Standing Committee on Law and Justice

Inquiry into judge alone trials under s.132 of the *Criminal Procedure Act 1986*

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Terms of reference

That the Standing Committee on Law and Justice inquire into and report on whether s.132 of the *Criminal Procedure Act 1986* should be amended so as to allow either party in criminal proceedings to apply to the court for trial by judge alone, without a requirement that the prosecution consents to the application, with the decision to be made by the court based on the interests of justice. In considering this issue, the Committee should compare how other Australian jurisdictions use judge alone trials with the situation in NSW and should consider the following possible model for any amendments:

1. Either party may apply for a judge only trial.

2. Applications to be made not less than 28 days before the commencement of the trial.

3. Applications may be made later than 28 days before the trial, but only with the leave of the court.

4. If the parties are in agreement, the court must order that the trial proceeds before a judge sitting alone.

5. If the prosecution applies and the accused does not consent, then the matter must proceed to trial with a jury, subject to the jury tampering exception as set out at 6.

6. If one of the parties applies and the court finds there is a risk of jury tampering, then the court must order that the matter proceed before a judge sitting alone.

7. If the accused applies and the prosecution does not consent, then the court must determine whether or not the matter should proceed without a jury based on an 'interests of justice' test.

8. When considering the 'interests of justice', the court may refuse to make an order where 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.

9. If there are multiple accused and not all agree to a trial by judge alone, the trial must proceed before a jury, again subject to the jury tampering exception as set out at 6.

10. Once consent to a judge only trial is given, it may not be withdrawn without leave of the court.

These terms of reference were referred to the Committee by the NSW Attorney General and Minister for Justice, the Hon John Hatzistergos MLC, on 27 April 2010.

Committee membership

The Hon Christine Robertson MLC	**Australian Labor Party**	*(Chair)*
The Hon David Clarke MLC	**Liberal Party**	*(Deputy Chair)*
The Hon John Ajaka MLC	**Liberal Party**	
The Hon Greg Donnelly MLC	**Australian Labor Party**	
Mr David Shoebridge MLC*	**The Greens**	
The Hon Lynda Voltz MLC	**Australian Labor Party**	

***Note on Committee membership**

Mr David Shoebridge MLC replaced Ms Sylvia Hale MLC as a member of the Committee on 9 September 2010. Ms Hale had been a valued member of the Committee since 29 May 2007.

Secretariat

Ms Rachel Callinan, Director
Ms Cathryn Cummins, Principal Council Officer
Ms Teresa McMichael, Principal Council Officer
Ms Kate Harris, Council Officer
Ms Shu-Fang Wei, Council Officer Assistant

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Chair's foreword

This inquiry into judge alone trials under section 132 of the *Criminal Procedure Act 1986* was commenced after the Attorney General requested that the Committee consider a proposal to amend the Act so as to allow either party in criminal proceedings to apply to the court for trial by judge alone, without a requirement that the prosecution consents to the application, with the decision to be made by the court based on the interests of justice. The terms of reference for the Inquiry outlines the proposed model which the Committee, with the assistance of stakeholders, has considered.

The proposed model for judge alone trials shifts the application and decision making process from the Office of the Director of Public Prosecution (ODPP) to the courts. This shift is most significant in instances where the accused applies for a judge alone trial and the prosecution does not consent. In this situation it is the court that would determine the application on the basis of an 'interests of justice' test.

This shift in decision making power from the ODPP to the court evoked much discussion amongst Inquiry participants, with a clear dichotomy of views emerging during the Inquiry.

On balance, and after much deliberation, the Committee has concluded that the proposed model for judge alone trials provides a fair and transparent system for both the accused and the prosecution to apply for a judge alone trial.

Our careful consideration of the model has, however, led us to identify three areas where the model can be improved. These areas relate to the need for the accused to provide informed consent to applications for judge alone trials, raising the threshold in the jury tampering exception, and ensuring that the 'interests of justice' test includes an inclusive, not exhaustive, list of factors for the courts to consider in determining applications for a judge alone trial.The Committee considers that, subject to our recommended changes, the proposed model will provide a transparent and equitable method of applying for, and determining, applications for judge alone trials.

While the Committee has supported the proposed model for judge alone trials, this should not be taken as support for judge alone trials as a replacement for jury trials. The Committee believes that both modes of trial have an essential role to play in our criminal justice system.

I wish to express my appreciation to Inquiry participants for their contributions to this Inquiry. The thoughtful, compelling and, at times, challenging arguments presented by them in relation to both the individual elements of the model and the potential impact of the model on the criminal justice system has been extremely valuable.

I express my thanks to my Committee colleagues for their considered contributions to this Inquiry. I also thank the staff of the Committee secretariat for their ongoing professional support.

Hon Christine Robertson MLC
Committee Chair

Summary of recommendations

Recommendation 1 *Page 95*

That the Attorney General seek to amend section 132 of the *Criminal Procedure Act 1986* so as to allow either party in criminal proceedings to apply to the court for trial by judge alone, without a requirement that the prosecution consents to the application, with the decision to be made by the court based on the interests of justice.

That the proposed model set out in the terms of reference for the Committee's inquiry form the basis of the amendment, with the inclusion of the changes set out in Recommendations 2, 3, 4, 5 and 6.

Recommendation 2 *Page 96*

That the Attorney General, in developing the legislative amendment to section 132 of the *Criminal Procedure Act 1986*, include a provision requiring the informed consent of the accused after receiving advice from an Australian legal practitioner, to an application for a judge alone trial.

Recommendation 3 *Page 96*

That the Attorney General, in developing the legislative amendment to section 132 of the *Criminal Procedure Act 1986*, include:

- a higher risk threshold than is included in the proposed model set out in the Inquiry terms of reference, and
- a requirement that once the risk threshold has been passed, a trial by judge alone will only proceed where all other means reasonably available to the court are considered to be unable to adequately address that risk to the satisfaction of the court.

Recommendation 4 *Page 97*

That the Attorney General, in developing the legislative amendment to section 132 of the *Criminal Procedure Act 1986*, ensure that the jury tampering provision provides that the courts '*may* make' an order for a judge alone trial if they consider that jury tampering is likely to occur, rather than '*must* make'.

Recommendation 5 *Page 97*

That the Attorney General, in developing the legislative amendment to section 132 of the *Criminal Procedure Act 1986*, ensure that it contains an inclusive, not exhaustive, list of factors to be considered by the courts when applying the 'interests of justice' test.

Recommendation 6 *Page 98*

That the Attorney General, in developing the legislative amendment to section 132 of the *Criminal Procedure Act 1986*, consider the approach taken in Western Australia and Queensland, where no interlocutory appeals are allowed from a court's decision in relation to an application for a judge only trial.

Chapter 1 Introduction

This Chapter provides an overview of the Inquiry process and an outline of the structure of the report.

Conduct of the inquiry

1.1 The terms of reference for the Inquiry were referred to the Committee by the Attorney General, the Hon John Hatzistergos MLC, on 27 April 2010. The terms of reference are reproduced on page iv.

Submissions

1.2 The Committee invited submissions through advertisements in *The Sydney Morning Herald* and *The Daily Telegraph*. The Committee also wrote directly to a number of stakeholders to invite them to make a submission to the Inquiry.

1.3 The Committee received 17 submissions. Submissions were received from a range of interested people and organisations including the Office of the Director of Public Prosecutions (ODPP), the NSW Public Defenders Office, the Chief Judge of the NSW District Court, legal professional bodies, two victims of crime groups, a number of criminal law practitioners and the Australian Human Rights Commission.

1.4 A full list of submission authors can be found in Appendix 1.

Hearings

1.5 The Committee held three public hearings at Parliament House on 11, 12 and 13 August 2010.

1.6 The Committee received evidence from a number of individuals and organisations, including representatives from the Department of Justice and Attorney General, the ODPP and the NSW Public Defenders Office.

1.7 A full list of witnesses is provided in Appendix 2. The transcripts of the hearings are available on the Committee's website.

A note on participation

1.8 The Committee thanks all the individuals and organisations who made a submission to the Inquiry or appeared as witnesses. The Committee values the thoughtful contributions made by all Inquiry participants in informing the debate on the merits of the proposed model, and in discussing the broader impact of the proposed model on the criminal justice system.

1.9 During the hearings, many participants set aside their strongly held views on the proposed model to assist the Committee to examine each aspect of the proposal and its implications in detail. We are indebted to their intellectual and professional integrity in doing so.

Structure of the report

1.10 The next chapter, **Chapter 2**, considers the current statutory provisions for judge alone trials in NSW and outlines the proposed model as set out in the Inquiry terms of reference. The Chapter also discusses the provisions for judge alone trials that exist in other Australian States and Territories.

1.11 **Chapter 3** examines the broad issues that were raised by Inquiry participants in relation to the proposed model. The Chapter begins by discussing the central issue for most Inquiry participants: the shift in decision making power from the Office of the Director of Public Prosecutions (ODPP) to the courts in determining applications for judge alone trials. The Chapter also examines a number of issues that were raised on the basis that the proposed model would increase the number of judge alone trials held in NSW. These issues include the potential efficiencies that may be achieved through an increase in the number of judge alone trials, the consequences of there being an increase in judicial decisions and the importance of community involvement in the criminal justice system through their participation on juries.

1.12 **Chapter 4** commences the Committee's detailed examination of the elements of the proposed model. The Chapter begins by exploring issues related to the 28 day timeframe for applying for a judge alone trial, including the appropriate length of the time frame and forum shopping. The Chapter then considers a number of issues relating to making an application for a judge alone trial, including the need to ensure that the accused has made an informed application and allowing both parties to make an application. The Chapter also discusses the aspect of the model that enables the accused to veto the prosecution's application for a judge alone trial, in contrast to the current situation where the ODPP has the ability to veto an accused's application. The Chapter concludes by examining two instances proposed by some Inquiry participants where a judge alone trial may be preferable: crimes involving the consideration of abhorrent or highly technical evidence.

1.13 **Chapter 5** discusses the 'interests of justice' test, which would be applied by the court under the proposed model in instances where the accused applies for a judge alone trial but the prosecution does not consent, to determine whether or not to agree to the application. The Chapter examines whether the factors to be considered under the 'interests of justice' test need to be explicitly defined, before discussing whether the decision made by the courts in this regard would, and should, be appealable. The Chapter also examines the impact of this aspect of the proposed model requiring the presentation of information about the case prior to the commencement of the trial. There were two concerns in this regard: the impact on pre-trial disclosures, and whether the judge who determines the application for a judge alone trial should be excluded from acting as the trial judge.

1.14 **Chapter 6** begins by considering the issue of jury tampering. Under the proposed model, if an application is made for a judge alone trial and the court finds that there is a risk of jury tampering, the court *must* order that the matter proceed before a judge sitting alone. This Chapter considers the options that are currently available to the courts to manage the risk of jury tampering before examining the jury tampering provision in the proposed model and the various views expressed by participants in relation to it. The Chapter concludes by examining the final two elements of the proposed model, which relate to instances where there are multiple accused to a crime and the process for withdrawing an approved application for a judge alone trial.

1.15 In the final chapter, **Chapter 7**, the Committee draws its conclusions as to whether section 132 of the *Criminal Procedure Act 1986* should be amended so as to allow either party in criminal proceedings to apply to the court for a trial by judge alone, without the requirements that the prosecution consents to the application, with the decision to be made by the court based on the interests of justice. In forming its opinion the Committee draws on its analysis of the broader issues presented by Inquiry participants and examined in Chapter 3, and the analysis of the various aspects of the proposed model in Chapters 4 – 6.

Chapter 2 Judge alone trial provisions

This Chapter provides an overview of the current statutory provisions for judge alone trials in NSW, and outlines the proposed model for amendments set out in the Inquiry terms of reference. Provisions for judge alone trials in other Australian jurisdictions are also discussed.

Current judge alone trial provisions in NSW

2.1 In NSW, criminal proceedings for indictable offences in the Supreme Court or District Court are to be tried by a jury.[1]

2.2 There is an exception to this, in section 132 of the *Criminal Procedure Act 1986* (NSW), which provides that an accused person may elect to be tried by a judge alone. Under section 132:

- an accused person in criminal proceedings in the Supreme or District Courts must be tried by judge alone if the person so elects, and if the judge is satisfied that the accused has sought and received legal advice before making the election[2]
- if there are multiple accused persons, an election for a judge alone trial may only be made if all of the accused elect to be tried by judge alone, and if the election is made in respect to all offences with which the accused persons are charged[3]
- an election may only be made with the consent of the Director of Public Prosecutions (DPP)[4]
- an election must be made prior to the date fixed for the person's trial[5]
- an accused person who has elected to be tried by judge alone may subsequently elect to be tried by a jury any time before the date fixed for their trial.[6]

2.3 The Department of Justice and Attorney General advised that these provisions were inserted into the Act in 1990 as a result of recommendations made in a 1986 Law Reform Commission report entitled *Criminal Procedure: the Jury in a Criminal Trial.*[7]

2.4 NSW is the only jurisdiction that requires the consent of the DPP for a judge alone trial to proceed. The Department of Justice and Attorney General advised that this requirement has always formed part of the provision.[8]

2.5 Ms Penny Musgrave, Director, Criminal Law Division, Department of Justice and Attorney General, informed the Committee that requests for judge alone trials are currently assessed by the DPP, with no involvement from the Department:

1 *Criminal Procedure Act 1986* (NSW), s 131.
2 *Criminal Procedure Act 1986* (NSW), s 132(1)(a) and (b).
3 *Criminal Procedure Act 1986* (NSW), s 132(2)(a) and (b).
4 *Criminal Procedure Act 1986* (NSW), s 132(3).
5 *Criminal Procedure Act 1986* (NSW), s 132(4).
6 *Criminal Procedure Act 1986* (NSW), s 132(5).
7 Submission 16, NSW Department of Justice and Attorney General, p 1.
8 Submission 16, p 1.

