Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Inquiry into the *Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017*

Submission to the Western Australian Legislative Council Standing Committee on Legislation

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Protecting and promoting justice, freedom and the rights of the individual

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

The ALA office is located on the land of the Gadigal of the Eora Nation.

[1] www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the Inquiry into the *Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017* ('the Bill') as it commences its review on the option for trial by judge alone in Western Australia.

2. The legislation proposed by the Bill proposes that an accused should have a right to trial by judge alone unless the court determines that it is not in the interests of justice to do so. It further provides that where the prosecution seeks to apply for a trial by judge alone, the order must not be granted unless the accused person consents.

3. Currently, the law allows for a trial by judge alone only if the court considers that it is in the interests of justice to do so: *Criminal Procedure Act 2004* (WA), s118(1). Specifically, the legislation states that the court may make an order if it considers that the trial, due to its length or complexity or both, is likely to be unreasonably burdensome to a jury. The court may also refuse a trial by judge alone if the trial will involve a factual issue that requires the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness: *Criminal Procedure Act 2004* (WA), s118(6).

4. The ALA is strongly of the opinion that the option to elect for trial by judge alone is well overdue in Western Australia, and that the proposed legislation overcomes many of the shortcomings of jury trials.

The case for trial by judge alone

5. The ALA is concerned that in modern society, there are many aspects of the jury system which indicate that the right to a trial by judge alone is essential to an accused's right to a fair trial.

Publicity

6. One of the most potent arguments for the right by trial alone is that it avoids the possibility of jurors being affected, or even overwhelmed, by adverse publicity.

7. In the High Court case of *Dupas v R* [2010] 203 A Crim R 186, a permanent stay of proceedings in respect of a murder re-trial was sought. Extensive media coverage had occurred during the lead up to the first and second trials and throughout the appeal proceedings over some seven years, including extensive publicity in numerous newspaper articles and four books. Further,

the applicant was identified in the media from an early stage as a suspect in regards to the murder. There were obvious dangers in a jury trial.

8. A further example is *R v TS* [2004] NSWCCA 98. The New South Wales Criminal Court of Appeal upheld an appeal and granted a new trial after the appellant's trial overlapped with his co-accused. The appellant had previously applied, and was ordered, a separate trial from the co-accused. The co-accused's trial proceeded first, however the appellant's trial began while the jury was deliberating on the first trial. The jury gave its decision on the second day of the appellant's trial, which resulted in overwhelming media coverage and public outrage. Part of the media reporting included coverage of the Crown Prosecutor's opening address and the evidence led at trial. Counsel for the appellant submitted in response that the jury should have been discharged and a six month adjournment granted due to the publicity.

9. While the trial judge carefully warned the jury of the second trial not to consider the publicity of the first trial, the Court of Criminal Appeal held that the trial should have been aborted as the publicity seriously impeded the appellant's right to a fair trial.

10. The issue of publicity is already identified as a potential problem in relation to jury trials in the current legislation in Western Australia, however generally trial by judge alone has only been granted in cases of extraordinary and *exceptional* publicity (for example, in *The State of Western Australia v Rayney* [2011] 42 WAR 383). Conversely, in *Schmidt v The State of Western Australia* [2014] 239 A Crim R 460, massive publicity preceding a murder trial (wrongly identifying the accused as a member of an outlaw bikie gang) was seen as insufficient to warrant a trial by judge alone.

Jurors conducting their own investigations

11. Trial by judge alone avoids the possibility of jurors accessing inadmissible or inappropriate materials. Numerous cases have aborted due to this: see *Bright v R* [2000] 114 A Crim R 446.

12. In the English Court of Appeal case in *R v Young* [1995] QB 324 the Court received affidavit evidence from all twelve jurors that while housed overnight at a hotel, four jurors indulged in a Ouija board séance to contact the deceased victim to discover whether the accused was guilty of murder. The results of the séance then ultimately influenced the final jury decision. Albeit an extreme example, this case demonstrates the risk of a jury conducting erroneous

investigations (or adopting impermissible methods of adjudication), a risk that exists in any jury trial. It is also very difficult to detect.

13. Another example includes the Victorian case of *R v Benbrika* [2009] VSC 142, where a trial judge 'repeatedly and unambiguously told the jury that the case was to be decided on the evidence given in the court room'. In spite of those directions there was evidence that the jury had accessed 'Wikipedia' via the internet as well as a dictionary. A re-trial was ordered.

Internet

14. With the prevalence of the internet in modern society, there has become a real and likely possibility that, particularly in high profile cases, juries will be exposed to highly prejudicial information about the allegations before they are even empanelled as jurors.

15. Although there has always been the risk of juries conducting their own investigations, this has been compounded by the rise of the internet and the resulting improvements in the speed and ease of distributing and accessing information.

