one, which is that the stated purpose of the bill is to increase the availability of trials by judge alone, without reducing the accused's right to be tried by jury. In your views, are the reforms likely to result in an increase in the number of trials by judge alone?

Chief Judge SLEIGHT: Yes; in my view because there are a number of applications made to the court that are rejected, so that in itself suggests there will be an increase. I am familiar with the attitude of certain members of the Criminal Bar who are supportive of more judge-alone trials.

Chief Justice QUINLAN: I think in the Supreme Court there would be some increase, but the smaller numbers of criminal trials done in the Supreme Court would probably mean that any increase would be felt more heavily in the District Court. As it is at present, the Supreme Court does more trials by judge alone than the District Court does because there are particular kinds of matters that I can go into later that regularly there are applications for trial by judge alone in circumstances in which the current law provides that it is in the interests of justice that that occur.

Hon NICK GOIRAN: Indeed, the committee has been informed by the Department of Justice that in the last five years, there were 17 trials by judge alone in the Supreme Court and eight such trials in the District Court. I am curious to know whether there is a specific form in those two jurisdiction that must be lodged when applying for a trial by judge alone under section 118 of the Criminal Procedure Act?

Chief Judge SLEIGHT: Yes. There is an application document that needs to be filed simply setting out the orders that are sought, which is a simple document saying that the accused seeks a trial by judge alone, but it must be supported by an affidavit setting out the grounds. And depending on the complexity of the issue that is revealed from the affidavit, an order may be made that the accused's counsel and the state's counsel file written submissions.

Chief Justice QUINLAN: Yes; it is a similar position in the Supreme Court that the application is filed in the ordinary course.

Hon NICK GOIRAN: Do the applications that are lodged have a form number? Is it form number 15 that must be lodged in the District Court or form number 12?

Chief Judge SLEIGHT: No.

Hon NICK GOIRAN: It is a generic application form?

Chief Justice QUINLAN: Yes. It is as in any pre-trial application that might be made in a criminal matter, so it would be made within the court's file, which, in a criminal trial typically, is INS—Indictment Supreme Court—number of the year. So it would be an application brought in that matter.

Hon NICK GOIRAN: I just make the observation that if anyone was minded to create such a form, it would obviously help the Department of Justice because we asked the department to provide us the number of applications and they said that that was not able to be created. But it strikes me that if a specific form were created it would allow for these things to be automatically extracted. Albeit, I can well imagine that given the workload in the two jurisdictions, it is not the most high priority matter.

Chief Judge SLEIGHT: No, there is no reason you could not introduce a requirement that a particular form be used for the applications. It is not something from our perspective that is necessary. But I can understand the rationale for having a form if you wanted to maintain statistics on it.

The CHAIR: If the bill were to result in an increase in the number of trials by judge alone, would you expect the additional trials to represent a similar distribution of offences to that currently dealt with by the courts or is it your view that applicants charged with certain offences would be more likely to allow for a trial by judge alone?

Chief Judge SLEIGHT: I will let the Chief Justice talk about the Supreme Court position because I think it is probably quite different. Primarily, trials by judge alone in the District Court are granted in circumstances where there has been significant adverse publicity to a point where the judge hearing the application forms the view that the accused may be prejudiced. I am of the view that if there were more applications for trial by judge alone, there would not be any particular patterns to the types of offences that would be targeted for those sorts of applications.

Chief Justice QUINLAN: As I indicated earlier, the Supreme Court's exclusive criminal jurisdiction is homicide, and in relation to the applications for trial by judge alone and the trials by judge alone that occurred, I can indicate, for example, that the overwhelming majority of them are in cases involving a plea of not guilty by reason of insanity—an issue

involving unsoundness of mind. The explanation for that is that a verdict of not guilty by reason of insanity is a verdict that can only be given after trial; that is, it is not a verdict, as it were, that the prosecution can simply accept as they might a guilty plea.

So, even if both the state and the accused are agreed that the accused person meets the legal criteria for not guilty by reason of insanity, there still needs to be a trial, and those trials usually turn on the question of expert psychiatric evidence. For that reason, they are quite short; they are not contentious. They, for example, accounted for in 2018–19 all of the six trials by judge alone in the Supreme Court. The other, which happens less often, but from time to time, are murder trials where there is often a combination of three things: pre-trial publicity, the length and complexity of the trial, and the confronting nature of the material that may be the subject of evidence. Those are matters in relation to which trial by judge alone is applied for under the current law and those circumstances are circumstances identified in the cases that it is applied for. I cannot see, and I would only be speculating to think that there would be any different pattern of applications, but of course we are only dealing with one kind of state offence in the Supreme Court in the exclusive jurisdiction. I should say this: one of the other areas that the Supreme Court does deal with, as I referred to, is commonwealth offences involving drug importation, for example, or corporations offences, insider trading et cetera. They must be tried by jury because the commonwealth Constitution provides that they must be tried by jury and the High Court has determined that there is not an individual right of an accused it can be waived; it is a fundamental aspect of the judicial system, and the justifications for it and the explanations for it are more to do with the jury being the community's constitutional representation of the community. Even if there were a change in the law in Western Australia, they could not apply to commonwealth offences.