> [Those requests] go to the DPP. The DPP consents or does not consent and then the courts advise that it will proceed by way of judge alone, so all the department receives is the notification that there is an agreement that it proceed by way of judge alone. [9]

2.6 The factors to be taken into account by the DPP in assessing applications for judge alone trials are set out in Prosecution Guidelines. Guideline No. 8 was the first guideline related to judge alone trials, and was created by the former DPP in 1989. The Guideline contained a presumption in favour of consenting to the election by the accused.[10]

2.7 In 1995/96, the current DPP replaced Guideline No. 8 with Guideline No. 24, which removed the presumption in favour of consent.[11]

2.8 A detailed consideration of the factors to be considered by the DPP in assessing applications for judge alone trials is provided in Chapter 4.

2.9 Figures from the Bureau of Crime Statistics and Research (BOCSAR) show that 640 of the 12,474 trials held in New South Wales between 1993 to 2007 were heard by a judge alone (equating to 5.1 per cent of the total number of trials over that period).[12] Ms Musgrave noted in response to those figures that there were no obvious trends in relation to the number or location of judge alone trials held:

> The percentage of judge-alone trials each year varied from a low in 1997 of 1.74 per cent through to 7.88 per cent in 2007 but there does not appear to be any clear overall trend; it is up and down. There was a slightly higher percentage of judge-alone trials in the Sydney west courts and regional courts but it was not pronounced. Judge-alone trials made up 4.3 per cent of trials in Sydney, 5.5 per cent in Sydney west and 5.6 per cent in other courts.[13]

2.10 Accurate figures on the number of judge alone trials held after 2007 are not available due to changes in the way higher court data is now recorded. BOCSAR is working on rectifying this issue.[14]

2.11 Table 1 illustrates the number of jury and judge alone trials held each year in NSW for the period from 1993 to 2007. It shows that while the number of judge alone trials has remained consistent, the number of jury trials has steadily decreased. The Committee did not receive evidence to explain the decrease in jury trials, but notes that it has not looked at the issue of jury trials broadly in this Inquiry.

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9 Ms Penny Musgrave, Director, Criminal Law Division, Department of Justice and Attorney General, Evidence, 11 August 2010, p 3.

10 Submission 2, Hon Justice R O Blanch AM, Chief Judge, NSW District Court, p 1.

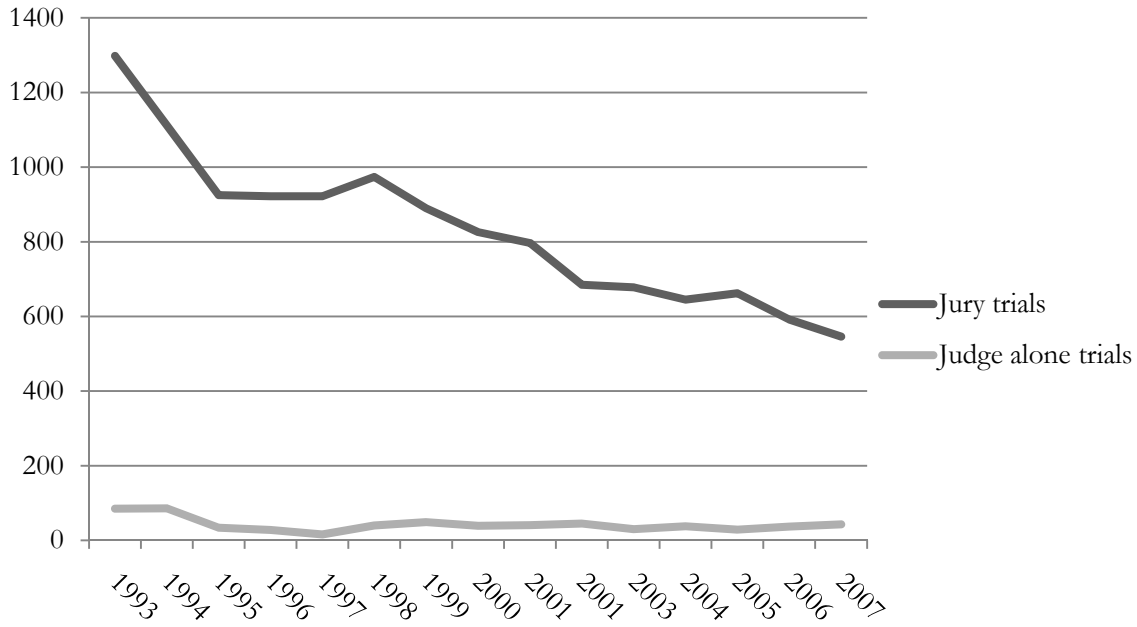
11 Mr Nicholas Cowdery QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Evidence, 11 August 2010, p 19.

12 Ms Musgrave, Evidence, 11 August 2010, p 2.

13 Ms Musgrave, Evidence, 11 August 2010, p 2.

14 The responsibility for recording higher court data was taken over by JusticeLink in 2008. Court staff and Judge's Associates now enter the data, with BOCSAR taking on a validation and audit role. The change has resulted in information on judge alone cases often not being recorded. BOCSAR is working on rectifying this issue.

Table 1 Number of jury and judge alone trials in NSW[15]



The proposed model

2.12 The Inquiry terms of reference require the Committee to consider whether section 132 of the *Criminal Procedure Act 1986* should be amended. The terms of reference set out the following proposed model for any amendments:

1. Either party may apply for a judge only trial.
2. Applications to be made not less than 28 days before the commencement of the trial.
3. Applications may be made later than 28 days before the trial, but only with the leave of the court.
4. If the parties are in agreement, the court must order that the trial proceeds before a judge sitting alone.
5. If the prosecution applies and the accused does not consent, then the matter must proceed to trial with a jury, subject to the jury tampering exception as set out at 6.
6. If one of the parties applies and the court finds there is a risk of jury tampering, then the court must order that the matter proceed before a judge sitting alone.
7. If the accused applies and the prosecution does not consent, then the court must determine whether or not the matter should proceed without a jury based on an 'interests of justice' test.

[15] Answers to questions on notice taken during evidence 11 August 2010, Ms Penny Musgrave, Director, Criminal Law Division, Department of Justice and Attorney General, p 1.

8. When considering the 'interests of justice', the court may refuse to make an order where 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.
9. If there are multiple accused and not all agree to a trial by judge alone, the trial must proceed before a jury, again subject to the jury tampering exception as set out at 6.
10. Once consent to a judge only trial is given, it may not be withdrawn without leave of the court.

2.13 The Department of Justice and Attorney General highlighted that the key difference between the current and proposed model is a shift in decision-making power from the DPP to the judiciary regarding the conduct of the trial:

> While the proposed amendments include minor differences to the existing provisions under s.132, these are administrative in nature. The only significant change being proposed is a shift from the current position, where the prosecution effectively acts as the decision maker in applications for judge alone trials, to a new regime under which a judge makes the decision based on the interests of justice.[16]

2.14 In other words, the DPP's current right of veto over the accused's election for a judge alone trial would be removed under the proposed model.[17]

2.15 Another important difference, pointed out by Ms Musgrave, is that under the proposed model either party (i.e. the accused or the prosecution) may apply for a judge alone trial. Ms Musgrave emphasised that if the prosecution applies for a judge alone trial but the accused does not consent, the matter must proceed before a jury. The only time a judge alone trial would proceed under the proposed model without the accused's consent is if there is a risk of jury tampering.[18]

2.16 All elements of the proposed model are considered in detail in the remaining chapters of this report.

Judge alone trial provisions in other jurisdictions

2.17 This section outlines judge alone trial provisions where they exist in other Australian jurisdictions. The current provision in NSW is similar to the South Australian and Australian Capital Territory provisions, while the proposed model is more closely aligned to the Western Australian and Queensland models.[19]

South Australia and Australian Capital Territory

2.18 The judge alone provisions in South Australia and the Australian Capital Territory are set out under section 7 of the *Juries Act 1927* (SA) and section 68B of the *Supreme Court Act 1933*

16 Submission 16, p 2.
17 Mr Peter Breen, Solicitor, Evidence, 11 August 2010, p 36.
18 Ms Musgrave, Evidence, 11 August 2010, p 1 and p 3.
19 Ms Musgrave, Evidence, 11 August 2010, p 5.

(ACT) respectively. South Australia was the first Australian jurisdiction to introduce judge alone trial provisions, in 1984.[20] The ACT provisions were introduced in 1993.[21]

2.19 As with the current NSW provision, under the South Australian and ACT Acts, only an accused person may elect for a judge alone trial.[22] The accused person must have received legal advice regarding the election,[23] while in the ACT there is a further requirement that the accused makes the election freely.[24] Neither jurisdiction requires consideration of the interests of justice.[25]

2.20 Also similar to the current NSW model, the South Australian and ACT provisions state that where there are multiple accused, each accused person must agree to be tried by a judge alone.[26] The ACT provisions further mirror the current NSW provisions in that an application for a judge alone trial must be made before the court allocates the date for the trial,[27] and an accused who elects to be tried by a judge alone may reverse their decision and elect to be tried by a jury at any time before their arraignment.[28] These latter provisions do not exist in the South Australian Act.

2.21 Unlike the current NSW model, neither the South Australian or ACT provisions require the consent of the Crown.[29]

2.22 Although the judge alone provisions in South Australia have existed the longest, the Committee was informed that only a low proportion of trials in that jurisdiction have proceeded to a judge alone.[30] The NSW Department of Justice and Attorney General suggested that the low number of judge alone trials in South Australia, which are comparable to NSW,[31] may be attributable to the fact that the prosecution is restricted from appealing a verdict of acquittal if the verdict is a result of a jury trial:

> Under s. 352 of the *Criminal Law Consolidation Act 1935* (SA), the prosecution is restricted from appealing against an acquittal where the verdict resulted from a jury trial, making acquittal by a jury a more appealing outcome for accused persons than an acquittal by a judge sitting alone.[32]

20 Submission 16, p 1.

21 Correspondence from Mr Victor Rodziewicz, Library Manager, Russell Fox Library, ACT Supreme Court, to Principal Council Officer, 11 October 2010.

22 *Juries Act 1927* (SA), s 7(1)(a); *Supreme Court Act 1933* (ACT), s 68B(1)(a).

23 *Juries Act 1927* (SA), s 7(1)(b); *Supreme Court Act 1933* (ACT), s 68B(1)(b)(i).

24 *Supreme Court Act 1933* (ACT), s 68B(1)(b)(ii).

25 Submission 16, p 2.

26 *Juries Act 1927* (SA), s 7(3); *Supreme Court Act 1933* (ACT), s 68B(1)(d).

27 *Supreme Court Act 1933* (ACT), s 68B(1)(c).

28 *Supreme Court Act 1933* (ACT), s 68B(2).

29 Submission 5 - Appendix 2, Office of the Director of Public Prosecutions, p 4.

30 Ms Musgrave, Evidence, 11 August 2010, p 6.

31 Submission 16, p 2.

32 Submission 16, p 2.

2.23 The Committee did not receive validated data regarding the number of judge alone trials in the ACT, however it was informed[33] that the proportion of judge alone trials there has steadily risen since 1998.[34]

Western Australia and Queensland

2.24 Judge alone provisions were first introduced in Western Australia in 1994. The original provisions were based on the current NSW model, including the requirement to obtain the consent of the Crown.[35]

2.25 The Western Australian provisions were amended in 2004, following recommendations from a WA Law Reform Commission review of the criminal and civil justice system in Western Australia.[36] The new provisions are closely aligned to the *proposed* NSW model, and the consent of the Crown is no longer required.[37] The Western Australian provisions are set out in Part 4 Division 7 of the *Criminal Procedure Act 2004* (WA).

2.26 The procedure for trial by judge alone in certain indictable matters was introduced into Queensland two years ago.[38] While the Queensland provisions differ in form to the new Western Australian provisions, they are nearly identical in operation.[39] Queensland's judge alone trial provisions are set out in Chapter 62 Division 9A of the *Criminal Code Act 1899* (Qld).[40]

2.27 The judge alone provisions in Western Australia and Queensland are similar to the proposed NSW model in that:

- either the prosecution or defence can apply for a judge alone trial[41]
- the court may make the order if it considers it to be in the interests of justice to do so, however if the prosecution applies, the consent of the accused must be obtained[42]
- the court can refuse an order if it considers the trial will involve a factual issue that requires the application of objective community standards, such as reasonableness, negligence, indecency, obscenity or dangerousness[43]

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33 Correspondence (1) and (2) from Mr Victor Rodziewicz, Library Manager, Russell Fox Library, ACT Supreme Court, to Principal Council Officer, 11 October 2010; Correspondence (1) and (2) from Mr Victor Rodziewicz, Library Manager, Russell Fox Library, ACT Supreme Court, to Principal Council Officer, 12 October 2010.