16. In *R v K* [2003] NSWCCA 406, it was discovered by defence counsel after the jury verdict was delivered that the jury had sought out the history of the trial through internet searches. After the trial concluded members of the jury convened at a nearby hotel to socialise. Defence counsel also visited the hotel, and (albeit improperly) eventually ended up talking to the jury. Through these discussions it was discovered that the jury had wrongly investigated the history of the matter for themselves through the internet, including the fact that the appellant had been accused of murdering his second wife and that the current trial was a retrial in relation to the alleged murder of his first wife.

17. On appeal the Court ruled the affidavits of the jurors admissible but did not consider evidence of the materials that were accessed by the jury to be admissible as it infringed upon the principle that the Court could not hear evidence of the jury's deliberations. The Court held that the evidence showing that some jurors learned from internet searches that the case was a retrial did not warrant a new trial.

18. In this case the Court observed that it may be appropriate to consider amendments to the *Jurors Act* to make it an offence to conduct external investigations. It was also stated that this issue could be avoided by the trial judge giving clear and unambiguous directions warning against juries conducting their own investigations. It is submitted that this is a simplistic and

unrealistic approach to the issue and that monitoring whether juries are conducting their own investigations, particularly through the internet, is almost impossible. Additionally, the rise of social media means that even where jurors do not decide to actively conduct their own investigations, the information may still inadvertently appear on their newsfeed.

19. If an accused person decides that they do not want to risk their liberty on a jury in circumstances where it is near impossible to detect whether they have conducted their own irregular investigations, the ALA submits that it should be their right to decide to seek a trial by judge alone.

Jury bias

20. There is some understandable mistrust in the system by people who come from marginalised groups, such as those accused of being members of a bikie gang, non-mainstream religion or those charged with an offence of the type that has been the subject of significant public derision: see generally *Webb & Hay v R* [1994] 68 ALJR 582.

21. In particular, with the increase of prosecutions for historical sex offences it has been the experience of criminal defence lawyers that the alleged offences often overwhelm and shock public sensibility and verdicts of guilty are returned in some cases that ordinarily (on their face) would have demanded a sense of reasonable doubt.

22. In *LFG v The State of Western Australia* [2015] WASCA 88, prior to the trial commencing the appellant had applied to be tried by judge alone after his prior convictions of sexual offences were ruled to be admissible as propensity evidence. It was submitted on behalf of the accused that there was a real risk that one or more of the jurors may have found it difficult to exclude from consideration the prejudicial effect of evidence that suggested the appellant had previously interfered sexually with four young boys in approximately the same age group as the complainant. Although the case did not fall within the ambit of s18(6) of the *Criminal Procedure Act* of requiring an evaluation of community standards, the Chief Judge dismissed the application for a trial by judge alone. This was upheld on appeal.

23. In the Court's judgment, the following passage from *TVM v The State of Western Australia* [2007] 180 A Crim R 183 was relied upon:

'[I]t is the law and the experience of the law that juries are, when properly directed, able to put aside prejudice and sympathy, and deliver verdicts on the facts in a dispassionate manner (at [29]).'

24. The ALA respectfully queries this observation of the Court. From its members' experience it has witnessed the opposite, particularly in cases dealing with sexual offences against children and where propensity evidence is led by the state.

25. This view has been supported in recent academic works. In a recent academic study on juries conducted by the University of New South Wales, 78 jurors were surveyed in regards to their conduct during 20 jury trials. The study concluded that the majority of jurors who participated had misunderstood or did not accept that they were required to receive the limited evidence produced during the trial. Rather than passively accepting the information divulged they expressed frustration that more information was not available and felt that critical information was being unreasonably withheld (Jill Hunter, 'Jurors' Notions of Justice', UNSW Jury Study (2013)).

Accountability

26. If a jury manifestly makes an error either by law or fact in the court of its deliberation, the prospects of this ever becoming known are remote. An error by judge will, however, appear on the face of the record and is comparably easy to cure.

Jury intimidation

27. There have been cases where jurors have been subjected to subtle and even overt threats both inside and outside of the jury room. In a trial by judge alone, this possibility will be completely removed. See: *Wong v The State of Western Australia* [2011] WASCA 56; *Smith v The State of Western Australia* (2016) 262 A Crim R 449.

Dissenting jurors

28. The problem of the jury not being able to agree (or being 'hung') is a perpetual problem for the system that would never be encountered in the case of a judge alone trial. Occasionally (especially in relation to federal charges) a unanimous verdict is required and the problems of

even one stand-alone juror causing a trial to be aborted is well acknowledged: see cases such as *Edwards v R* [2000] 116 A Crim R 522.

Flexibility

29. If a trial proceeds by judge alone, the court has significantly greater flexibility as to when to sit, and if an adjournment for some protracted period is necessary, then the court is in a position to accommodate this.