The CHAIR: You will have seen the second reading speech suggest that an increase in judge-alone trials would save the courts time. Do you agree with that statement?

Chief Justice QUINLAN: I will go first. I do not agree with that statement. In fact, I would be quite sure that the time required to complete a case would be substantially longer. There are some aspects of a trial involving the jury that would not have to occur in a trial by judge alone. One is the very beginning of the trial, which is the opening, the jury empanelment process and the judge's introductory remarks to the jury. That, in my experience, takes about an hour. The other aspect that one would not have would be the judge's direction to the jury at the close of the trial, which can be between one and five or six hours, depending upon the length of the trial. Sometimes in a significantly longer trial it might be longer than that. But as you would understand, any jury direction that required more than a couple of hours would be in a trial that is itself already two or three weeks long.

Those would be the adjustments in the time to trial, but then there would be a significant addition to the judge's writing time that would need to be accommodated. Having spoken to the judges of the court, those who have actually conducted these trials, the shortest period of time it takes to put together reasons is four days; it can take a lot longer. So there would not be a saving of time in that regard. I should say this in relation to the differences between a jury trial and a judge-alone trial, which we all have experience of in the civil sphere: jury trials tend to be more disciplined than trials by judge alone because all of the participants, the lawyers and the judges, are conscious of the fact that they are working to a time schedule with a jury. In a trial by judge alone, be it civil or criminal, it is not uncommon, for example, for a day to be in lieu because the lawyers wish to look into some issue or matter of that kind. So it is not necessarily a like-for-like comparison in terms of the actual running of the trial in court. But certainly it is the additional writing time that would increase substantially the judge time required.

Chief Judge SLEIGHT: I have nothing to add. I agree with everything the Chief Justice has said.

Hon NICK GOIRAN: Further to that, our first witness this morning was former District Court judge Mr McCann, and one of the things that he indicated to the committee is that it would be open to a judge hearing the matter on his or her own without a jury to give oral reasons for a decision in a short time frame after the trial had concluded, and that it was not necessarily for written reasons to be prepared. Is there any comment on that?

Chief Justice QUINLAN: I could comment in relation to the jurisdiction that the Supreme Court exercises. There would be no instance in which dealing with a homicide matter a judge would be likely to give reasons orally. Certainly, for example, in some cases, in the Magistrates Court, for example, magistrates will give oral reasons at the end of the trial, which might involve one issue and two or three witnesses. With the complexity of criminal trials, particularly given that writing reasons in relation to the result of a criminal trial is a different exercise with different standards of proof et cetera, I think it unlikely that in most serious crime one would expect an ex tempore judgement. We try to deliver them as often as we can, but I am not aware of it ever happening in a homicide trial.

Chief Judge SLEIGHT: I disagree with the views expressed by Mr McCann. There would be a very small number of trials in the District Court where that may be possible, but the District Court is not a Magistrates Court. It is a superior court that deals with highly complex criminal matters. Its jurisdiction now has increased almost to the same level as the Supreme Court. We are dealing with cases where the maximum penalty is life imprisonment. We are consistently

imposing terms of imprisonment that are commensurate with the length of terms of imprisonment imposed on persons who have been convicted for murder. The trials are becoming longer and more complex. In the sexual offence area, we are dealing with very lengthy trials involving multiple complainants, trials that go several weeks, sometimes months.

We are doing all of the serious crime now in this state, other than murder, really. That is the nature of our jurisdiction. In my view, the complexities of the trials are such that written reasons would be required for all verdicts returned in a judge-alone trial except for some very, very minor cases.

[3.20 pm]

The CHAIR: Moving on to question 4, you will also be aware of the suggestion that an increase in judge-alone trials would cut down on appeals. Can you give us your views about that statement?