34 Figures prior to 2008 are unavailable.

35 Submission 16, p 1.

36 Law Reform Commission of Western Australia, *Review of the criminal and civil justice system in Western Australia,* Project 92, 1999.

37 Submission 5 - Appendix 2, p 4.

38 Submission 14, Her Honour Chief Judge Patricia M Wolfe, District Court of Queensland, p 1.

39 Submission 16, p 1.

40 *Criminal Procedure Act 2004* (WA), s 118(4); *Criminal Code Act 1899* (Qld), ss 614 - 615E.

41 *Criminal Procedure Act 2004* (WA), s 118(1); *Criminal Code Act 1899* (Qld), s 614(1).

42 *Criminal Procedure Act 2004* (WA), s 118(4); *Criminal Code Act 1899* (Qld), ss 615(1) and (2).

43 *Criminal Procedure Act 2004* (WA), s 118(6); *Criminal Code Act 1899* (Qld), s 615(5).

- if there are multiple accused to be tried together, the court must not make such an order in relation to one of the accused unless it makes the same order for all.[44]

2.28 As with the proposed NSW model, the Western Australian and Queensland models also contain provisions regarding jury tampering.[45] Jury tampering will be considered in Chapter 6.

2.29 There are also several differences between the Western Australian, Queensland and proposed NSW model, including:

- courts in Queensland may make an order for a judge alone trial if there has been significant pre-trial publicity that may affect jury deliberations[46] (although there is nothing preventing other courts from taking this issue into consideration)[47]
- the Western Australia and Queensland Acts provide that a court can make an order for a judge alone trial if the trial is likely to be complex and/or lengthy, and as such is likely to be unreasonably burdensome to a jury,[48] and
- in Queensland (and under the proposed NSW model), a judge alone trial can only proceed if the accused gives their informed consent.[49] Informed consent is not required in Western Australia.

2.30 Another difference is that in Western Australia, an application for a judge alone trial must be made before the identity of the trial judge is known;[50] while in Queensland, if the identity of the trial judge is known to the parties when the application is decided, an order for a judge alone trial can be made if the court is satisfied there are special reasons for making it.[51] There is no reference to the identity of the trial judge under the proposed NSW model, although it does provide that applications are to be made more than 28 days before the trial (or less than 28 days with the leave of the court).

2.31 In relation to the number of judge alone trials held each year, the Committee was informed that the number of such trials in Western Australia has been very low, representing approximately one per cent of the total number of trials held each year.[52]

2.32 The NSW Department of Justice and Attorney General noted that only a small number of judge alone trials have been held in Queensland, although it recognised that the provisions are still very new:

> From the date of assent (19 September 2008) to 30 June 2010 the number of applications for judge alone trials was 16. Five applications had been granted (31.25%). Those five granted applications form 0.5% of the 1007 trials conducted

44 *Criminal Procedure Act 2004* (WA), s 118(8); *Criminal Code Act 1899* (Qld), s 615A(2).

45 *Criminal Procedure Act 2004* (WA), s 118(5)(b); *Criminal Code Act 1899* (Qld), s 615(4)(b).

46 *Criminal Code Act 1899* (Qld), s 615(4)(c).

47 Submission 16, p 1.

48 *Criminal Procedure Act 2004* (WA), s 118(5)(a); *Criminal Code Act 1899* (Qld), s 615(4)(a).

49 *Criminal Code Act 1899* (Qld), s 615(3).

50 *Criminal Procedure Act 2004* (WA), s 118(2).

51 *Criminal Code Act 1899* (Qld), s 614(3)

52 Correspondence from Ms Penny Musgrave, Director, Criminal Law Division, NSW Department of Justice and Attorney General, to Principal Council Officer, 17 September 2010.

during this period. Prior to 2008, Queensland did not allow judge alone trials, and hence the provisions are still very much in their infancy.[53]

Other jurisdictions

2.33 There are no provisions for judge alone trials in Tasmania, Victoria or the Northern Territory.[54]

2.34 While the Inquiry terms of reference only require the Committee to compare judge alone trial provisions in Australian jurisdictions, the Committee nonetheless received information regarding judge alone trials in the United Kingdom and New Zealand. Discussion of the provisions in these jurisdictions primarily focused on jury tampering, and will be considered in Chapter 6.

Committee comment

2.35 The Committee notes that the proposed model for judge alone trials in NSW closely aligns with the provisions that are used in Western Australia and Queensland. The Committee also notes that the *original* Western Australian provisions were based upon the *current* NSW model, and that they were amended following recommendations from the Western Australian Law Reform Commission.

2.36 The merits of the different provisions in other jurisdictions' models will be considered throughout the remainder of this report, as will the potential impact of, and stakeholder response to, the proposed model for judge alone trials in NSW.

53 Answers to questions on notice taken during evidence 11 August 2010, Ms Musgrave, p 1.

54 Submission 16, p 1; Submission 5 - Appendix 2, p 4.

Chapter 3 Broad issues

This Chapter begins by discussing the central issue of concern for most Inquiry participants in relation to the proposed model: the shift in decision making power from the Office of the Director of Public Prosecutions (ODPP) to the courts in determining applications for judge alone trials. Inquiry participants were clearly divided on this issue, with some arguing strongly for the decision making power to remain with the ODPP, whilst others argued strongly for transferring that decision making power to the courts. The Chapter then examines a number of issues that were raised on the basis that the proposed model would increase the number of judge alone trials in NSW. These issues include the potential efficiencies that may be achieved through an increase in the number of judge alone trials, the consequences of there being a subsequent increase in judicial decisions and the importance of community involvement in the criminal justice system through their participation on juries.

Shift in decision making power from the ODPP to the courts

3.1 The proposed model for judge alone trials shifts the application and decision making process from the ODPP to the courts. Under the proposed model applications for judge alone trials would be made to the courts whereas applications are currently made to the ODPP. If the parties are in agreement the court orders that the trial proceeds by judge alone. And, most significantly, where the accused applies and the prosecution does not consent then the court must determine the matter.

3.2 Section 132(3) of the *Criminal Procedure Act 1986* currently provides that an election for a judge alone trial may be made only with the consent of the DPP.[55] This provision effectively means that it is the ODPP who determines, after an application by the accused for a judge alone trial, how a trial will proceed.

3.3 However, under the proposed model, if the accused applies but the prosecution does not consent, then the court must determine whether or not the matter should proceed without a jury based on an 'interests of justice' test.[56]

3.4 The 'interests of justice' test is discussed in Chapter 5.

3.5 This shift in decision making power from the ODPP to the court provoked much discussion amongst Inquiry participants. Participants were clearly divided on this aspect of the model, falling into two distinct categories: those who prefer that power to remain vested in the ODPP, and those who prefer to see the decision shift to the judiciary. It was on the basis of this element of the proposed model that many Inquiry participants formed their view on whether or not they support the proposed model in general.

55 *Criminal Procedure Act 1986*, s 132(3).

56 Proposed Model, Item Seven.

3.6 The deliberations within the NSW Bar Association on this issue encapsulated the clear division between Inquiry participants. Mr Stephen Odgers SC, Chair, Criminal Law Committee, NSW Bar Association, explained that the Association was unable to reconcile the two opposing arguments:

> The issue of the present power of the Director of Public Prosecutions to effectively veto trial by judge alone has been considered at length by the committee and it was unable to reach any consensus view. I can say to you there was a clear split between the views of prosecutors on my committee, who unanimously opposed the abolition of the veto, and the vast majority of those who primarily defend, who saw no difficulty with abolition and allowing the trial judge to have a broad discretion in the interest of justice to determine whether or not it should be trial by jury or by judge alone.[57]

3.7 Mr Odgers noted that it was highly unusual for the Bar Association to be unable to reach consensus on an issue: '[t]his was an exceptional situation, where there was a clear dichotomy and no consensus at all'.[58]

ODPP as decision maker

3.8 Several Inquiry participants were strongly opposed to removing the right of the ODPP to determine the merits of applications for judge alone trials, arguing that the ODPP was the most appropriate office to determine applications.

3.9 Mr Odgers from the NSW Bar Association identified five commonly advanced reasons for retaining the right of the ODPP to act as the decision maker for applications for judge alone trials:

- the ODPP is more likely to take into consideration the importance of community involvement in the criminal justice system through jury trials when determining applications
- the determination of the mode of trial is an integral component of the prosecutorial function, such as whether or not to proceed with the prosecution and what witnesses should be called to give evidence
- relinquishing the determination of applications for judge alone trials to the judiciary '… will compromise the independence of the judiciary, or at least, the appearance of the independence of the judiciary …'[59]
- it is not procedurally fair that the accused should have the right of veto over the mode of trial, but the Crown does not possess a similar right
- a judge is poorly placed to determine the most appropriate mode of trial as compared to the prosecutor.[60]

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57 Mr Stephen Odgers, Chair, Criminal Law Committee, NSW Bar Association, Evidence, 12 August 2010, p 36. Mr Odgers appeared before the Committee on behalf of the NSW Bar Association in order to assist the Committee by summarising the competing arguments on the proposed model and answering any queries.

58 Mr Odgers, Evidence, 12 August 2010, p 40.

59 Mr Odgers, Evidence, 12 August 2010, p 37.

60 Mr Odgers, Evidence, 12 August 2010, pp 36-38.

3.10 Mr Nicholas Cowdery QC, Director of Public Prosecutions, was of the opinion that the current system for assessing applications for judge alone trials 'operates satisfactorily'.[61] Mr Cowdery argued that the proposed model would bring '… unnecessary complexity to the system. If the court is to apply an "interests of justice" test when parties do not agree, then for the sake of consistency the same test should be applied even when the parties consent'.[62]

3.11 Mr Cowdery observed that the suggested amendments would remove the 'accessible and streamlined approach' that is currently used, and replace it with four alternatives:

- if both Crown and defence consent to a judge alone trial, then the trial will be by judge alone
- if the Crown makes an application for a judge alone trial and the defence refuses, the trial will be by judge and jury
- if the defence makes an application and the Crown refuses, the court will order how the trial shall proceed by applying an 'interests of justice' test
- if there is a risk of jury tampering, the trial will be by judge alone.[63]

3.12 The present approach for determining applications for judge alone trials, including the use of Prosecution Guideline 24, is discussed in Chapter 2 and Chapter 4.

3.13 Mr Cowdery argued that involving the ODPP in the determination of applications for judge alone trials ensures that the community has confidence in the decision making process, because the Guidelines by which the ODPP makes its decision are 'publicly available'[64] and decisions are made after thorough deliberation:

> The requirement for consent of the prosecutor safeguards public confidence in the administration of justice, particularly as all prosecutors must follow the Prosecution Guidelines when assessing the election under delegations. Prosecution Guideline 24 is very detailed and the decision is never made without careful consideration.[65]

3.14 Mr Daniel Howard SC was concerned that the proposal to remove the ability of the ODPP to determine applications for judge alone trials represented a fundamental shift in the criminal justice system away from the 'core assumption' that trial by jury is usually the best way to administer justice:

> When Judge Alone trials were first introduced in NSW, it was intended to be the exception rather than the rule and it was never proposed that it would become the 'default' mode of trial. The current proposal will change that, in any case where the accused wants trial by judge alone. The prosecution will need to convince a judge that jury trial is in the 'interests of justice'. This is a fundamental shift in the core assumption of our criminal justice system that trial by jury, per se, is almost always in the best interests of justice.[66]

61 Submission 5, Office of the Director of Public Prosecutions, p 1.

62 Submission 5, pp 1-2.

63 Submission 5, p 1.

64 Mr Nicholas Cowdery QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Evidence, 11 August 2010, p 22.

65 Submission 5 - Appendix 2, Office of the Director of Public Prosecutions, p 3.

66 Submission 11, Mr Daniel Howard SC, p 4.

3.15 Mr Howard noted that the right to choose the mode of trial was an integral function of the prosecution, and to remove that function would lead to the erosion of both the independence of the judiciary and public confidence in the criminal justice system:

> The choice of mode of trial – by jury or judge alone – is an integral part of the prosecutor's function, as much as is the decision to prosecute, the choice of charges, the choice of witnesses and the choice of evidence to present on behalf of the state. These are not appropriate matters for the judiciary to be involved in, as this will compromise the independence of the judiciary, with corresponding loss of public respect and confidence in the integrity of the system.[67]

3.16 Mr Howard also considered that the prosecutor would have a far deeper knowledge of the case in question than the judiciary, and that therefore the prosecutor would be better positioned to determine the most appropriate manner for the trial to proceed:

> The prosecutor, in preparing the case, often over many months, acquires a much deeper knowledge of the issues in the case and the subtleties that are often involved; the prosecutor will generally have interviewed all important witnesses, will have access to the accused's prior criminal history, and will have knowledge of certain important issues of credibility that, in many cases, should not be made known to the other party or to the judge. A judge would not be able to obtain this same deep understanding of the issues on a motion for trial by judge alone.[68]

3.17 Mr Howard Brown, Deputy President, Victims of Crime Assistance League (VOCAL), emphasised that, in his opinion, '[t]he judge (who should be independent and represent no-one) is poorly placed, when compared to the prosecutor (who represents the state on behalf of the community) to determine what is the best mode of trial'.[69]

3.18 Mr Cowdery questioned the ability of the judiciary to make an impartial decision as to the preferred mode of trial, because the decision would impact on the judges role in the trial:

> I take issue with the fact that the judge in that situation is an independent referee. The judge is one of the two options. It is either trial by judge or trial by judge and jury. The judge is being invited to be a judge in his or her own cause, in making a decision about whether or not he or she will prevail. I do not think it is a case of leaving it to the referee. I think the Crown, with its obligations and its duties to the public interest, is in a better position, privy to knowledge that, if the judge had to make a decision, that would have to be conveyed to the judge, with possible disadvantages that that might entail.[70]

3.19 Mr Brown observed that allowing the judiciary to determine how the trial would proceed could jeopardize the judiciary's independence, and expose the judiciary to accusations of bias in admitting certain pieces of evidence:

> … if we gave that power to the accused to veto that particular process we would then be placing the judge in a position where instead of being independent to the particular process and merely ensuring that the rules are followed, he is exposing himself – or

67 Submission 11, p 3.

68 Answers to questions on notice taken during evidence 11 August 2010, Mr Daniel Howard SC, p 2.

69 Submission 11, p 3.

70 Mr Cowdery, Evidence, 11 August 2010, p 22.

> herself, I should say to be completely non-sexist– the judges would expose themselves to a situation where they could be accused of bias in allowing certain pieces of the evidence into the particular trial and passing a direction in relation to that.[71]

3.20 The issue of excluding the judge who determines the application for a judge alone trial from acting as the trial judge in examined in Chapter 5.

