



The Chair and Members
Legislation Committee
By email: lclc@parliament.wa.gov.au

Dear Hon Dr Talbot and Committee members,

Inquiry – Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017

I refer to the current inquiry into the Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 and respectfully submit that the Bill should be amended to require that the **consent of the accused be fully informed**.

For accused who do not speak English as a first language (eg many Aboriginal people, CALD people), or who have mental health or cognitive issues, I submit that such a protection is especially appropriate. Indeed, I submit that even for those who do speak English as a first language, such a protection is appropriate since though they may understand the meaning of the order, they may not fully appreciate and agree to its effects.

The trial by judge alone provisions of South Australia, New South Wales, ACT and Queensland all include protections against uninformed consent by the accused, albeit not in any uniform way. Some jurisdictions require proof that the accused has received prior legal advice as to the effect of the proposed order. Others require the court to satisfy itself before making the order that the accused properly understands the effect of the proposed order.

I submit that what is needed is a form of protection that requires the court to be satisfied that the accused both understands the effect of the order, and freely agrees to it. Mere receipt of legal advice does not guarantee that it has been understood. Merely understanding the effect of the order does not mean the accused freely agrees to it. The right of an accused to a jury trial is a fundamental right. If it is waived, it is proper that the court be satisfied that the accused's decision is an informed and free choice.

I acknowledge that section 118 of the Criminal Procedure Act 2004 as it currently stands does not contain such a protection. It is however appropriate that it do so. This Bill provides an opportunity.

I submit also that the Bill should be amended to include a **review clause**. My concern is that if trial by judge alone becomes common, legal aid funding for jury trials may become so constrained that future accused face a choice between consenting to a trial by judge alone or being unrepresented at a jury trial. This must not happen. A review offers a means for monitoring the operation and effectiveness of the consent provisions.

While the right of the accused to a jury trial is fundamental, so too is the need for the jury to be impartial. I submit that the Bill may not strike the right balance as to what should happen where those two tenets are in conflict, as would happen if there is a risk of **jury tampering** but the accused does not consent to trial by judge alone. New South Wales law offers a precedent that seems to strike a sensible balance. It allows the court to order trial by judge alone without the accused's consent if in its opinion there is a substantial risk of jury tampering and the risk can't be reasonably mitigated by other means.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'All. Xa', with a stylized flourish at the end.

Hon Alison Xamon MLC
Member for North Metropolitan

8 October 2019