Chief Justice QUINLAN: Yes. My view is that appeals would increase. Obviously, that requires some degree of prognostication, but the factors that lead me to that view are this. Firstly, a set of written reasons—a trial by judge alone can be appealed by the state. An acquittal can be appealed, so an avenue of potential appeals would be present which is not present in relation to jury trials. The second is that the articulation of individual factual findings in the course of a matter are inevitably, I would suggest, going to be more likely to be the subject of a focused challenge on an appeal. That does not necessarily mean that there would be more successful appeals, but it would mean that persons seeing the particular matters taken into account may wish to challenge individual particular matters that are referred to by a trial judge in reasons. That happens regularly in civil matters. It is very difficult to overturn factual findings made on the basis of the credibility of a witness, but that does not stop such appeals being lodged. Likewise, we have a significant number in the Court of Appeal, particularly in the criminal jurisdiction, of unrepresented appellants, and those appeals do not generally have the discipline of being aware of what the restrictions in appellate review of factual findings are. So I think, on the whole, one could expect that there would be an increase in the number of appeals. I do not offer—I cannot offer—any view as to how many would be successful or what proportion of them would be successful, but the workload of the Court of Appeal would increase.

Chief Judge SLEIGHT: That is my conclusion as well, and it is one that is shared by all of the judges of the court that I have discussed the issue with.

The CHAIR: Thank you.

Hon NICK GOIRAN: Further to this, we have been told, I think, from the two witnesses earlier today, albeit expressed differently, that a lot of the rhetoric in this matter so far has been largely coming from the perspective of the accused, and we were encouraged to be also thinking about this from the perspective of the victim. My ears pricked up when you mentioned earlier that if a decision is made by a judge on a trial without a jury, it would enable the state to appeal a not guilty verdict. That, in and of itself, sounds to me like something that would be of interest to victims who might be quite distressed by a not guilty verdict, perhaps traumatised by the fact that their matter has resulted in a not guilty verdict. Notwithstanding the fact that the information being provided to us today is that it would increase the time for the courts, and, obviously, there are significant resource implications that flow from that, is it reasonable to say, though, that opening the door for more appeals might well be something that is welcomed by the community, even if it is not welcomed by the judiciary?

Chief Justice QUINLAN: Look, I could not comment. It might be. There have been appeals from acquittals in Western Australia. I am not aware of there ever being a successful one; that is, from a trial by judge alone. I think it is an important observation. I do not want to suggest what the policy determinations of this committee should be, because that is, of course, not my function or my proper role, but it is a relevant matter to take into account the interests of all the persons in a criminal trial in relation to what is involved in a jury trial compared to a trial by judge alone. For example, one of the areas in relation to which it is very common that, in the Supreme Court, we exercise jurisdiction where it is necessary for us to write written reasons is in the area of Dangerous Sexual Offenders Act applications, for which we do provide written reasons. They are dealing with matters of the utmost intimacy and sensitivity for victims of those offences. They add an additional feature to the judgement-writing process, of course, because one does not wish to re-traumatise people by the judgement-writing process. It is necessary, of course, to give reasons which are comprehensible and explain the issues of fact and law, but there is a certain sensitivity which one must be aware of in relation to the articulation of that. And it is a relevant matter to bear in mind, because at present, in a jury trial where there is a not guilty verdict, for example, in such a case, that is the only verdict that is given. A judge reaching a conclusion that a complainant is not believed has to say so and has to say why. I did notice in the DPP's submission to this committee some expression of the fact that that itself may have the potential to affect other persons with an interest in the process. Now, I simply put those matters as relevant matters to bear in mind. There are, of course, considerations operating in either direction in relation to each of those sorts of things.

Chief Judge SLEIGHT: If I could just comment about that further, a very significant number of trials in the District Court are trials relating to alleged sexual offending, and there is also quite a significant number of trials which might be broadly described as domestic violence–type offending at the worst level. Most of those trials are word on word, and in a judge-alone trial, the judge would have to provide reasons as to why a particular witness's evidence was rejected or created a reasonable doubt. Where we have word on word, it may well be that some comments rather damaging to the witness will be made in the judgement, and the victims—the alleged victims—could be very severely traumatised by the judge having to give those reasons.

The CHAIR: On question 5, we ventured into this territory, but this has a particular emphasis. The committee has received submissions that the requirement to prepare reasons in a trial by judge alone would enhance the quality of the criminal justice system as any possible errors can be identified in the reasons and fully reviewed by an appellate court. Do you agree with that statement?

[3.30 pm]

Chief Justice QUINLAN: I will start by saying it is important in considering that statement to ask what is meant by "enhance the quality". It may well enhance the capacity to review factual findings in appellate review and there is no doubt that when reasons are given for factual findings, it enables certain aspects of a decision to be the subject of appellate review more easily than otherwise. That is one of the features of reasons which adds. Whether or not that enhancement counterbalances the effect of it being one person determining whether a person is believed as opposed to 12 persons believing that a witness is to be believed, it is a question that needs to be asked. I do not think it is appropriate for me to give a categorical view on that other than to say: one benefit may well significantly outweigh the loss of other aspects of what the jury system is intended to give.

