PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

29 November 2019

The Hon Dr Sally Talbot MLC
Chair
Standing Committee on Legislation

Dear Chair

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

Thank you for the invitation to make a submission to the above inquiry by the Committee. I note that the closing date for submissions was 22 November 2019 and I apologise for the lateness of this contribution, which was occasioned by the recent pressure of business. I note that the Committee is to report by 12 May 2020 and express the hope that you may find the following to be useful.

I have pleasure in attaching a research paper prepared for me by my professional assistant, a senior government lawyer, Mr Malcolm Bradshaw. I agree with what he has written and the document enables me to crystallise in summary form the views I have acquired over a period of 25 years as a prosecutor (culminating in my appointment as Crown Counsel for W A) and 22 years' service on the Supreme Court.

In principle no change is required

We are here dealing with charges of the most serious criminal offences in respect of which the policy of the criminal process, inherited from the U K and developed to achieve a remedy for injustices previously inherent in the system, is that the best guarantee an accused person has to achieve a fair trial, is trial by his or her "peers".

In addition the system, rather than the continental inquisitorial process, enables the community to participate directly in the working of the criminal law and to ensure that it remains relevant to community standards according to the judgment of reasonable people.

By trial by jury is meant trial by the members of the accused's community, not drawing on their knowledge of the facts outside of the court process, as was originally the case, but guided by the contribution of an adversarial process, putting both sides of the case, and according to the rulings of the trial judge as to the admissibility of evidence, and his or her directions as to the law.

Anecdotally speaking, I think it is abundantly clear that jurors, by and large, understand the solemn duty imposed upon them and do their best to discharge that duty without fear or favour, acting upon their view of the evidence, rather than uninformed public

PO Box 5817, Perth, St George's Terrace, PERTH WA 6831
Telephone: (08) 9264 9570
Email: piccc@piccc.wa.gov.au

opinion. The system includes processes designed to protect jurors from external pressures in the general run of cases. In short, it works.

The availability of the appellate process enables the correctness of jury decisions to be tested by reference to the arguments of the prosecution and the defence and the directions of the trial judge in relation to the law and the use which may be made of the evidence, leaving to the jury the fact-finding process.

But there is always the capacity to argue that the verdict of the jury is flawed because the evidence, if properly handled by the jury, was simply inadequate to establish guilt beyond reasonable doubt. As the old saying has it, it is better that ten guilty persons be acquitted than that one innocent person be convicted.

In those circumstances, there is, in my respectful opinion, a lack of persuasive force in the argument that the system would be improved by the availability of judicial reasons for the fact finding process. Further, if that were true, the system of trial by jury should be abandoned in favour of trial by a single judge or, as has sometimes been suggested, a panel of judges.

When there should be trial by judge alone

The answer is, in my respectful opinion, well provided by the provisions of Part 4, Division 7, of the *Criminal Procedure Act 2004 (WA),* and in particular by s 118. I will not here refer to the decided cases, but will simply make the point that the section provides good access to the decision of the court, on the application of either side. The court has then to exercise its discretion to make or refuse an order for trial by judge alone according to where the interests of justice may lie in the particular case, without a bias in any direction.

The accused has the right to trial by jury and so must consent to an order for trial by judge alone. "Judge shopping" is prevented and the process is flexible and may be exercised in a manner designed to expose the issues without unduly incurring costs. The court may inform itself as it thinks fit. The interests of all the accused persons to be tried together are to be considered, and the position where a number of charges are to be tried together is to be considered.

The court, in dealing with such an application, is necessarily involved in the exercise of a discretionary judgment that an order should be made in the interests of justice in the particular circumstances of the case before it – a positive reason to alter the status quo. That will be a decision which will not necessarily align with the perceived interests of all or some of the parties.

In my view that is the appropriate test for the decision of such an application brought because in the view of one or more of the parties trial by jury may not be the best and fairest mode of trial in the particular circumstances of the case.

Is the proposed amendment flawed?

In my respectful opinion, it would not be an improvement upon the current law. It necessarily involves the abandonment of s 118(6) and the preservation to members of the community serving as jurors the application of relevant, reasonable, community standards, but, more seriously, I do not see how the reversal of the interests of justice test would work.

I am simply unable to conceive how a judge might conclude that the interests of justice would not be adequately served by a trial by a judge, knowing the law and able to find the relevant facts before considering whether guilt had been established beyond reasonable doubt. The proposed reversal of the onus seems to incorporate an unworkable test for the making of the decision.

Yours sincerely,

HON MICHAEL MURRAY AM QC
PARLIAMENTARY INSPECTOR

CRIMINAL PROCEDURE AMENDMENT (TRIAL BY JUDGE ALONE) BILL 2017

COMMENTS PROVIDED BY THE OFFICE OF THE PARLIAMENTARY INSPECTOR OF THE CORRUPTION AND CRIME COMMISSION (PICCC)

NOVEMBER 2019

Introduction and background

1. PICCC welcomes the opportunity to provide comments on this proposed legislation, which has entered Parliament as a private member's Bill sponsored by the Hon. Aaron Stonehouse MLC. Mr Stonehouse is to be commended for the extensive amount of work he has undertaken to have a draft bill prepared, without the extensive level of drafting and policy support which is made available to Government members who are tasked with working on issues of significant policy and legal complexity.