3.21 Mr Emmanuel Kerkyasharian, Committee member, NSW Young Lawyers Criminal Law Committee, highlighted that the shift in decision making power from the ODPP to the judiciary places the judiciary in the unique position of being required to make a decision on their level of involvement in a trial:

> One of the things that does for the first time is put a judge is in a position where the judge is saying, "In this case a jury is not going to do it as well as me," or vice versa. Even if that is not the criteria that they are considering, that is the perception that will flow from that decision. That is a pretty significant change.[72]

3.22 Mr Kerkyasharian suggested that this would expose the judiciary to criticism that they were placing more confidence in their own abilities to determine matters than that of a jury:

> In a sense because we are opening up the judges to criticism for making that decision. The Director of Public Prosecutions is already open to criticism for that decision, fair enough, but now we are asking the judges to make a decision in particular cases as to whether they are going to do the job right or the jury is going to do the job right … I accept I am simplifying it is perhaps too much, but the danger is that that will be cast as the judge saying, "I can do it better."[73]

Judiciary as decision maker

3.23 Other Inquiry participants were strongly in favour of the key aspect of the proposed model which allows the courts to decide how the matter is to proceed in instances where the accused has requested a judge alone trial but the prosecution does not consent. They argued that the judiciary is better placed than the ODPP to determine applications for judge alone trials, and that such a decision was a natural extension of the courts role to arbitrate disputes.

3.24 Mr Odgers from the NSW Bar Association outlined some of the arguments in favour of allowing the courts to decide how a matter is to proceed, including:

- there is no reason to assume that in determining this issue, judges would be more inclined to decide in favour of a judge alone trial than a jury trial, or vice versa
- the decision as to the mode of trial is not an integral component of the prosecutorial function: '… there is a big difference between determining whether or not to prosecute and how to prosecute from the question of who decides the ultimate question of fact…'[74]

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71 Mr Howard Brown, Deputy President, Victims of Crime Assistance League, Evidence, 12 August 2010, p 18.

72 Mr Emmanuel Kerkyasharian, Committee member, NSW Young Lawyers Criminal Law Committee, Evidence, 12 August 2010, p 19. The Committee notes that NSW Young Lawyers were largely supportive of the proposed model.

73 Mr Kerkyasharian, Evidence, 12 August 2010, p 19.

74 Mr Odgers, Evidence, 12 August 2010, p 37.

- the judiciary is routinely required to make decisions based on the 'interests of justice'.[75]

3.25 The Department of Justice and Attorney General observed that there was no reason to believe that the ODPP was better placed than the judiciary to weigh the competing interests that need to be balanced in determining contested applications for judge alone trials:

> Without any criticism of the prosecution's ability to make a fair and just decision on judge alone trials, there is no reason to believe that the prosecution is better placed to weigh the competing interests than the judiciary.[76]

3.26 Ms Penny Musgrave, Director, Criminal Law Division, Department of Justice and Attorney General suggested that by transferring the decision making power as to whether or not a trial proceeds as judge alone from the ODPP to the judiciary, the decision would have a greater degree of consistency and transparency than is currently the case:

> Currently, the Director is making a determination based on that guideline and I am confident the Director does make the determination based on the guideline, but there is no legislative control over that guideline and if that determination is made by the court in accordance with the test set out in the provisions – in the new model – you will have consistent and transparent decision making on that right.[77]

3.27 Ms Musgrave observed that requiring the judiciary to determine this matter was a natural extension of the role of the court as an arbiter between the prosecution and defence counsels:

> … the judge will only be making a determination where there is a disagreement about whether this should proceed to trial by way of judge alone. Yes, the prosecution is often in a position of knowing more about the facts of a case before a trial commences. They do not necessarily know what the issues are from a defence perspective and the role of the decision maker in this process is actually to arbitrate between two competing positions. Part of that is an examination of the facts but essentially it is arbitrating between those two positions, and that is what a court does, that is the job of the court.[78]

3.28 The Law Society of NSW advised that it's members could discern no strong justification for vesting the decision as to the mode of trial on the prosecution: '[t]he Law Society's Criminal Law Committee is of the view that there is not a strong justification for vesting the decision on whether a trial will be held before a judge alone on the prosecution'.[79]

3.29 The Law Society suggested that it would be more appropriate for the judiciary to assume this function, as an extension of their role as the administrators of justice:

> To determine such an application would be for the court to exercise its legitimate function, namely the administration of justice, where a matter between the parties is in

75 Mr Odgers, Evidence, 12 August 2010, pp 37-38.

76 Submission 16, Department of Justice and Attorney General, p 2.

77 Ms Penny Musgrave, Director, Criminal Law Division, Department of Justice and Attorney General, Evidence, 11 August 2010, p 4.

78 Ms Musgrave, Evidence, 11 August 2010, p 12.

79 Submission 8, Law Society of NSW, p 1.

> dispute. The only disadvantage there may be in the view of the Law Society could be the court's time.[80]

3.30 The Queensland Law Society also expressed support for the proposal to allow the courts to determine applications for judge alone trials in instances where the accused has requested a judge alone trial, but the prosecution does not consent.[81]

3.31 Mr Malcolm McCusker QC, a Western Australian barrister who argued that '[i]f an accused applies for a judge only trial then the trial should be by judge alone'[82] regardless of whether the prosecution agreed, saw no disadvantage in allowing the courts to determine applications for judge alone trials if the proposed model were to be implemented:

> I perceive no disadvantages in the Courts determining an application for a judge alone trial, on the basis of the "interests of justice", rather than the DPP. There is no reason why a judge should not apply the "objective community standards' to which the proposed model applies.[83]

3.32 Mr Thomas Spohr, Chair and Executive Councillor, NSW Young Lawyers Criminal Law Committee, referred to the fact the Prosecution Guidelines can be changed (see paragraph 2.7) as a weakness in the current system of determining applications for judge alone trials:

> … I do not necessarily think we ought to pin our hopes on the fact that the following decision-maker will be just as reasonable and take into account the same conditions. This changed Guideline is a perfect example of that. The presumption was turned entirely on its head.[84]

3.33 Mr Mark Ierace SC, Senior Public Defender, NSW Public Defenders Office, observed that having the judiciary determine applications would allow an immediate exchange of arguments as to the best way to proceed, as opposed to the current paper-based application system for judge alone trials:

> I think that in one sense at least the judiciary is better placed in that, effectively, at the hearing there would be an opportunity for an immediate exchange of views and opinions. At the moment the process of application is by letter, that is, defence counsel sends off a letter to the Director of Public Prosecutions, the DPP considers the contents of that letter and the decision is then forthcoming. So the procedural difference, I think, would lend to an immediate exchange of views on the issue and that airing, if you like, of the issue would be beneficial to a more appropriate outcome… [85]

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80 Answers to questions on notice taken during evidence 12 August 2010, Law Society of NSW, p 2.

81 Submission 15, Queensland Law Society, p 2.

82 Submission 3, Mr Malcolm McCusker QC, p 2.

83 Answers to questions on notice taken during evidence 13 August 2010, Mr Malcolm McCusker QC, p 1.

84 Mr Thomas Spohr, Chair and Executive Councillor, NSW Young Lawyers Criminal Law Committee, Evidence, 12 August 2010, p 18.

85 Mr Mark Ierace SC, Senior Public Defender, NSW Public Defenders Office, Evidence, 11 August 2010, p 27.

Committee comment

3.34 Under the proposed model, if the accused applies for a judge alone trial and the prosecution does not consent, then the court must determine whether or not the matter should proceed without a jury based on an 'interest of justice' test. This differs from the current situation, where the ODPP determines applications from the defence for a trial to proceed before a judge sitting alone with reference to Prosecution Guideline 24.

3.35 Inquiry participants were clearly divided on the merits of this shift in decision making power. Whilst some Inquiry participants supported the ODPP retaining its right to determine applications for judge alone trials, others expressed support for shifting that decision making role to the courts. Inquiry participants on both sides of this debate made compelling arguments in support of their position.

3.36 On the one hand, it was argued that the ODPP is in many ways better placed than the judiciary to determine applications for judge alone trials. In this regard it was argued that the ODPP appropriately brings to bear consideration of the community's involvement in the criminal justice system, and that determining the mode of trial is an integral component of the prosecutorial function. Some Inquiry participants also argued that the in depth knowledge of the case developed by the prosecutor in preparing for trial means that the ODPP is better equipped than the judiciary to determine such applications.

3.37 The Committee also notes that there were few indications from Inquiry participants that the present system for judge alone trials was problematic. Although in this regard we also note the comments from Mr Ierace of the NSW Public Defenders Office, that defence counsels rarely request judge alone trials because of the perception that it is unlikely the ODPP will consent to a judge alone trial proceeding. The comments made by Mr Ierace in this regard are discussed in further detail in Chapter 5.

3.38 Conversely, other Inquiry participants argued that there is no reason to believe that the ODPP is better equipped than the judiciary to determine applications for judge alone trials. It was argued that transferring the decision making power to the courts would provide greater transparency and consistency in determining applications, and that determining applications was a natural extension of the judiciary's role as an arbiter between the prosecution and defence.

3.39 The Committee notes the clear dichotomy of views on the issue. The Committee also notes that the NSW Bar Association similarly grappled with this dichotomy, and was ultimately unable to reach consensus on the merits of the proposed model.

Potential increase in the number of judge alone trials

3.40 As noted in Chapter 2, there were 640 judge alone trials held in NSW between 1993 and 2007, compared to the 12,474 trials held before a jury. This equates to 5.1 per cent of trials being held before a judge sitting alone over that period.[86]

[86] Ms Musgrave, Evidence, 11 August 2010, p 2.

3.41 The Committee notes that the number of judge alone trials held in other Australian States and Territories is similarly small. As noted in Chapter 2, although the judge alone provisions in South Australia have existed since 1984, the Committee was informed that only a low proportion of trials in that jurisdiction have proceeded to a judge alone.[87]

3.42 In Western Australia, approximately one per cent of the total number of trials held each year is heard by a judge sitting alone.[88] Judge alone provisions were introduced in Western Australia in 1994, and amended in 2004.

3.43 In Queensland, where provisions for judge alone trials have only been in place since September 2008, there have been 16 applications for a judge alone trial from the date of the implementation of the provision until 30 June 2010. Only five of these applications have been granted, forming 0.5 per cent of the total number of trials during this period.[89]

3.44 There seemed to be a shared assumption amongst many Inquiry participants that if the proposed model were to be implemented, there would be an increase in the number of judge alone trials held in NSW, although there was no clear evidence presented about the extent of any increase.

3.45 For example, Mr Ierace observed that if the model were introduced, defence counsels would be more likely to 'turn their mind' to the possibility of applying for a judge alone trial.[90] Mr Howard noted that he had '… no doubt that the proposal, if introduced, would lead to more applications for judge alone trials'.[91]

3.46 Inquiry participants discussed the impact of a potential increase in the number of judge alone trials with reference to three main factors:

- potential efficiencies that may be achieved through an increase in judge alone trials
- a potential increase in judicial decisions and the consequences of this
- the importance of community involvement in the criminal justice system.

3.47 The next three sections will examine each of these factors in turn.

Potential efficiencies achieved by judge alone trials

3.48 Several Inquiry participants highlighted that efficiencies in regards to both time and cost savings may potentially be achieved through a greater incidence of judge alone trials. However, some Inquiry participants questioned whether any time or costs savings would eventuate from an increased prevalence of judge alone trials. Others highlighted the need to ensure that any efficiencies are not achieved at the expense of a fair and balanced criminal justice system.

87 Ms Musgrave, Evidence, 11 August 2010, p 6.

88 Correspondence from Ms Penny Musgrave, Director, Criminal Law Division, NSW Department of Justice and Attorney General, to Principal Council Officer, 17 September 2010.

89 Answers to questions on notice taken during evidence 11 August 2010, Ms Penny Musgrave, Director, Criminal Law Division, Department of Justice and Attorney General, p 1.

