



**SOLICITOR-GENERAL
WESTERN AUSTRALIA**



22 November 2019

Hon Dr Sally Talbot MLC
Chair, Standing Committee on Legislation
Parliament House
4 Harvest Terrace
WEST PERTH WA 6005

Attention: Ms Tracey Sharpe, Committee Clerk

By Email: lclc@parliament.wa.gov.au

Dear Dr Talbot

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

1. Presently, section 118(1) of the *Criminal Procedure Act 2004* (WA) permits a prosecutor or accused to apply for trial by judge alone without a jury (except for matters governed by section 80 of the *Commonwealth Constitution*).
2. On such an application the Court may make the order if it considers it is in the interests of justice to do so. However, the Court cannot make such an order upon an application by the prosecutor, unless the accused consents. See section 118(4).
3. Sections 118(5) and (6) set out matters which a Court may take into account in deciding whether to make an order for trial by judge alone. These matters include whether the complexity and length of the trial would be unduly burdensome to a jury; whether it is likely that acts may constitute an offence against section 123 of the *Criminal Code* (relating to corrupting or threatening a juror) would be committed; and whether the trial involves a factual issue that requires the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness.

Proposed Amendment

4. The *Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017* proposes to delete sections 118(4)-(6) and replace these provisions with new versions of sections 118(4) and (5).
5. The new version of section 118(4) is to the effect that, upon an application for an order for trial by judge alone, a Court must make such an order unless: (a) the Court is satisfied that the order is not in the interests of justice; or (b) unless sections 118(5), (7) or (8) apply.

Level 28, David Malcolm Justice Centre, 28 Barrack Street, Perth, Western Australia 6000
Telephone: (08) 9264 1806 Facsimile: (08) 9321 1385
e-mail: solgen@sg.wa.gov.au

6. Section 118(5) provides that if the application for an order for a trial by judge alone is made by the prosecutor, the court must not make the order without the consent of the accused.
7. Section 118(7) provides that if an accused is charged with 2 or more charges that are to be tried together, the court must not make an order for trial by judge alone in respect of one of the charges unless the court makes such an order in respect of each other charge.
8. Section 118(8) provides that if 2 or more accused are to be tried together, the Court must not make an order for trial by judge alone unless the Court also makes such an order in respect of each other accused.

Effect of Proposed Amendments

9. The operation of sections 118(7) and (8) is the same as previously, as the proposed amendments do not change these provisions. Likewise, the accused's right of veto in respect of an application by a prosecutor in the new version of section 118(5) is equivalent to the right of veto presently contained in section 118(4).
10. Hence, the substantial effect of the proposed amendments is to change the test applied by a Court in deciding whether to order a trial by judge alone from a test based upon whether the Court "considers it is in the interests of justice to do so", to a requirement to make such an order unless the Court is satisfied that "the order is not in the interests of justice".
11. As well, the proposed amendments to section 118 will no longer set out particular matters in sections 118(5) and (6) which a Court must take into account in determining the interests of justice.
12. It should be anticipated that the effect of the proposed amendments will be to increase the number of trials which occur by judge alone, as the default position will be that such an order will be made if the accused seeks it, subject to the Court positively forming the view that such an order is not in the interests of justice.
13. If this occurs, it is necessary to evaluate the impact which a greater number of trials by judge alone will have upon judicial resources.

Present Number of Trials by Judge Alone

14. The attached table has been compiled by doing a catchword search of "trial by judge alone" of the eCourts Portal in Western Australia. The table extracts decisions of the District Court and Supreme Court over the last 5 years, since 2015, which have published reasons following a trial by judge alone. Judgments have been excluded where it is recorded that a judge has published written reasons based upon ex tempore reasons delivered at the conclusion of a trial. In such cases, the judge has not been required to prepare separate reasons, taking up any substantial further judicial time.
15. Leaving aside the exclusions mentioned, over the last 5 years, there have been 6 trials by judge alone in the District Court and 12 trials by judge alone in the Supreme Court. It should be observed that many of the Supreme Court trials by judge alone involve single issues, such as the mental capacity of an accused,

where there is no substantive dispute that the relevant acts constituting the offence charged have occurred.

16. The attached table inferentially demonstrates that, where there is a trial by judge alone, it is necessary for a judge to reserve his or her decision, and prepare substantial written reasons. This takes quite a number of judicial days.
17. Part of the reason for this is due to the obligation of judges to expose their reasoning process in respect of the assessment of factual issues. Justice Edelman stated the nature of the duty to give adequate reasons in *Poulson v Langthorn* [2013] WASC 278 at [22], in respect of the obligation contained in section 31 of the *Magistrates Court Act*. He said:

"The duty to give adequate reasons is an incident of judicial power. There are several general purposes for the duty. First, sufficient reasons expose decisions to scrutiny. Secondly they promote general acceptability of judicial decisions. Thirdly, providing sufficient reasons is consistent with the court's democratic institutional responsibility to the public."
18. If the proposed amendments have the anticipated effect of increasing the number of trials by judge alone, this will inevitably mean that additional judicial resources are required to permit judges to comply properly with their judicial obligation to provide adequate reasons for their decision.
19. The Bill does not provide for the costs of any extra judicial resources. In my view, the Bill should not be enacted unless the Parliament has assessed the need for, and made adequate financial provision for, the consequential effects of the Bill upon the judiciary.

Yours sincerely

JOSHUA THOMSON SC
SOLICITOR-GENERAL

TABLE OF CASES SINCE 2015 WITH "TRIAL BY JUDGE ALONE" IN CATCHWORDS (excluding published reasons based upon ex tempore reasons)			
Case Name	Trial Dates	Decision Date	Decision length (Pages)
District Court			
WA v Livingstone [2018] WADC 111	23-24 August 2018	31 August 2018	36
WA v Impicciatore [2017] WADC 144	31 October – 1 November 2017	7 November 2017	38
WA v Eades [2017] WADC 123	28 August 2017	8 September 2017	23
WA v Pinder [No 2] [2016] WADC 119	26-29 July 2016	10 August 2016	39
WA v Donovan [2016] WADC 53	4-6 April 2016	8 April 2016	29
WA v Atherley [2015] WADC 45	5-6, 9-13, 16-17, 20 March 2015	29 April 2015	75
Supreme Court			
WA v Daly [2019] WASC 386	2-5 September 2019	29 October 2019	34
WA v Chaytor [2019] WASC 228	26 June 2019	2 July 2019	41
WA v Shayler [2019] WASC 86	12 March 2019	20 March 2019	21

WA v Jones [2018] WASC 395	3-7 December 2018	17 December 2018	61
WA v Marotta [2018] WASC 329	22-23 October 2018	31 October 2018	52
WA v Rigden [2018] WASC 217	17 July 2018	26 July 2018	32
WA v Wark [No 2] [2018] WASC 18	9 October – 24 November 2017	22 January 2018	196
WA v Mule [2017] WASC 287	11-14 September 2017	6 October 2017	39
WA v Herbert [2017] WASC 101	20-23 March 2017	10 April 2017	71
WA v Siddique [No 2] [2016] WASC 358	20-28 October 2016	7 November 2016	50
WA v Lang [No 2] [2016] WASC 206	27-29 June 2016	6 July 2019	31
WA v Williams [2015] WASC 347	10 September 2015	21 September 2015	33