One thing that is not going to change and could not change is that there is no possibility for an error of law at present to go uncorrected in a jury trial. I think there is sometimes an impression—I am sure it is not one shared by this committee, having heard the evidence in relation to this—that a jury is simply asked at the end of a trial, "How say you? Guilty or not guilty, having heard the submissions of the parties?" All of the matters of law that are relevant to a jury trial are recorded in reasons in effect by the judge's directions as to law as are the factual issues that a jury is required to determine. So in that respect, there is a record of the potential for error, which is what is currently dealt with. What there is currently not in the case of a jury trial is, as it were, a reason for, for example, those quintessentially factual questions: is the witness who said this occurred is to be believed over the accused who said that it did not occur? There is the difference.

There are already limitations in the civil sphere on disturbing findings of a trial judge based on the credibility of witnesses for that very reason, that is hard to recreate those issues in an appellate environment. I hope that provides some assistance without trespassing on the committee's territory.

The CHAIR: Chief Judge.

Chief Judge SLEIGHT: It cannot be really argued against that judge-alone trial provides a mechanism of a closer examination of the factual finding process, so it enhances a process in that regard but one needs to balance against that other considerations which go to the quality of justice. That includes such things as the benefit of having a system where the community's actively involved in the decision-making. Judges are often criticised for being out of touch and not reflecting community values. One of the benefits of a jury system is that it is the community that is making the decision, or a random sample from the community. Those criticisms cannot really be levelled at a jury decision.

Chief Justice QUINLAN: Might I add something to what the Chief Judge has just said. It rose from some evidence that I think the committee heard earlier in the week, which I found quite striking, which was in the exit interviews of jurors that the Sheriff's Office conducts, I think the statistic was something like 52 or 54 per cent of jurors leave the process with a more favourable view of the justice system than when they came in. I think four per cent had a less favourable view and then a middle that did not change. We probably cannot say what they started with but of those people whose views changed, we can say that it is overwhelmingly positive. My own experience, limited though it is compared to the Chief Judge, of dealing with juries, speaking with them and the unstated response, as it were, is that when one gets to the end of the trial and the jury is discharged and you thank them for their service and say that you hope that they have garnered a greater understanding of the criminal justice system, you get nods. I think there are more than 500 jury trials a year in Western Australia. That is 6 000 people who will go back into the community with a better understanding of how the system works, to speak to their family and friends et cetera. In a real respect, juries have a critical function within a trial but they are also the most directly informed ambassadors that the criminal justice system has. I think that is an aspect of the criminal justice system that should not be lost sight of.

Hon NICK GOIRAN: I have to say that this is not the first time that we heard that message and I think it is a useful one for us to hear. Equally, I think it is important to note that the bill that is before the Legislative Council at the moment is

not proposing to disband jury trials altogether. It is simply giving, as I understand it, a right to an accused to essentially always have a trial by judge alone should they elect to have it. But I imagine that there would still be a very significant proportion of trials undertaken by jury into the future.

Chief Justice QUINLAN: I think that is certainly right, Mr Goiran. I raise it because some of the submissions that are made do seem to proceed from a basis that trial by jury is somehow inconsistent with contemporary standards of justice. It is a matter for the committee to determine the policy in relation to this and ultimately for the legislature to determine the policy in relation to this, but if the policy reason for this bill is that juries are in principle inconsistent with contemporary standards of justice, that is not a reason to have a right of an accused; that is a reason to abolish juries entirely. Policy is a matter for the legislature. My concern, in addition to the effects on the work of the courts, is the coherence of the law. If the policy reason for moving away is a policy reason which suggests that trial by jury is in principle inherently an inferior mode of trial, that is a different policy consideration.

The CHAIR: Because we are a little pressed for time here and I am loath to send you away with questions if we can get through the material we want to cover with you, I will try to speed up going through these questions. You have given us a very fulsome account of your views. I am not asking you to hurry; I am just explaining how we might proceed. I am thinking that you might not have much to add to your previous comments as far as question 6 goes, which is about the increased burden of judges being offset by savings in sitting times.

Chief Judge SLEIGHT: I just add that before coming here today, I did some quick calculations. Already I think the District Court needs another five judges to meet its current workload under its current system but with judge-alone trials, I did a rough calculation which would suggest to me that another 10 judges on top of that would be needed. I can provide those calculations to the committee later if you wish.

[3.40 pm]

The CHAIR: Yes, I think that would be useful. So that would become effectively question on notice C1. I imagine that that is the answer to question 7, which is about additional resources. Was there anything, Chief Justice, that you wanted to add as far as question 6 or 7 goes?