90 Mr Ierace, Evidence, 11 August 2010, p 28.

91 Answers to questions on notice taken during evidence 11 August 2010, Mr Howard, p 2.

3.49 Ms Musgrave of the Department of Justice and Attorney General outlined the expected efficiencies that may be achieved by judge alone trials compared with jury trials:

> … we can go to distinct steps in the trial process that would be reduced; if you do not have to give complicated directions to a jury that would evaporate. A judge is required to take into account those directions but he does not have to sit there and explain it. You do not have to empanel the jury; you do not have to give them directions every afternoon at the end of the proceedings … You also do not have to have days off when one juror is sick, which is what happens at the moment. A trial can be adjourned for two or three days because one juror is not well, so there are a number of instances. Currently on a voir dire you take evidence in front of the judge. If that evidence was admissible, you then repeat that process in front of the jury … it would reduce the risk of retrials based on the discharge of a jury. A lot of work has been done in that respect and everyone is trying very hard to reduce the risk of discharge in other ways but if you do not have a jury it stands to reason that there is a saving. [92]

3.50 Mr Peter Breen concurred that not involving a jury in the trial process would result in time and cost savings for the criminal justice system: '[a] judge-alone trial will be completed more efficiently than a jury trial. It will save money and it will save time. A lot of jurors will be able to stay at home instead of coming into court and adjudicating …'.[93]

3.51 Mr McCusker noted that a judge sitting alone would avoid the prospect of having a hung jury and would also avoid the need to hold a retrial because a jury has been discharged due to exposure to prejudicial material:

> … jury trials take much longer to run than a trial by judge alone. They take much longer because, for a start, the jury panel has to be empanelled, and sometimes that can take up to a day, which is a waste of the court's resources and the fees that are paid to the barristers on both sides incurred in that process. Juries may not be able to reach a verdict – what is called a hung jury may occur. When there is a hung jury that means the trial has to be started again, perhaps months later. Furthermore, with jury trials there are sometimes occasions, fortunately not too frequent but they do occur from year to year, where the jury is discharged by the judge because of some prejudicial material that may appear in the media or otherwise.[94]

3.52 Several Inquiry participants expressed the view, however, that judge alone trials would *not* achieve greater efficiencies than jury trials, arguing that in practice, there would be little difference in the length and cost of judge alone trials as compared to jury trials.

3.53 For example, VOCAL suggested that there is little difference in the time taken to resolve matters by jury than by judge alone, because the parties to a judge alone trial may be caught up in extensive legal arguments:

> I appreciate that there is a view within the Legal Profession of defence practitioners that Jury trials are traditionally lengthier than those of Judge alone and at first glance this may well be true but it should also be noted that a Judge alone trial is no guarantee of a quicker resolution of the matter before the court. In our experience a matter being heard by a Judge alone may take fewer trial days but the period of time

92 Ms Musgrave, Evidence, 11 August 2010, p 3.

93 Mr Peter Breen, Evidence, 11 August 2010, p 42.

94 Mr Malcolm McCusker QC, Evidence, 13 August 2010, p 1.

> which passes between the commencement of a trial and its conclusion is not necessarily any shorter and often is far longer. We have seen time and time again where a Judge sitting alone makes a direction with which the defence disagrees, the matter being stood over whilst the defence seeks direction from a higher authority or insists on going into "voir dire" in order to challenge such directions.[95]

3.54 NSW Young Lawyers suggested that in reality, any savings in time or costs would be unlikely to eventuate under the proposed model, because the prosecution would be required to present their entire case during the arguments for the trial to proceed as judge alone:

> … the proposed model will inevitably cost more, both in time and money. The prosecution will be forced to produce its case (presumably in summary form) before the court, in order to respond to the submission that the trial ought to proceed by judge alone.[96]

3.55 Some Inquiry participants noted that an increased prevalence of judge alone trials may result in a corresponding increase in the number of appeals, and an increase in the number of legal arguments throughout a trial, both of which could have a negative impact on any expected time or cost savings expected to be achieved by judge alone trials.

3.56 For example, Mr Brown, Vice-President, VOCAL, noted that cost and time savings would likely be eroded if there was an increased number of appeals resulting from an increase in the number of judge alone trials:

> If the net result is an increase in the number of appeals which then go on to the Court of Criminal Appeal, any transitional cost savings which might be perceived as coming about from judge-alone trials will be lost through the appeal process and that is one of the real problems.[97]

3.57 Mr Pouyan Afshar, President, NSW Young Lawyers, also observed that while jury trials may appear to be less efficient that judge alone trials, the limited circumstances under which a jury verdict can be appealed may balance the efficiencies that are expected to be achieved by judge alone trials:

> There are many advantages that jury trials bring to a trial in a criminal matter, including obviously the fact that community values are represented and there are certain efficiencies later on in the process, such as the fact that an appeal from a jury trial happens only in limited circumstances whereas obviously in a judge-alone trial there may be more scope for an appeal later on. So when we are talking about efficiencies, efficiencies that are recognised in the initial part might not actually end up being more efficient for the system later on, especially in the appeal process.[98]

3.58 The issue of appeals is also discussed in Chapter 5, with specific reference to the possibility of appeals arising from the application of the 'interests of justice' test under the proposed model. The potential for an increased number of appeals is also examined in the next section of this Chapter in relation to the corresponding increase in written judgments that would arise as a result of an increase in judge alone trials.

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95 Submission 7, Victims of Crime Assistance League, p 2.

96 Answers to questions on notice taken during evidence 11 August 2010, NSW Young Lawyers, p 1.

97 Mr Brown, Evidence, 12 August 2010, p 30.

98 Mr Pouyan Afshar, President, NSW Young Lawyers, Evidence, 12 August 2010, p 15.

3.59 A number of Inquiry participants argued that any changes to the criminal justice system should not have efficiency as their main focus, but should instead aim to enhance the fairness of the criminal justice system.

3.60 In this regard, Mr Cowdery cautioned against using efficiency as a measure of the performance of the criminal justice system, arguing that the primary concern should be that justice is administered effectively and professionally:

> By "efficient" I presume you mean fast and cheap. By those criteria, judge alone trials are usually more efficient. But I am more interested in the quality of criminal justice and in maintaining it at the highest level, given its rightful place in the government of our community. I prefer it to be effective and for it to be carried out professionally.[99]

3.61 Mr Afshar observed that while efficiency is important when considering the costs involved in running a trial, these considerations must be balanced with the right of the accused to receive a jury trial:

> The question of efficiencies is one that obviously needs to be borne in mind when you are talking about trials and how long they are going to run and what resources are going to be expended in their running. We are of the view that those efficiencies and the quest to get to those efficiencies should be balanced with the rights of the accused to be heard by his or her peers …[100]

3.62 Mr Spohr also contended that efficiency was a low order priority for the criminal justice system, noting that sometimes a fair and due process can be an inefficient process:

> … efficiency is a very low order priority in the criminal justice system, except insofar as an inefficient trial may adversely affect fairness, efficiency ought almost not feature at all, in our view, in considerations of jury trials. The fact that something is inefficient makes no difference at all to whether or not in our view it ought to be heard by judge alone or otherwise. The fact of it is that in order to be fair, one often by necessity needs to be inefficient and that in our view is the correct balance.[101]

3.63 Mr Howard noted that the seriousness of offences being dealt with by the criminal justice system, and the likelihood that conviction will result in an accused losing their personal freedom, warrants consideration of issues other than cost savings when determining the most appropriate mode of trial:

> Judge alone trials are less costly; no doubt this is why they have become the standard form of trials in civil cases. Similarly, summary criminal matters are dealt with by a magistrate. However, here we are talking about the serious crimes that warrant an indictment and trial in the superior courts; these matters usually involve a very significant allegation and matters of community significance. There is often a likelihood of a person going to prison. Juries are to be preferred in these matters, and this is where the line should be drawn against further extension of judge alone trials

99 Answers to questions on notice taken during evidence 11 August 2010, Mr Nicholas Cowdery QC, Director, of Public Prosecutions, Office of the Director of Public Prosecutions, p 3.

100 Mr Afshar, Evidence, 12 August 2010, p 15.

101 Mr Spohr, Evidence, 12 August 2010, p 22.

> for cost saving purposes; the cost to quality of justice and to community participation in and respect for the law, would be far greater than the money saved.[102]

3.64 Mr Howard emphasised that the matters considered by the criminal justice system '… are too fundamental and important to be sacrificed in the name of "cost efficiency", "statistical outcomes" or the other measures of "bean counters"'. [103]

3.65 VOCAL concurred that the central importance of the criminal justice system to the community meant that the effectiveness of the system should not be measured by the cost of administering justice:

> There is a cost of living in a civilised society and that cost is that we deal with those who have offended against that community in a civilised manner. We should not, at any time, attempt to place a ceiling on costs associated with the delivery of Justice in this state.[104]

Committee comment

3.66 The Committee considers that, regardless of the potential efficiencies that may be achieved by judge alone trials, economic efficiency should not be the primary consideration in evaluating the proposed model for judge alone trials. Whilst an efficient criminal justice system is important, it should not be achieved at the expense of a system that is fair and balanced for all parties.

3.67 The Committee notes the arguments of Inquiry participants that judge alone trials will achieve both time and cost efficiencies, largely through the removal of the need to involve a jury in the trial process. The Committee also notes that several Inquiry participants contended that judge alone trials would *not* achieve the efficiencies suggested.

3.68 On balance it appears that some efficiencies could be achieved through the introduction of the proposed model, although the extent of these time and costs savings are not clear. The Committee further considers that concerns about the efficiency or otherwise of judge alone trials should not be the main area of concern when evaluating the merits of the proposed model for judge alone trials.

Impact of an increase in judicial decisions

3.69 Some Inquiry participants highlighted that the proposed model would lead to a corresponding increase in the need for the judiciary to prepare detailed written judgments, outlining findings of law and findings of fact, at the conclusion of a judge alone trial. It was argued that these judgments would increase the workload for the judiciary, and would potentially increase the number of instances where a verdict can be appealed, both of which would detract from the efficiencies that may be achieved by a judge alone trial.

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102 Answers to questions on notice taken during evidence 11 August 2010, Mr Howard, p 2.

103 Answers to questions on notice taken during evidence 11 August 2010, Mr Howard, p 9.

104 Submission 7, p 2.

3.70 In relation to the increased workload for the judiciary, Mr Ierace noted that while juries do not give reasons for the verdicts, a judge is required to provide a comprehensive judgment that outlines the relevant principles of law and findings of fact, which would take time to prepare:

> The judge, unlike the jury, would be required and, indeed, is required under current law, to give reasons for the verdict or verdict. That involves identifying and stating the relevant principles of law and the findings of fact. The judge in a jury trial receives the verdict, which is simply one or two words, and effectively moves on to sentence. Where there is a trial by judge alone the judge has to make time to consider his or her verdict and write the appropriate judgment. That will take some time. Of course, it is not possible to say how long; it would vary from judge to judge and case to case depending on the complexity of the evidence.[105]

3.71 Mr Ierace highlighted that the requirement to write a detailed judgment would hinder a judge from undertaking further trial work and may counteract the projected time savings of having a judge alone trial:

> However, that downside, that is, the cost to the community of a judge not hearing evidence but rather sitting in chambers writing a judgment, has to be balanced against the inevitable savings in time of a trial by judge alone as opposed to a jury trial. I am saying that a trial by judge alone is significantly shorter than a jury trial if only because the various procedures in a jury trial are not required, such as explaining to a jury their role, opening and closing addresses by counsel to the jury would be far shorter in a trial by judge alone, and many of the questions asked of jurors would be unnecessary. So, there is that counterbalancing effect.[106]

3.72 Mr Cowdery further suggested that the 'burdensome' task of having to prepare written judgments would cause unhappiness within the judiciary itself:

> Judge alone trials involve the judges in the additional, burdensome task of preparing written judgments on the facts and liability. Judges in many jurisdictions complain, officially and informally, of the additional work required when sitting alone without a jury.[107]

3.73 Mr Ierace suggested that another consequence of the need to produce detailed judgments may be more appeals resulting from judge alone trials than from jury trials, because a jury simply delivers their verdict without having to give any explanation of their decision:

> … one can expect there to be more appeals from convictions by judges who have arrived at the verdict as opposed to jurors. That is because having exposed his or her reasoning there is more opportunity, if you like, for defence counsel to find error. By contrast, with a verdict by jury – although such verdicts can be and often are successfully challenged; the appellate court has to engage in the process of determining whether the conviction was not reasonably available on the evidence given to the jury – there is more opportunity for appeals. However, to the extent that we already have trials by judge alone, I do not know that the likely additional number of appeals is such as to cause any great concern. In other words, I would not expect if

105 Mr Ierace, Evidence, 11 August 2010, p 29.

106 Mr Ierace, Evidence, 11 August 2010, p 29.

107 Submission 5 - Appendix B, p 5.

> trials by judge alone occurred more often than they do presently that there would be an avalanche of additional appeals, nothing like that.[108]

3.74 Mr Breen also noted that requiring the judiciary to produce judgments detailing the grounds and reasons for their decision may lead to an increased number of appeals:

> … when a jury makes the decision about the facts, you do not know the basis of its decision. You cannot appeal the jury's decision on the facts. You can say generally that it got it wrong, but you cannot analyse what its decision is because you do not know the reasons for the decision. When a judge sitting alone makes a decision about the facts, the judge has to outline the reasons for his or her decision … there are going to be more appeals and appeal points in a judge-alone trial because the judge sitting alone not only considers the law but has to consider the facts as well. The evidence about the facts is going to give rise, obviously, to more appeal points than to a decision just based on the law.[109]

3.75 However, other Inquiry participants challenged the suggestion that the requirement to produce written judgments would result in a significant increase in the number of appeals. It was also argued by that the requirement to produce written judgments would result in a more transparent criminal justice system.