2. This paper is not presented as a comprehensive treatise on the full range of legal issues associated with trial by judge alone. Instead, it confines its commentary to the limited scope of issues raised in the Bill, and in particular, the issue of jury impartiality.

3. As with any proposal to amend the law, the initial question must always be what is the mischief that the bill is seeking to remedy. In considering this proposition, it is to be noted that Division 7 the *Criminal Procedure Act 2004* (ss 117 to 120) does provide for a trial by judge alone in prescribed circumstances.

Overview and scheme

4. The Act identifies three scenarios under which a trial by judge alone may be appropriate:

   - if it is in the interests of justice to do so (s 118(4));
   - that the trial, due to its complexity or length or both, is likely to be unreasonably burdensome to a jury (s 119(5)(a)); and
   - that it is likely that acts that may constitute an offence under *The Criminal Code* section 123 would be committed in respect of a member of the jury.[1]

5. In the Second Reading Speech of the Bill presented by Mr Stonehouse, the following reasons are presented for the proposed reforms:

   - in relation to the application of s 118(4), the Bill reverses the onus of proof, such that it would need to be proven that it is <u>not</u> in the interests of justice to have a judge alone trial – creating a standing presumption in favour of a judge alone trial;

[1] Section 123 relates to acts concerning the corrupting or threatening of jurors.

- it is suggested in the Second Reading Speech that this arrangement increases 'personal choice' (presumably of mode of trial) for those who are subject to prosecution;

- it would help to avoid the problems associated with the empanelling of an impartial jury, noting that jury impartiality can be compromised by the frequency and extent of the internet news cycle;

- the absence of a jury would improve the efficiency of the courts, with judges being able to consider written submissions; and

- a requirement for judges to provide reasons for their decisions would improve the transparency of judicial decision-making and consequently reduce the prospect of applications for appeal.

6. At face value, a number of these objectives are not unreasonable. However, the key question which is not yet answered in the material supporting the Bill is the extent to which these issues can or cannot be overcome through the existing mechanisms available under Division 7 of the *Criminal Procedure Act.*

Impartiality of juries

7. The issue of the Court being able to empanel an impartial jury is often raised as the most compelling reason for judge alone trials. This is not an unreasonable concern given the saturation media coverage which can circulate around some accused persons. In Western Australia, for example, the necessity for an accused to rely on a trial by judge alone was tested extensively in *The State of Western Australia v Rayney* [2011] WASC 326.

8. In *Rayney* the application of the accused person (Mr Lloyd Rayney) for a trial by judge alone referred to "the extent and nature of pretrial publicity [which] created the danger of a prejudice against the accused", and a view that the length and complexity of the trial would make it "unreasonably burdensome" for a jury.[2]

9. This factor was tested in *Rayney* by reference to the cases of *The State of Western Australia v Martinez* [2006]; *TVM v The State of Western Australia* [2007]; and *Arthurs v Western Australia* [2007]. In each of these cases the accused person had applied for trial by judge alone under the *Criminal Procedure Act*.[3]

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[2] *The State of Western Australia v Rayney* [2011] WASC 326 at 329.

[3] Above n 2, at 39.

10. In *Martinez*, EM Heenan J stated that when dealing with an application for a judge alone trial, there should be no preferential predetermined starting point. His Honour observed that in the matter before the Court, while there were advantages in obtaining a judgment which reflected community standards through a jury, this need not apply as a universal principle.[4]

11. In *Arthurs*, the accused person was subject to a significant degree of pre-trial publicity in relation to the nature of the alleged offence and also false suggestions of links to another highly publicised murder overseas. Martin CJ made the following observation in relation to the application of the accused person Dante Arthurs, for a trial by judge alone:

> It is, I think, entirely consistent with the interests of justice for weight to be given to the subjective views of an accused person, provided of course that they are not fanciful or irrational. Thus, in my opinion an apprehension by an accused person, which is not fanciful or irrational, that he or she may not get a fair trial by jury because, for example, of pre-trial publicity or because of their ethnic, religious, cultural or other peculiar circumstances, may be entitled to significant weight.[5]

12. In *TVM*, McKechnie J adopted the following position when considering an application for trial by judge alone:

> In summary, s 118(4) requires a court to do two things. The first is to consider, on information, whether it is in the interests of justice to grant an application for trial by judge alone. If the court so concludes, the next issue is whether to exercise a discretion to grant such an order. In the exercise of that discretion, but without limiting it, the matters, where relevant, contained within s 118(5) and s 118(6) become important.
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> All this leads me to conclude that, with great respect, I am unable to follow the principle in *Arthurs* and *Martinez* that in the resolution of the application a judge starts from a neutral position as to a preferred mode of trial. Instead, it is my view that on application under s 118 a judge, concluding that it is in the interests of justice for a trial to be held before a judge alone instead of a judge and jury, exercises a discretion whether to make the order for trial by judge alone.[6]

13. The underlying basis of judicial decision-making in response to applications for trial by judge alone in Western Australia, in these three cases has arguably reflected variable approaches to judicial reasoning. In the sample referred to above, it has ranged from:

- considering applications without a predetermined starting point, based on the position in *Martinez*;

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[4] *The State of Western Australia v Martinez & Ors* [2006] WASC 25, 39.
[5] *The State of Western Australia v Arthurs* [2007] WASC 182, 204.
[6] *TVM v The State of Western Australia* [2007] WASC 299, 305.