Chief Justice QUINLAN: The only thing I will add is this. In terms of increasing the burden on judges, there is a time burden, of course, because judges are working to capacity. One thing I would say, and it is an issue that has received significant attention in the literature in recent times, and one in relation to which the Chief Judge and I are acutely aware, is concerns about judicial wellbeing and burnout of judges, and being able to have judges be able to perform at their best into the future. I am sure I am correct in saying that if you asked any judge, "What is the most significant workplace pressure and source of stress?", it is keeping on top of the timely delivery of reserve decisions. That is the principal thing. If you ask 100 judges, 99 will tell you that that is the thing that causes any amount of workplace stress that there is. The burden is numerical but it is one—I do not want to be alarmist—in which an increase in resources would be necessary in order to get sustainable work lives out of judges, because of that wellbeing effect. Other than that, those are the only points.

The CHAIR: Question 8 is about the collection of data, or information about the amount of time judges spend in judgement writing. Are there any formal or informal processes for monitoring or quantifying this time?

Chief Judge SLEIGHT: In the District Court, and it is mainly a judicial wellness issue but it is also a matter of maintaining standards, I have a confidential report given to me, which I can access at any time really, which records judges who have outstanding written decisions and the length of time that those decisions have been outstanding.

Chief Justice QUINLAN: I, too, have access to that information. In terms of the amount of time judges spend on writing, judges do not fill out timesheets. In one sense, I could facetiously say that if you took 65 hours a week and then subtracted the number of hours that a judge is in court, you probably have the number of how many hours are spent a week in judgement writing time, because other than judges such as the Chief Judge and myself and others with significant administrative responsibilities, judgement writing time is what judges are doing when they are out of court. They are either in court or they are writing judgements, so it is basically any other time. In terms of keeping track of it, that is something that a head of jurisdiction has to do, in terms of speaking with colleagues and monitoring how people are getting on and, if necessary, as happens from time to time, to take a judge out of court in order to give them time to get on top of the writing. But as you can imagine, that has its own follow-on effect.

The CHAIR: You have already talked about savings and costs, and I think we have a fair idea of your views on both those matters. Is there anything you would like to add about possible savings to the state were these changes introduced and additional costs—anything over and above what you have already told us?

Chief Justice QUINLAN: No, I do not think so.

Chief Judge SLEIGHT: No.

The CHAIR: So we move on to question 11. What types of cases are typically tried by judge alone in the current system, and are those trials generally shorter than they would be if tried by jury? Again, I think we have probably covered your remarks on that. If neither of you have anything to add, we will move on to 12. In your view, would a trial by a judge alone under the proposed amendments take less time than if conducted by a jury; and, if so, would the same reasons as above apply? Again, we have covered that matter.

Chief Justice QUINLAN: Yes.

The CHAIR: Question 13: the bill proposes removing a number of criteria set out in the Criminal Procedure Act 2004 upon which it may be considered in the interests of justice to conduct a trial by judge alone—that is, the complexity of the trial, jury interference and factual issues requiring the application of objective community standards. In your view, what would be the effect of removing these criteria? Would it be appropriate for these to continue to be considered when determining whether an application is in the interests of justice?

Chief Justice QUINLAN: I can probably just respond to that by saying the law as it currently stands in Western Australia as established by the decisions of the Court of Appeal is that subsections (5) and (6) are neither confining nor exhaustive criteria for determining what is in the interests of justice. They are important statutory guidelines. I cannot see that there would be any benefit by removing them. I would expect that matters such as complexity, length, burdensome and the other matters would always be matters relevant to the interests of justice, regardless of whether they were spelt out in the legislation itself.

Chief Judge SLEIGHT: Yes, there is quite a considerable amount of law on how judges should deal with applications for a judge-alone trial. I should perhaps just observe that I was the judge who made the order for a judge-alone trial for Mr Rayney. In the decision that I gave in that matter, I comprehensively dealt with all the authorities on the issue. One of the criteria that the authorities indicate that I should consider was the wishes of the accused, so even under the existing system the wishes of the accused are a factor which a judge considering such an application must take into account.

Hon NICK GOIRAN: But at the moment you could order a trial by judge alone under objection from the accused?

Chief Justice QUINLAN: No.

Hon NICK GOIRAN: The accused would always have to consent?

Chief Judge SLEIGHT: Yes. The application in the Edwards trial was made by the prosecution initially, but it would not have got off the ground unless the accused had joined in on the application.

Hon NICK GOIRAN: Why then do the authorities say that you must take into account the view of the accused when by default the accused must have at least applied or consented?

Chief Judge SLEIGHT: Because in deciding what are in the interests of justice, the subjective wishes of the accused are simply a factor you should take into account.