3.76 For example, Mr McCusker refuted suggestions that there would be an 'avalanche' of appeals as a consequence of the judiciary preparing written judgments, arguing that written judgments would simply afford clear avenues of appeal for counsel if they felt the decision was 'perverse':

> You might get a jury that has a particular view that this is not dishonest and another jury later on says it is dishonest, and neither gives any actual reason, whereas if the judge concludes dishonesty the judge has to explain why and it is open then to scrutiny and possibly appeal. I do not think that having judges write the reason for the decision is going to create an avalanche of appeals, it is just that it gives the accused and, for that matter, the prosecution – because I would say the prosecution should have a right of appeal – a right of appeal if a verdict is clearly perverse.[110]

3.77 Mr Odgers from the NSW Bar Association observed that while a written judgment may make it easier to challenge a verdict, he questioned if there would be a 'significant increase' in the number of appeals as a result of judge alone trials:

> … it is not apparent to me that there would be a significant increase in appeals if it was by judge alone. I suppose the difference is that because a judge is required to give reasons, whereas a jury does not give reasons, that may mean that it will be easier for an appeal court to assess the process of reasoning which lead the judge to the ultimate determination, because it will be expressed.
>
> So that would perhaps make it easier for an appeal court to be willing to hold that a verdict was unreasonable, for example. The current position is that the court looks at the totality of the appeal, the evidence, and comes to a view about whether they think there was a reasonable doubt and then they try to imagine how the jury might have concluded beyond reasonable doubt that there was guilt. It is a somewhat amorphous process of the challenge to a jury's verdict as being unreasonable; whereas an

108 Mr Ierace, Evidence, 11 August 2010, p 29.

109 Mr Breen, Evidence, 11 August 2010, pp 40-41.

110 Mr McCusker, Evidence, 13 August 2010, p 10.

> argument that the judge's verdict was unreasonable would be more easily determined. That might, I suppose, result in more appeals, but I am not convinced that there will be a big difference in the number of appeals or successful appeals.[111]

3.78 Mr McCusker argued that the lack of transparency in jury verdicts was a 'major defect' with the jury system, particularly given the importance that the community places on transparency in decision making in other aspects of life:

> This is a day and age where everything is supposed to be transparent, but the jury's verdict is absolutely inscrutable, and I think that is a major defect. If I were an accused person and I went before a jury and I was innocent and got convicted I would want to know why.[112]

3.79 The Law Society of NSW also noted that a judges written verdict opens up their decision to greater scope for scrutiny and review:

> It is inherent in the judicial office that a judge must discharge the functions of office with impartiality and integrity. Judges are required to record their reasons for decision in written judgments, and their work is subject to scrutiny and review in a range of ways, including through the appeals processes.[113]

3.80 Mr McCusker suggested that the increased transparency that would result from the judiciary having to produce written judgments would be a positive development for the criminal justice system:

> If a judge gives his or her reasons for a decision, it is true it is then open to scrutiny, unlike a jury verdict, and there may be good grounds for an appeal. If there are, that is good because the system of justice is then being served. In all other areas of the law judges have to give reasons for the decision, laying the decision open to appeal if the reasons are untenable. Why should it not be the same with criminal trials? I do not understand why the distinction is drawn.[114]

Committee comment

3.81 The Committee notes the concerns of some Inquiry participants that an increase in the number of judge alone trials will result in an increased workload for the judiciary, who, unlike a jury, will be required to prepare written judgments outlining the relevant principles of law and findings of fact that have informed their decision.

3.82 The Committee further notes the concerns of some Inquiry stakeholders that the increased prevalence of written judgments may afford greater opportunities to appeal the court's decision. There was disagreement among Inquiry stakeholders about how significant an impact the proposed model would have on judicial workloads and the rate of appeals.

3.83 The Committee considers that the preparation of written judgments explaining the basis for a judge's decision in a particular matter affords transparency in decision making, which in turn

111 Mr Odgers, Evidence, 12 August 2010, p 42.

112 Mr McCusker, Evidence, 13 August 2010, pp 10-11.

113 Answers to questions on notice taken during evidence 12 August 2010, Law Society of NSW, p 6.

114 Mr McCusker, Evidence, 13 August 2010, p 7.

enhances the community's understanding of why a verdict has been reached. We therefore do not feel that the requirement for a judge to prepare a written judgment at the conclusion of a judge alone trial detracts from the other benefits that may be achieved by the proposed model.

Community involvement in, and perceptions of, the criminal justice system

3.84 The role of the community in the criminal justice system was extensively discussed by Inquiry participants during the course of the Inquiry, with concern expressed by some that if the number of judge alone trials were to increase, the role of the community in the criminal justice system would be diminished. These issues were raised largely in the context of arguments presented against the proposed model.

3.85 Some Inquiry participants highlighted the importance of the community's involvement in trials as jury members from the perspective of the victims of crime. Others suggested that the community has greater confidence in jury verdicts than in verdicts from judge alone trials. Inquiry participants also debated the ability of juries and judges to represent objective community standards in their decision making processes.

3.86 It was also suggested that the proposed model would act as something of a 'slippery slope' in terms of eroding the central importance of the jury in our system of criminal justice, with some Inquiry participants advocating strongly for the importance of the role of the jury in the criminal justice system, whilst others questioned the merits of the jury system.

Victims perspective on judge alone trials

3.87 A number of Inquiry participants suggested that involving the community in determining the guilt or innocence of the accused provides the victim with greater confidence in the verdict than in the verdict from a judge alone trial, even in instances where the verdict does not result in a favourable outcome for the victim.

3.88 In this regard, the Homicide Survivors Support After Murder Group Inc noted that when there is a dispute over the seriousness of a crime, the victim of that crime would prefer the matter be heard before a jury of their peers:

> Where there is a dispute regarding the seriousness of a crime, especially in the matters of Manslaughter and Murder or Assault Occasioning Grievous Bodily Harm with Intent and Assault occasioning Grievous Bodily Harm, these matters should be tried before a Judge and Jury, so that the intention that an accused should be tried before "a panel of one's peers" should be "seen to be done".[115]

3.89 The Homicide Survivors Support After Murder Group Inc observed that while victims can often be surprised by the verdict reached by a jury, its members would regardless prefer a matter to be heard before a jury:

> The great majority of these trials have been before a Judge and jury and whilst some of the verdicts have been fair, there have been some where the Jury's "not guilty"

115 Submission 13, Homicide Survivors Support After Murder Group Inc, p 1.

> verdict have stunned not only our members but also the Judge, so much so, that we have wondered if the Jury heard the same evidence we did.
>
> Notwithstanding these occasions our members are generally in favour of trials before Judge and Jury.[116]

3.90 Mr Howard noted the importance of a jury verdict in allowing a victim of crime to feel that they have been heard by their community, even though the victim may not agree with the verdict that the jury has reached:

> Let us say you have a victim of a rape or child sexual assault who wants a jury trial. They want to tell their community what happened. If the judge decides "No, I am going to hear this", and the accused is acquitted by a judge, how will that victim feel? They have not had their community determine the issue and they will feel that it is not the real McCoy. I think they will respect the judge less … if the average victim wants a trial by jury and does not get it and the accused is acquitted they will be unhappy and feel that the system has let them down. If it is a collective jury decision it is a hard knock for a disappointed victim to receive but usually they will accept it because the community has heard it. [117]

3.91 Mr Brown highlighted that victims of crime may perceive that a judge sitting alone is too far removed from the process of determining the innocence or guilt of the accused, whereas a jury is comprised of a group of people to whom a victim can often more easily relate:

> … because the judge has to be completely separated from the process and, for want of a better expression, devoid of emotion, the majority of our victims feel that the judges have no real concern for them. The fact there is a jury, people just like themselves, gives them comfort that the decision that is being made in relation to the person's guilt or innocence is in fact being made by a group of people who are similar to them, the victim, and not someone who is aloof, begowned and bewigged.[118]

3.92 Mr Brown advised that in his experience as a victim's advocate, he had seen victims of crime affronted by the detached manner of the judiciary:

> … can I say from my own personal experience, specifically related to judges of the District Court, there are a substantial percentage of judges of District Court who, by their various comments, have affronted victims purely and simply because of the legal and technical manner in which they have dealt with the case and the victims have felt that there has been absolutely no empathy whatsoever …[119]

3.93 Mr Brown suggested that these factors all contribute to a preference of victims to have their matter heard and determined by a jury, rather than a judge sitting alone:

> … if you are convinced that it is the judge who is making that decision and has already formed an opinion about you, then the perception is that the decision has been handed down and that is why, even though as you rightly pointed out, there is that view out there that you are better off to be before a jury if you are the accused, we still believe and all our counselling models are all developed around the prospect and the

116 Submission 13, p 1.

117 Mr Daniel Howard SC, Evidence, 11 August 2010, p 46.

118 Mr Brown, Evidence, 12 August 2010, pp 28-29.

119 Mr Brown, Evidence, 12 August 2010, p 29.

> process that you are far better off to be adjudged by a jury of your peers. Let us be brutally honest about this, because we have an adversarial system, when you are a victim of crime you too are being adjudged by the jury.[120]

Committee comment

3.94 The Committee acknowledges that the determination of matters in the criminal justice system can be a difficult and intimidating process for a victim of crime to endure.

3.95 The Committee notes the advice from victims advocacy groups that victims may prefer to have their matters heard before a jury, rather than by a judge sitting alone, because they want to have their matter heard and determined by the community to which they belong. The Committee also notes the advice that victims may feel more confident in verdicts that are delivered after the deliberations of a jury.

3.96 The Committee refers to its earlier observation that the criminal justice system must be fair and balanced for all of participants in the system. Based on the information received during this Inquiry, the Committee acknowledges that for some victims of crime, a fair and balance criminal justice system requires the use of juries to determine the guilt or innocence of the accused.

Community acceptance of verdicts

3.97 In the context of the proposed model leading to an increase in the number of judge alone trials, a number of Inquiry participants expressed concern that the community would less readily accept verdicts delivered by a judge sitting alone as compared a jury. It was argued that that community involvement in the determination of verdicts provides those verdicts with legitimacy. It was also suggested that the anonymity of the jury protects individual jurors from adverse reactions to verdicts.

3.98 Mr Cowdery argued that community involvement in the criminal justice system affords legitimacy to the justice process because the community is reassured by the fact that a group of community members, rather than a single individual, is involved in determining issues of guilt or innocence:

> The involvement of the community gives a greater legitimacy to the criminal justice process. It brings people into the process itself, making decisions about it; the old saying of a judgment by your peers – although we do not have that strictly speaking of course – there is value in being assessed as to whether or not you have acted criminally by your fellow citizens. I think there is some value. It also improves community acceptance of the process because the rest of the community knows that representatives of the community have been involved in it, and a good number of them, so they find the process more acceptable than just sending people off to be dealt with by a single individual who may, as you pointed out earlier, have all kinds of prejudices, beliefs and attitudes that cannot be tested and cannot be modified.[121]

120 Mr Brown, Evidence, 12 August 2010, p 29.

121 Mr Cowdery, Evidence, 11 August 2010, p 19.

3.99 Mr Howard noted that a verdict reached by a judge sitting alone may be perceived as less legitimate than a verdict reached by a jury, particularly in instances where the victim of the crime is displeased that the trial proceeded before a judge sitting alone:

> By making an order for judge alone trial, the judge is taking away the right to jury trial of the community, who is one of the two parties to the adversarial proceeding. That will include victims and their relatives, as well as the broader public. Inevitably there will be cases where the relevant community, including victims and relatives, will be unhappy a judge's decision to order a judge alone trial, and the resulting outcome will be seen as less legitimate by that side of the adversarial process, who will have been denied the fundamental right to a jury trial.[122]

3.100 The Committee notes that these comments mirror the advice received from victim support groups that victims of crime may feel more confident in verdicts that are delivered after the deliberations of a jury (as discussed in the preceding section).

3.101 Mr Ierace concurred that the community has more confidence in jury verdicts than in verdicts from judge alone trials, because a jury verdict provides 'some guarantee' to the community that the verdict is appropriate:

> … I think the negative side of trials by judge alone is, firstly, that even where both parties agree to that process, the community has an interest in trials by jury and to some extent that interest is downplayed when there are trials by jury, certainly if they are to occur on a large scale. What I am saying is that it is not only in the interests of the accused to have the right to trial by jury but it is some guarantee to the community that the verdict is an appropriate one, whatever it is. Arguably, in some cases that guarantee is lessened when it is a trial by judge alone.

3.102 Some Inquiry participants were concerned that if unpopular verdicts were reached by judges sitting alone, there would be a hostile community reaction directed against individual judges. By contrast, it was suggested that a jury reaching an unpopular verdict is protected from any negative reaction through their anonymity.