- to giving 'weight' to the subjective views of the accused person, as applied in *Arthurs*;

- through to a judge retaining a discretion to make an order for a trial by judge along in appropriate circumstances, but this being a matter of discretion for the judge, rather than compulsion, based on the position in *TVM*.

14. More recently, Western Australian courts have been prepared to allow a trial by judge alone in the matter of *Wark* in 2015.[7]

15. In *Wark*, the accused person made application for trial by judge alone on the basis that pre-trial publicity would deprive him of his right to receive a fair trial before a jury for the murder of Ms Hayley Dodd. In this context, Wark's application addressed the generality of receiving a fair trial, based on the broad pre-trial public knowledge of his case.

16. However, what would appear to be of greater influence in the decision to grant a trial by judge alone in *Wark* was the application of the State for trial by judge alone in that same case. This addressed the very specific issue of the presumed public knowledge of the linkages between Wark and the unsolved disappearance of another woman, Ms O'Shea. It was this specific issue which the court believed was more likely to be prejudicial to Wark's trial, rather than the broader existence of pre-trial publicity. By making the application, the State was ensuring that the trial proceeded and was not at risk of being aborted due to a difficulty in ensuring the impartiality of the jury.[8]

17. It is submitted that *Wark* affirms the previous point (at 13) that the courts have variable approaches to validating the reasoning for allowing a trial by judge alone. This variability probably reflects the fact that the circumstances of different cases are unlikely to ever be identical. So while the outcome of facilitating a trial by judge alone can be identical across cases, the pathway to achieving that outcome will reflect the unique circumstances of the case.

18. It is further submitted that in these circumstances, the existing legislation can and does achieve the requirement for trial by judge alone, when appropriate.

Other issues

19. The Second Reading Speech of the Bill refers to other reasons for supporting arrangements for trial by judge alone. These include allowing an accused person to exercise a personal choice in relation to mode of trial, improving the efficiency of the courts, and providing reasons for judicial decisions.

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[7] *The State of Western Australia v Wark* [2017] WASC 154.
[8] Ibid, 193-194.

20. The issue of the publication of reasons for decisions was addressed by Pritchard J in *Wark:*

> The fact that a trial by judge alone will result in the publication of the trial judge's reason for decision is not, in my view, ordinarily a factor which weighs in support of a trial by judge alone. In cases where the evidence is likely to be complex or technical, no doubt the publication of reasons will assist the accused and the public to be confident that the verdict was based on a correct comprehension of such technical evidence. However, in those cases, s 118(5) makes clear that it is the complexity of the issues or the evidence, rather than the desirability of reasons, per se, that supports the conclusion that a trial by judge alone would be in the interests of justice. If the interests of justice were equated with the provision of written reasons by a trial judge, the interests of justice may be said to warrant a trial by judge alone in every criminal trial of an indictable offence. Yet it is apparent from the existence of the discretion in s 118 itself, that a trial before a jury, and a trial by judge alone, are equally valid modes of trial.[9]

21. The Second Reading Speech refers to the issue of 'personal choice', in allowing the accused person to elect to be tried by judge alone. Pritchard J observed in *Wark*:

> The subjective view of the accused as to whether or not he or she would receive a fair trial from a jury will be relevant but not determinative, what is in the interests of justice. The views of the accused should, however, not be given undue weight, because the interests of justice are not coterminous with the interests of an accused. As McKechnie J observed in *TVM*, 'the accused's perception in favour of or against trial by jury may not be supported by any facts'.[10]

Concluding remarks

22. It is clear that the general tenor of this submission is that that the arrangements for trial by judge alone should remain unchanged. They have been capable of accommodating a variety of different circumstances and allow sufficient flexibility to ensure that the interests of justice are upheld.

23. It is especially important to note that this is an area of law which is developing in Western Australia. While the earlier cases of Martinez, Arthurs and TVM were all based on different approaches to reasoning, there is nothing to suggest that the decisions were unsound and resulted in unjust judicial outcomes. More recent applications in *Rayney*, *Wark* and *Edwards* suggest that trial by judge alone is become increasingly settled as an area of law.

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[9] Ibid, 189.
[10] Ibid.

24. There appears to be little evidence that the other areas of change, suggested in the Member's Second Reading Speech, are reflective of any significant momentum for change.

Malcolm Bradshaw
Assistant to the Parliamentary Inspector of the Corruption and Crime Commission