Hon AARON STONEHOUSE: The wishes of the accused alone, though, would not be sufficient, presumably, for the court to make such an order, or may they be?

Chief Judge SLEIGHT: I cannot imagine the wishes of the accused being sufficient to persuade a judge for a judge-alone trial at the moment, no.

Hon AARON STONEHOUSE: It would merely be a factor.

Chief Justice QUINLAN: If the wishes of the accused alone were a controlling criterion, that, in effect, would be giving a presumptive right, which is what this bill would propose to do. So it is ultimately a question of what is in the interests of justice, having regard to all the various considerations that are involved.

Hon NICK GOIRAN: The reason I asked that is because we have a submission somewhere here from the director of Legal Aid, which I am just trying to grab. In a letter to the committee dated 4 November 2019, which is public, the director of Legal Aid concludes by saying —

> It is appropriate that the prosecution not be able to obtain a trial by judge alone without the support of the accused.

Chief Justice QUINLAN: That, with respect, represents an incorrect understanding of the law. Subsection (4) of section 118 provides that on an application by the prosecution, it must not order it unless the accused consents.

[3.50 pm]

Hon AARON STONEHOUSE: That is retained in the bill as well in case they were pre-empting some loss of that particular clause.

Hon NICK GOIRAN: Okay.

The CHAIR: We have already overlapped into this question, which I think shows that our questions are logically progressing. Can you envisage any situations where it would not be in the interests of justice to order a trial by judge alone?

Chief Justice QUINLAN: This was one of the issues that I raised in my submission, and I noticed that the parliamentary inspector had also raised; that is, if the law is that there is a presumptive entitlement of an accused person to trial by judge alone, it is difficult to see by what criteria a judge could then determine the opposite, because all of the things that a judge would take into account are the reasons we have juries—community involvement, 12 people, anonymity. Those are all the reasons we have juries, so there could not be anything that I can foresee about a particular matter. The one exception to that might be the issue that is expressed in section 118(6), which is you might be able to say that there are some questions that are so wrapped up in the community's view and opinion about decency or matters of that kind that compel having a jury, but it is difficult, it seems to me, to see once one has a presumption of an entitlement, by what criteria does one then say that it is not in the interests of justice for that entitlement to be exercised?

The CHAIR: Do you have anything to add to that, Chief Judge?

Chief Judge SLEIGHT: No, I have nothing to add, thanks.

The CHAIR: I am going to try to finish going through the questions with these witnesses unless there is a strong argument from anybody else on my side of the table to wrap up. Coming to the question about interference with jury members, have either of you had any experience or are you aware of incidents with juries being interfered with?

Chief Judge SLEIGHT: I am sorry, I have not researched this, but my recollection is that last year a judge aborted a trial on, I think, about the second day, because a juror complained that he or she was approached by someone outside the court. We have tried to introduce some changes to the way in which jurors exit the District Court building at lunchtime to minimise the chance of them running into other people, but that is the only occasion I can recall offhand.

Chief Justice QUINLAN: Yes, I do not have anything to add to what the Chief Judge says about that.

The CHAIR: The question about hung juries: some submissions have noted that hung juries are a problem in the criminal justice system that could be avoided by trials being conducted by judge alone. Do you have any comments to make about that assertion?

Chief Judge SLEIGHT: The assertion is correct, but you can see the figures. I think they have been presented to you by the Department of Justice. The figures are not, in my view, alarmingly high.

Chief Justice QUINLAN: Any time that it is necessary to have a trial for a second time is unfortunate, so in that sense any hung jury is unfortunate that there needs to be a second trial. The only thing I would say about that is that hung juries are by no means the only or even the most common reason why we have a trial needing to be held a second time—there are retrials as a result of appeals to the Court of Appeal, failures to disclose in a timely manner new evidence, new evidence arising in the course of the trial. So a hung jury is one of the realities of why we occasionally have to conduct trials again and it is a matter to be taken into account. One always likes to find silver linings to these things, and one of the things about a hung jury is that every time there is a hung jury, it demonstrates that the jurors are taking their oaths seriously, that they are performing their task diligently and not going along a with a result for the sake of it, but exercising their independence. Whilst one would prefer there never to be hung juries, at least when they occur we know that the jurors are taking their oaths seriously and that is the reason for that result.

Hon NICK GOIRAN: It does strike me that in the situation of a hung jury you have obviously got more than one person who has come to the conclusion that the individual is guilty, and were that thinking to be in the mind of the single judge, the accused would be convicted.

Chief Justice QUINLAN: Absolutely.