30. Conversely, if a witness or members of the jury become unavailable, or for some other reason the trial is unable to proceed, then the trial must be aborted. Generally speaking, where a trial is unable to be adjourned for much longer than a day without the jury needing to be discharged.

31. The accused person must then have another trial listed, a process which currently in the Western Australian courts can take over 12 months. This is expensive both to the accused and the community and further prejudices the accused by increasing *Longman*-type (forensic disadvantage) considerations.

32. Albeit not a central consideration, a trial by judge alone does provide the court with some flexibility in regards to the running of the trial and it may provide some comfort to the accused that the trial will not be aborted due to issues beyond their control.

Cost

33. Running a trial without a jury is obviously a far less costly exercise then the conventional jury trial. There are many costs associated with paying and reimbursing jurors (as well as reserve jurors) that could be avoided in the case of judge alone.

34. It would also significantly shorten trials as the need to empanel juries, instruct them, conduct the jury ballot and allow for deliberation time would be removed. This could, in some cases, remove up to two days from a standard trial. This would not only reduce the cost of paying jurors but also the cost of court security, custodial services, court staff and Legal Aid.

35. Again, this ought not be a determinative reason for reform, it is a potential public interest benefit.

Reasons for decision

36. A trial by judge alone has one major advantage over a jury trial in that it results in a clear set of reasons as to why the acquittal or conviction eventuated. This enhances the transparency of the process, with no one in the community being left to guess the reasons behind a decision to convict or acquit.

37. Currently in Western Australia, s120 of the *Criminal Procedure Act 2004* (WA) requires a judge sitting in a trial by judge alone to provide a judgment that includes the principles of law that have been applied and the findings of fact that have been relied upon.

38. In contrast, s56BC(1) of the *Juries Act 1957* (WA) makes it an offence to disclose any statement, opinion or argument advanced by members of the jury in the course of their deliberations. Section 56BC(2) allows for that information to be disclosed to a court or the police for the purpose of investigation, however that power is rarely exercised.

39. In cases that are technical, highly emotional or have received excessive publicity, it is difficult to detect when juries may have relied upon improper or erroneous findings of fact or misinterpreted legal principles. This difficulty is completely removed in the case of a trial by judge alone as the judges are required to fully explain their reasoning and findings.

The case against trial by judge alone

40. The principal reason that is generally advanced in opposition to a trial by judge alone is that the historical foundation of our system requires that a person be adjudicated upon by a jury of his/her peers reflecting community values. This is an ancient proposition that, while in some respects laudable, has probably outlived its usefulness. On balance, there is no reason why a trial by jury is likely to represent a more fulfilling or community-based outcome than that by judge alone.

41. The requirement of a judge to provide reasons is sometimes seen (particularly by the judiciary) as being onerous and a task that might take a long time to complete. While there might be some validity in this it is also true that most modern trials require such complex and lengthy jury directions that the preparation involved in performing this function is not manifestly greater than that which is involved in preparing a judgment.

42. Accepting, however, that there will be some extra workload placed on judges in this regard the matter could be resolved by the appointment of more judges, or the provision of extra professional staff to assist in writing the judgments. In our submission, this issue ought not to prevail against the manifest benefits to justice of allowing an accused person to unreservedly elect trial by judge alone.

Conclusion

43. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Inquiry into the *Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017*.

44. In summary, the option for an accused person to elect for a trial by judge alone in Western Australia is strongly supported for the following reasons:

    (1) Juries can, and often are, affected and overwhelmed by adverse publicity;

    (2) It is impossible to control or even ascertain whether jurors have improperly made their own investigations or inquiries;

    (3) The prevalence of the internet in modern society compounds these issues and means that it is impossible to ascertain to what materials a jury might have been exposed;

    (4) It is impossible to monitor or control jury bias, which can further affect marginalised groups;

    (5) If a jury makes an error of fact or law, it is very difficult (if not impossible) to detect and even more difficult to prove in an appellate court;

    (6) There have been cases where jurors have been subjected to subtle or even overt threats both inside and outside the jury room;

    (7) A trial by judge alone removes the possibility for a 'hung' jury;

    (8) A trial by judge alone provides the court with flexibility as to when and how the court sits, and can accommodate changes to the trial schedule in way that jury trials cannot;

    (9) The cost of a jury trial far exceeds the cost of a trial by judge alone; and

(10) In a trial by judge alone, the judge must provide reasons for their decision unlike a jury. The process is secure and transparent.

45. In supporting the proposed Bill, there is no suggestion on the part of the ALA that the right to trial by jury should be abolished, but the option to elect a trial by judge alone is one that is manifestly overdue in the modern era.

46. Whatever the perceived downside to such a choice might be, it is significantly outweighed by the numerous benefits to the community of a system which allows an accused to choose a trial by judge alone.

47. For these reasons, the ALA supports the proposed legislation in the *Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017*.

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