3.103 In this regard, Mr Ierace observed that the anonymity of the jury provides protection from any backlash if an unpopular verdict is reached, whereas a judge sitting alone would be the sole focus of any negative reaction to a verdict:

> … when a verdict is given by jury that many would regard as contrary to the public expectation of what the verdict would be – with the possible exception of recent publicity in the *Daily Telegraph* in relation to the Lindy Chamberlain trial – that verdict is not criticised, it is accepted, and the community moves on. I can well imagine that if there was a very large increase in the number of trials by judge alone that that would not necessarily be the same practice by certain aspects of the media. In other words, that is, for example, where there was an acquittal that was not well received by the media, the judge would come in for personal criticism.[123]

3.104 Mr Spohr noted that the anonymity of the jury, combined with the fact that there are twelve jurors as opposed to a single judge sitting alone, protects the jurors from feeling the pressures and criticism that may result from the trial:

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122 Answers to questions on notice taken during evidence 11 August 2010, Mr Howard, pp 1-2.

123 Mr Ierace, Evidence, 11 August 2010, p 27.

> In essence the anonymity of the jury protects everybody involved in the process … The beauty of having the jury there is that you have anonymous people representing, in effect, the people, making the decision. And so they are less open to criticism and assuming they have been led well through the whole process can ground the decision that has been made, whereas a judge will, in the same way, get presently subjected to criticism in relation to sentence.[124]

3.105 Similarly, Mr Breen suggested that the safety of the judiciary may be jeopardised in instances where the community has a strong negative reaction to the verdict delivered by a single judge, whereas a jury is largely protected from outbursts of anger:

> Another issue for consideration with judge alone trials is the security of the trial judge. One benefit of jury trials is that any opprobrium for a disappointing verdict falls on the jury and there would be no question of individual jurors suffering recriminations from a disgruntled accused or bearing the acrimony of biased media commentators. A judge sitting alone by way of contrast may encourage people to focus blame for the verdict on the judge and cause the judge to be vilified, or worse, to be threatened, intimidated, and even physically harmed.[125]

3.106 However, Ms Mary Macken, President, Law Society of NSW observed that '[t]here is ample scope already for people to vent blame on the system. It is an issue currently and will remain an issue whether it is judge alone or judge with jury'.[126]

3.107 Mr Andrew Wilson, Manager, Practice Department, Law Society of NSW, suggested that it is part of the role of the judiciary to take responsibility for the decisions that they make throughout the course of the trial:

> … judges are eminent people of our society who are appointed to these positions to do that job. They make the decisions and during the course of a trial they will make decisions favourable to the accused and some favourable to the prosecution. I feel that is part of their role.[127]

Committee comment

3.108 The Committee notes the views expressed by some Inquiry participants that a verdict reached by a judge sitting alone may be perceived as less legitimate by the community than a verdict reached by a jury. Some Inquiry participants suggested that the involvement of the community's voice in the criminal justice system through the use of juries to determine verdicts instills confidence in the community that justice has been served, even in instances where the community may disagree with the verdict.

3.109 The Committee acknowledges that there can be dissatisfaction within the community with verdicts reached in the criminal justice system. The Committee also acknowledges the concerns of some Inquiry participants that a judge sitting alone may become the focus of any adverse community reaction to verdicts that are unpopular or controversial.

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124 Mr Spohr, Evidence, 12 August 2010, p 23.

125 Submission 4, Mr Peter Breen, p 2.

126 Ms Mary Macken, President, Law Society of NSW, Evidence, 12 August 2010, p 11.

127 Mr Andrew Wilson, Manager, Practice Department, Law Society of NSW, Evidence, 12 August 2010, p 8.

3.110 The Committee considers that the judiciary is sufficiently robust to deal with any criticisms that may eventuate from verdicts delivered by judges sitting alone. The Committee is confident that, in the event that a particularly controversial or divisive judgment was reached by a judge sitting alone, appropriate action would be taken to ensure the safety of the judge in question.

Representing objective community standards

3.111 Some Inquiry participants argued that juries are better able to reflect objective community standards than judges. In this regard it was suggested that if there were to be an increased prevalence of judge alone trials, these objective community standards would not be appropriately represented by a judge sitting alone.

3.112 Some Inquiry participants suggested that juries are able to resolve issues without allowing personal prejudices or beliefs to influence the application of objective community standards. When questioned on this perception, Mr Cowdery observed that juries are generally able to follow directions from the judge to set personal prejudices aside and determine a case on the facts being presented:

> … responsible counsel and judges in their directions, if it is suspected that some kind of prejudice or some kind of preconception might have some bearing on the outcome of the case, will make submissions about that and give directions about that. I have seen that done. By and large I think we can have confidence that juries do follow directions given by judges. Not always. There are some who cannot resist the temptation to go on the Internet and look up everything about everybody or to make inspections of crime scenes in the middle of the night, and that causes problems, but they are very rare. They are exceptions.[128]

3.113 In addition, Mr Cowdery expressed confidence in the ability of juries to resolve matters in a fair and balanced way, that takes into consideration the range of different cultural and ethnic backgrounds that are represented in a jury room:

> … when you get the twelve jurors in the jury room together I am confident – perhaps it is misplaced confidence – that when you get twelve people from different backgrounds coming together and discussing matters, they will do it in an equitable way, in a balanced way and in an inclusive way and not prey on prejudices that might be apparent in the way they operate on decision-making by the jury. When we are a multicultural, multi-ethnic, multinational community, and that is represented on juries, I do not think prejudice overcomes reason and reasonableness in the approach juries adopt.[129]

3.114 Mr Cowdery noted that the forthcoming broadening of the jury selection criteria will serve to further increase the representative nature of juries:

> Jury selection, which is going to be broadened in the near future I gather, tries to sample the population fairly widely to bring in people from all kinds of backgrounds.

128 Mr Cowdery, Evidence, 11 August 2010, p 21.

129 Mr Cowdery, Evidence, 11 August 2010, p 21.

> It is going to be an even more representative sample when the new provisions are implemented.[130]

3.115 Mr Howard suggested that juries are better able to discern the facts of a case than a judge, because the jury is able to collectively examine and question the veracity of the witnesses and the evidence that is presented throughout a trial:

> … juries have a real function to perform. They have a fact-finding capacity based on the collective nature of a jury and its collective wisdom and common sense that a single judge just does not have. No matter how commonsensical, intelligent and decent he or she may be, a judge does just does not have the capacity to look at things from the many angles that a jury does. Over many years of the many jury trials that I have prosecuted, and defended, I have acquired an immense respect for the capacity of juries to find the facts. Not just in cases involving issues such as reasonableness or standards that should be left to public measure, but just simple everyday establishing what the fact is.[131]

3.116 Ms Macken indicted that the Law Society of NSW also believes that '…twelve people chosen to be representatives of society are very good at determining credibility and facts'.[132] Ms Macken noted that the jury system is based on the premise that trial by one's peers is likely to produce a fairer outcome than a trial before a member of the judiciary:

> The whole basis of the jury system is that you are not going to be tried by peers of the realm or people in established power; you will be tried by representatives of your community and, therefore, you will receive a fair hearing.[133]

3.117 It was also argued by some Inquiry participants argued that juries are better able to reflect changes in community values as compared to a judge sitting alone. For example, Mr Sphor highlighted the ability of a jury to reflect the evolution of community standards over time, as compared to a member of the judiciary who, as an individual, may not be able to as readily identify changes in societal expectations:

> The standards of ordinary people – we refer to these things as having definitions but the truth is they are extraordinarily ephemeral; and they should be because they are moveable feasts. What was indecent in the 1920s may not be indecent now. Without wanting to unduly criticise anybody, but in this case judges, there is a very good argument to say that judges, not least because they are individual but also because of their particular background and because they have by their very nature been involved in the criminal justice process for many years and maybe jaded by that, may not necessarily be as representative.[134]

3.118 NSW Young Lawyers emphasised that juries are better equipped to reflect changing community standards and that the community has a 'vested interest' in being part of the criminal justice process:

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130 Mr Cowdery, Evidence, 11 August 2010, p 21.

131 Mr Howard, 11 August 2010, pp 44-45.

132 Ms Macken, Evidence, 12 August 2010, p 13.

133 Ms Macken, Evidence, 12 August 2010, p 11.

134 Mr Spohr, Evidence, 12 August 2010, p 21.

> The community has a vested interest in jury trials. The jury is the means by which changing community values – particularly on changeable issues such as indecency and reasonableness – are best represented in the criminal justice system.[135]

3.119 Some Inquiry participants questioned the ability of a judge sitting alone to reflect objective community stands in their judgments. Concerns centered around the perception that judges share a relatively narrow range of life experiences, and that a single person determining the facts by themselves does not bring the same rigour to decision making as a group of twelve jurors.

3.120 For example, Mr Ierace argued that the ability of judges to reach a dispassionate conclusion may be overstated, and referred to their narrow life experiences:

> I think one could easily overstate the ability of the judge to deal with their own emotions and arrive at the appropriate decision dispassionately. They are, first of all, human beings and I think as a community we place too high an expectation on judges being able to deal with such matters and, secondly, to overcome, if you like, their often, in an experiential sense, narrow backgrounds. In order to become a judge a prerequisite is that you are a very good lawyer and in order to get to that point of being a good lawyer with appropriate experience it does not necessarily but it usually follows that you have spent many years as a barrister or a solicitor long hours and weekends at the one occupation, so the option of trial by judge alone I think should be realistically understood as not a match for the broad human experience of a jury.[136]

3.121 Mr Howard noted that judges tend not to be representative of the ethnically diverse community in NSW, whereas a jury is drawn from a diverse pool of people who bring varied life experiences to the decision making process:

> This is with no disrespect to any individual judge at all, but a typical judge comes from a relatively privileged and, often elite, background. I do not think they could be said to be necessarily representative of our community at all. I think if you look at the ethnicity of the make-up of the bench, for example, it would not fairly reflect our population in terms of its composition and multi-ethnicity. That is an issue as well because when you have a jury, particularly with a broadened jury pool that makes an effort to be representative of the community, then any accused who has a guilty verdict brought against them at least knows it was not some well-connected member of an elite who has made the determination but that it was the community of which they are a part.[137]

3.122 Mr Howard also observed that a single judge does not have the 'collective wisdom' of a jury and suggested that judges are representative of a very narrow segment of the community:

> Judges are fallible. They do not have the collective wisdom of a jury. They are certainly not representative of the community. They tend to be a well-connected elite, of largely Anglo-Saxon background. Decisions in criminal cases should not reflect the view of an elite. Respect for the law will diminish unless the community continues to play the major role in the decision making process …[138]

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135 Answers to questions on notice taken during evidence 11 August 2010, NSW Young Lawyers, p 3.

136 Mr Ierace, Evidence, 11 August 2010, p 31.

137 Mr Howard, Evidence, 11 August 2010, p 45.

138 Submission 11, p 8.

3.123 Mr Howard argued that the group decision making process that a jury must go through to reach a verdict provides a much more robust decision than a judge sitting alone:

> The collective common sense of a jury reflects the rich variety of outlook within the community, disciplined by the requisite debate and discussion, in the pursuit of the unanimity that is required to reach a verdict. A Judge merely has to debate with himself/herself, which does not always make for a robust dialogue.[139]

3.124 Mr Cowdery also highlighted the benefit of having twelve people attempting to resolve the issues under consideration during a trial, highlighting that a jury will need to resolve any conflicts of opinion in order to reach a verdict:

> … in those sorts of situations where there might be differing views, it is better to have those views being shared, discussed and moderated in a jury process rather than running the risk of one person having a particular set of views, which would then prevail without any of that discussion and compromise that is part of a jury process … Prejudices are something that very often are referred to in counsels' addresses and the judge's summing up to the jury. Bear in mind that on a jury you will still have twelve mixed people most likely of different ethnicities, different religions, different backgrounds, different levels of education et cetera. You have much more of an opportunity for conflict and the resolution of conflict within the jury if those sorts of issues are going to be present.[140]

3.125 Mr Cowdery observed that a judge sitting alone would likely be more constrained to strictly apply the law, and may not take into consideration factors such as compassion when reaching their verdict:

> … juries are known to bring in merciful verdicts of not guilty in circumstances where the offence has in fact been proven. Our system is flexible enough to cope with that – it has for centuries – whereas a judge would not operate that way. A judge would be much more constrained, I suspect, to apply the law strictly and not to import that human quality of compassion or whatever it might be. [141]

3.126 One Inquiry participant, Mr Malcolm McCusker QC, a barrister from Western Australia, disagreed that judges are less able to reflect objective community standards when reaching a verdict in a trial, or that a judge sitting alone is less able to reach a considered verdict than a jury. In this regard, Mr McCusker argued that judges regularly apply 'objective community standards' in civil cases, and that there was no reason to believe that judges would be unable to do the same in criminal cases:

> Judges have the experience and ability to apply such "objective community standards" and do so on a regular basis in civil cases. There is no reason to think that they will not be able to do so, or that juries would be better fitted to do so, in criminal trials. The concepts of reasonableness, negligence, indecency, obscenity or dangerousness are concepts which judges deal with regularly. It is mere speculation to believe that juries, selected at random, will be any better able to do so than judges. Furthermore, Magistrates now deal with quite serious criminal offences, sitting alone, and without a