Hon NICK GOIRAN: I am not sure why it is that some—my description of them—high-profile legal minds in our state in the submissions that have been provided have used hung juries for a reason as to why we need single-judge trials. I would have thought that these same individuals who are very keen to ensure that a person is not wrongly imprisoned, not wrongly convicted, would be very concerned that one decision-maker would get it wrong.

Chief Justice QUINLAN: Yes, I think that is a fair point. I suppose what I should say is this: we are fortunate in this country to have a professional, educated, independent, non-corrupt judiciary, and in many respects we are the envy of the world, but judges can make mistakes as well. They can believe a person who is not telling the truth and they can disbelieve a person who is telling the truth. That is an inherent feature of the system, and one of the justifications that is given for juries is the one that you identified; that is, what you have in the comparison between the two is one

person—let us take it as an oath-on-oath case—believing and giving reasons and 12 agreeing. That is the metric, as it were.

Chief Judge SLEIGHT: Can I just add a further comment, if I may? In many trials, as I have already commented, it is word against word, and reasonable minds, in my view, can have different views about who to believe and who not to believe. In the civil jurisdiction of the court, where I have sat as a judge conducting a judge-alone trial, often I spend many hours agonising over what evidence I am going to accept and what evidence I am going to reject. It is not an easy task.

The CHAIR: Moving on to question 17, you will see that we have had a couple of alternative "improvements" suggested in some of our submissions—for example, a requirement for juries to provide brief and informal reasons for their decisions and the automatic provision of assistance to juries such as transcripts, written guidance and recordings. Have you considered either of these or any other improvements to the conduct of jury trials and have such measures being implemented or trialled?

[4.00 pm]

Chief Justice QUINLAN: It is very common in jury trials in my court now that the jury is provided a copy of the transcript of the evidence at the close of the trial. Once upon a time, that never happened; it is now quite commonplace, and particular directions by judges have been developed to account for that.

It is also very common that jurors are provided with aids for the purposes of their deliberation by the judge and to explain that, for example, it is quite common—I have certainly done it—to provide a decision tree to assist a jury that will take them through the issues that arise on the elements of the offence. So that it has a question: "If yes, go to question 2. If no, not guilty." Next question: "If yes, go to question …" et cetera. One finds that, for example, in a self-defence case where there are a number of elements that you provide and I would expect they would be almost universally applied in homicide cases involving self-defence. It is not something that I would wish to, as it were, say should be introduced straightaway or without further consideration but my own personal view, and I do not speak for any of the other judges in this respect, is that there might be room for a greater use of special verdicts in jury trials. There is already provision for it in the Criminal Procedure Act. For example, the decision tree example I gave, you might have the jury return with the answer, "Yes to question 1; no to question 2" et cetera. I say that because one experience I have had with juries which I am the only judge who is currently sitting who has the experience. I sat with a jury in a civil matter last year—six jurors—and I gave them a list of questions and at the end of the trial, they answered the questions yes or no, so it was possible to see in that process the reasoning process that led to the particular outcome. That is something worth contemplating. I do not present it as something that should be immediately adopted because I think it would require careful consideration. But there are always ways of looking at that. At the moment, under the Criminal Procedure Act, if a judge considers it would assist in the determination of sentence, the judge can ask for a ruling on a particular fact.

Chief Judge SLEIGHT: I have nothing really to add to what the Chief Justice has said about what the practice is now. Generally, transcripts are provided, certainly by a significant number of judges on a regular basis, other aids, written guidances, to a jury. In relation to the first question about giving informal reasons, I do not think that is appropriate because there is quite a skill in articulating reasons and the jury may not have the skills to do that. It would certainly create greater delays I think in verdicts being reached. But, again, for the reasons that I articulated earlier about the impact on victims—sorry, I should say complainants—in sexual cases, they, perhaps, would be traumatised to hear the reason why an accused is acquitted.

Hon NICK GOIRAN: I thought it was quite persuasive earlier when the Director of Public Prosecutions put the case that it is one thing to get 12 people to agree on a decision; it is another thing to get the 12 people to agree on the reasons for that decision.

Chief Judge SLEIGHT: Yes; I think that is right.

Chief Justice QUINLAN: And it is the case that there may be a multiplicity of reasons why, for example, that witness is believed and the jurors might have. That is part of what we tell the jurors to do in bringing their life experience to the determination of issues and to discuss them and so on. It is certainly my experience and from speaking to my colleagues that juries in Western Australia in 2020 are diverse groups of people—age, gender, ethnicity—when they come together. So part of what they are instructed to do in bringing their life experience is to bring all of that diversity.

The CHAIR: You will have noticed that some submissions have referred to alternative systems, particularly those adopted by some European countries, where, for example, they adjudicate sitting and deliberating alongside professional judges. In your view, could the jury system in WA be improved by drawing on some of those concepts?

Chief Justice QUINLAN: I think it would be a big question. It would require a good deal of research. What I can say is that we do have some circumstances in our current system where lay adjudicators sit with professional judges. The

State Administrative Tribunal, for example, in a disciplinary matter in relation to a doctor or a lawyer, will routinely have a judge and two or four other persons who are lay persons usually from the particular profession. That is something that is not unknown in our system. It has not yet been something that is being contemplated for the criminal justice system generally. I think that would be a matter, to some extent, in terms of law reform beyond my pay grade this afternoon, but something that might be the subject of further research.

Chief Judge SLEIGHT: I think in complex corporate crime, there is merit in considering an alternative system but other than to make that observation, I have nothing further to add.

The CHAIR: Some submissions to the committee referred to the idea that jury trials facilitate democratic participation or community participation to be more accurate in the administration of justice. However, others have noticed that jury trials lack transparency and are inconsistent with contemporary expectations of reasoned justice. In light of these differing submissions, to what extent do you think jury trials are necessary to facilitate community confidence in the criminal justice system? Do have you anything to add?

Chief Judge SLEIGHT: I have nothing further to add, really, to what the Chief Justice said on that issue earlier.

Chief Justice QUINLAN: Just one other thing to mention in relation to transparency. It is not only the transparency of the outcome but the transparency of the process. I offer this as a consideration to the committee to take into account. In relation to some of the benefits that the jury system can give. One of the things that presenting a case before 12 lay persons does is discipline both the judge and the lawyers to express the case and the issues in the case in a manner that is properly understood by 12 intelligent lay persons but who are not lawyers. For purposes of efficiency, lawyers and judges when they are talking only to each other will tend to use a language that efficiently communicates issues in a manner that is not easily understood by non-lawyers. If you were to go and visit any civil trial on most days of the week, you would find that even the most intelligent, educated lay person has difficulty following what happens in a trial with lawyers and judges because of the language that is used. There is a certain transparency associated with the discipline of the onlooker being able to understand a jury trial as much as the jury.

The CHAIR: Chief Judge, you have helpfully prepared a submission that the law in the ACT following amendments in 2011 does not permit judge-alone trials for some serious offences, such as murder and nearly all sexual offences. South Australia does not permit an accused to elect to be tried by judge alone where the accused is charged with certain minor indictable offences. Do you think it would be appropriate to similarly limit the right of an accused person to apply for trial by judge alone to certain offences?

[4.10 pm]

Chief Judge SLEIGHT: The ACT legislation, in fact, is narrower than ours, in that to get a trial by judge alone you have to have the consent of both the prosecution and defence, and the judge must be satisfied that it is in the interests of justice. Having overcome those hurdles, they then have a provision which excludes certain types of offences. I am not quite sure of the rationale of excluding certain types of offences; it seems to me that you either support the bill in its current form or you do not have the amendments. I do not think excluding certain types of offences is justified or makes much sense to me anyway.

Chief Justice QUINLAN: I do not have anything to add to that other than to say that, ironically, if one looks at the kinds of trials that have been the subject of trial by judge alone, the categories that are excluded in the ACT would cover 95 per cent of the kinds of matters that are currently dealt with in the interests of justice in trials by judge alone in this state.

The CHAIR: Our final question, before I ask my colleagues if they have any supplementary questions, is: some jurisdictions require the court to be satisfied that an applicant has obtained legal advice before applying for an order for trial by judge alone. In your view, should a similar safeguard be required under the act?

Chief Judge SLEIGHT: My view is: no.

Chief Justice QUINLAN: No, and I say that for this reason, or put it this way: if a person is represented, it is their lawyer's professional obligation to provide advice in relation to these things. I think there can sometimes be a risk of over-legislating what is expected professional conduct already. One would expect anybody to have made that choice, even currently. Bringing an application would require the person to have been given proper legal advice.

The CHAIR: Thank you very much. Do my colleagues have any follow-up questions? No? In that case, I will formally close the hearing by thanking you for attending today. We can end the broadcast now.

A transcript of this hearing will be forwarded to you for correction. If you believe that any corrections should be made because of typographical or transcription errors, please indicate these corrections on the transcript. Errors of fact or substance should be corrected in a formal letter to the committee. You have taken a couple of questions on notice, so when you receive your transcript of evidence, the committee will advise you when to provide your answers to questions

taken on notice. If you want to provide additional information or elaborate on particular points, you may provide supplementary evidence for the committee's consideration when you return your corrected transcript of evidence.

Thank you very much for coming.

Hearing concluded at 4.13 pm

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