139 Submission 11, pp 8-9.

140 Mr Cowdery, Evidence, 11 August 2010, p 17.

141 Mr Cowdery, Evidence, 11 August 2010, p 17.

> jury, and no-one has ever suggested that Magistrates are less able to apply "objective community standards" than a randomly selected jury.[142]

3.127 Furthermore, Mr McCusker observed that understanding of objective community standards will vary from jury to jury, and within a single jury:

> I do not see why it should be presumed that a jury will be better able than a judge to apply "objective community standards such as reasonableness, negligence, indecency, obscenity or dangerousness". These are questions which judges, in civil actions, are accustomed to applying on a regular basis. Research has shown that there are widely differing views held in the community on a number of such matters, and it is a total fallacy to suggest that there is one "community standard". The views of jurors may vary both within the jury and from jury to jury.[143]

3.128 Mr McCusker suggested that the training that judges received places them in a better position to objectively determine the guilt or innocence of the accused, as opposed to a group of jurors that are randomly drawn from the electoral role:

> Indeed, in any event, we appoint judges because of their education and their ability, it is hoped, to bring to bear an objective mind in considering guilt or innocence. We appoint jurors because they happen to be drawn from the electoral list and are unlucky enough not to be able to get out of jury service.[144]

3.129 Mr McCusker also refuted the suggestion that judges represent a narrow sociological portion of the community:

> On the question that is often raised of judges coming from a distinct sociological group whereas you want judgement by your peers, they say that someone from a working-class suburb with little education should not be judged by someone who comes from an entirely different environment, having gone to a private school, for example, and having gone on to university and having come from a wealthy background. I cannot see the logic or sense in that. For a start, no analysis has been made of the backgrounds of judges. I know in Western Australia, and I imagine it is so in other States, that many of the judges do not come from that kind of background that is attributed to them.[145]

3.130 The Law Society of NSW also noted that '[l]aw students, who go on to become judges and public prosecutors have varied backgrounds. They bring a wealth of experience to the performance of their office'.[146]

Committee comment

3.131 The Committee notes the extensive debate among Inquiry participants on the ability of judges and jurors to better reflect objective community standards in the determination of trials in the criminal justice system.

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142 Submission 3, p 2.

143 Answers to questions on notice taken during evidence 13 August 2010, Mr McCusker, p 1.

144 Mr McCusker, Evidence, 13 August 2010, p 3.

145 Mr McCusker, Evidence, 13 August 2010, p 3.

146 Answers to questions on notice taken during evidence 12 August 2010, Law Society of NSW, p 9.

3.132 Inquiry participants discussed the ability of the jury to set aside personal prejudices when reaching a verdict and the ability of a jury to reflect evolving community values. Some Inquiry participants questioned the ability of a judge sitting alone to reflect objective community standards, and argued that a judge sitting alone may not bring the same rigour to decision making as a group of twelve jurors.

3.133 The Committee believes that both juries and judges bring different attributes and strengths to deliberations in criminal trials, and that neither judges nor juries can be considered superior, or inferior, to the other.

Impact of the proposed model on the role of the jury

3.134 Some Inquiry participants expressed concern about the potential impact of the proposed model on the role of the jury in the criminal justice system. It was suggested that as the proposed model will lead to an increase in judge alone trials, and a corresponding decrease in jury trials, the importance of the jury will be undermined. This lead some Inquiry participants to advocate strongly for the primacy of the jury in the criminal justice system.

3.135 A number of Inquiry participants argued that jury trials should remain as the preferred mode of trial in the criminal justice system. For example, Mr Howard was concerned that '[o]nce you take away from the people the absolute right, not the qualified right, to partake in jury trials and to have as a community a crime determined by a community jury, that is the thin end of a very nasty wedge'.[147]

3.136 Mr Odgers of the NSW Bar Association summarised the arguments that are advanced in support of the jury system:

> … to summarise some of the arguments in favour of jury trials – they involve the community in the process of criminal justice; they reflect democratic principles; they bring the collective sense and common sense of ordinary people into the criminal justice system; and they infuse community values into that system. They are also said to be a safeguard against arbitrary exercise of power by the state.[148]

3.137 Mr Sphor from NSW Young Lawyers explained that the jury system is one of the few opportunities for the community to participate in the criminal justice system, and that this is a right that has been upheld by the High Court:

> We have mentioned obliquely in our submission a case in which it was decided in the High Court that the Australian Constitution obliges indictable matters to be dealt with in front of a jury of 12 in the Commonwealth domain. One comment that has been made a couple of times by the High Court is that the community has the right to participate and it is one of the few ways in which they can participate. It is one of the main things that judges say to jurors when they are either called for jury duty or discharged from their obligations: 'This is one of your few opportunities to participate in the criminal justice process.'[149]

147 Mr Howard, Evidence, 11 August 2010, p 45.

148 Mr Odgers, Evidence, 12 August 2010, pp 36-37.

149 Mr Spohr, Evidence, 12 August 2010, p 19.

3.138 The NSW Young Lawyers identified *Brown v The Queen* (1986) 160 CLR 171 and *Brownlee v R* (2001) 207 CLR 27 as two relevant High Court cases that express support for the right of an accused to be tried by a jury comprised of twelve of their peers.[150]

3.139 In *Brown v The Queen*, Justice Deane argued that the determination of the guilt or innocence of an alleged offender by a panel of ordinary and anonymous citizens is an 'essential conception' that helps to ensure that the administration of justice is 'unbiased and detached':

> … regardless of the position or standing of the particular alleged offender, guilt or innocence of a serious offence should be determined by a panel of ordinary and anonymous citizens, assembled as representatives of the general community, at whose hands neither the powerful nor the weak should expect or fear special discriminatory treatment. The essential conception of trial by jury helps to ensure that, in the interests of the community generally, the administration of criminal justice is, and has the appearance of being, unbiased and detached.[151]

3.140 Mr Howard argued that it is the seriousness of indictable offences, where there is a risk that a person will be deprived of their liberty, that warrants the involvement of the community in the criminal justice system:

> What we are talking about here now are indictable matters, as you all know. We are talking about the serious matters that can result in people being incarcerated and going to jail. These are the most serious matters.
>
> We already have summary jurisdiction where, of course, there is no jury in the local court. We have pretty well done away with the jury in all civil matters, bar occasionally defamation matters where you might have a jury but it is still very rare. I feel that the issue involved in indictable offences that can result in somebody's liberty being taken away from them is so serious that it is an issue that the community needs to have a major role in.[152]

3.141 Mr Howard further highlighted the importance of trial by jury in our society, suggesting that trial by jury is a fundamental aspect of democracy that enhances the quality of the criminal justice system:

> Trial by Jury is part of our 'Deep Structure' as a society, our 'DNA' - it is a fundamental component of our democratic way of life; participation in jury duty enhances both the quality of result and the respect that the community has for the decision in any given case and for the system itself. It defines the quality of our criminal laws and our system of criminal justice. The procedures applicable to jury trials have evolved over time to reflect modern trends of efficiency, but the core idea has been the same for centuries - that a person charged with serious crime should be tried by his/her 'country' (i.e., peers).[153]

3.142 Despite the strong support for the jury system from the majority of Inquiry participants, one participant, Mr Malcolm McCusker, advocated strongly *against* the use of juries in the criminal

150 Submission 9, NSW Young Lawyers, p 2.

151 *Brown v The Queen* (1986) 160 CLR 171 at 202 per Deane J.

152 Mr Howard, Evidence, 11 August 2010, p 44.

153 Submission 11, p 6.

justice system. Mr McCusker was of the view that whilst historically juries were a group of the accused's peers, the modern jury has moved away from that position:

> … it was a system that was founded in small local communities where, indeed, the jury were selected because they knew the accused and the other persons involved and therefore were considered better capable of making an assessment of their guilt or innocence. We have swung away from that.[154]

3.143 Mr McCusker highlighted that the random selection of jurors from the electoral roll, combined with the rights of both the defence and prosecution to peremptory challenges to have certain jurors dismissed, means that in practice, it is highly unlikely that a jury will be made up of one's peers:

> It sounds great but there are a number of problems with it. First, juries are selected at random, as we know. In Western Australia, and even in New South Wales too, there is a right to a number of peremptory challenges—that is challenges of jurors without cause. I know from experience that some lawyers, be they prosecution or defence, try to pick jurors who they think—I do not know how they get to this conclusion—might be favourable to their cause. So if the juror's address seems to be from a working-class suburb and the person on trial is a working-class person there is an attempt made to have that kind of jury. Sometimes where it is an offence against a female some lawyers take the view that they try to keep as many females off the jury as possible.
>
> But the fact is that although we talk about judgement by one's peers, it is theoretically possible and by no means far-fetched that you could have a jury consisting mainly of 18-year-old unemployed people, and that is supposed to be the collective wisdom and experience of representatives of the community.[155]

Committee comment

3.144 The Committee notes that the majority of Inquiry participants were strongly supportive of the continued involvement of the community in the criminal justice system through the use of juries. One Inquiry participant presented thought-provoking arguments as to the merits of the jury in today's criminal justice system, and questioned whether the modern jury can be considered to be representative of the accused's peers.

3.145 It is clear from the views expressed on this issue that the proposed model raised important issues for many within the legal system.

Concluding remarks

3.146 The Committee notes the concerns expressed by some Inquiry participants in regards to the potential impact of the proposed model on the criminal justice system, as discussed in this Chapter. These concerns related to whether any significant efficiencies may be achieved by increased numbers of judge alone trials, the impact of an increase in judicial decision making and subsequent appeals, and the importance of community involvement in the criminal justice system. We do not consider, however, that any of the issues raised by Inquiry stakeholders in

154 Mr McCusker, Evidence, 13 August 2010, p 3.

155 Mr McCusker, Evidence, 13 August 2010, p 2.

this regard detract significantly from the overall benefits that may be achieved by the proposed model.

3.147 While it is not within our terms of reference to consider the merits of jury trials versus judge alone trials more broadly, the contributions made by Inquiry participants as set out in this Chapter have informed a robust debate on the comparative views on jury and judge alone trials which has assisted the Committee in its examination of the proposed model.

3.148 The Committee considers that although efficiencies may be achieved by judge alone trials, it should not be the primary consideration in evaluating the proposed model for judge alone trials. In addition, a potential increase in the number of judicial decisions will provide greater transparency in decision making, and allow the community to develop an enhanced understanding of why a particular verdict has been reached.

3.149 The Committee also believes that the proposed model will not diminish the involvement of the community in the justice system. While there may be an increase in the number of judge alone trials if the proposed model is implemented, the Committee believes that jury trials will remain the preferred mode of trial in the majority of instances.

3.150 On balance, and after careful consideration, the Committee considers that the shift in decision making power from the ODPP to the court in relation to applications for judge alone trials, which is most significant in relation to situations where the accused applies and the prosecution does not consent, is appropriate.

3.151 The Committee believes that the shift in decision making power from the ODPP to the court will assist in ensuring that the determination of applications for judge alone trials is consistent and transparent. We agree that it is also a logical extension of the court's role as an arbiter of disputes between the prosecution and the defence.

3.152 The Committee will now proceed to carefully examine each aspect of the proposed model for judge alone trials, before reaching a final conclusion on the merits of the proposed model.

Chapter 4 Applications and consent

This Chapter commences the Committee's examination of the elements of the proposed model set out in the Inquiry terms of reference (see page iv).

The Chapter begins by exploring issues raised by Inquiry participants in relation to the timeframe for applying for a judge alone trial, including the appropriate length of the time frame and forum shopping. The Chapter then considers a number of issues related to making an application for a judge alone trial under the proposed model, including the need to ensure that the accused has made an informed application and allowing both parties to make an application. The Chapter also discusses the aspect of the model that enables the accused to veto the prosecution's application for a judge alone trial, in contrast to the current situation where the Office of the Director of Public Prosecutions (ODPP) has the ability to veto an accused's application. The Chapter concludes by examining two instances proposed by some Inquiry participants where a judge alone trial may be preferable: crimes involving the consideration of abhorrent or highly technical evidence.

Timeframe for requesting a judge alone trial

4.1 Under the proposed model, applications for a judge alone trial are to be made not less than 28 days before the commencement of the trial. Applications may be made later than 28 days before the trial, but only with the leave of the court.[156]

4.2 This differs from section 132 as it is currently drafted, which states that 'an election must be made before the date fixed for the person's trial in the Supreme Court or District Court'.[157]

4.3 As to the rationale for the timeframe in the proposed model, Ms Penny Musgrave, Director, Criminal Law Division, Department of Justice and Attorney General, advised that the 28 day period was selected primarily to maximize the number of instances where the identity of the trial judge is not known, so as to avoid instances of forum shopping and secondly, to remove the need to summons a jury if the trial is to proceed before a judge sitting alone:

> Twenty-eight days was selected after some consideration and in part to try to address those concerns about judge shopping and whether or not the identity of the judge was known. One of the considerations was to ensure there was sufficient time to make preparation for a judge-alone trial and avoid the need to summons a jury. If the application is made on the day, the jury has been summonsed and there are no efficiencies built in there, but that is not the prime driver. In a typical case in the metropolitan region, making an application 28 days out from the trial date would mean that the identity of the judge would not be known unless the matter has been case managed. In regional areas it is likely that the identity of the judge will be known because it is a circuit and that circuit will have been fixed. So, selecting the 28 days is a balance and it may not in all cases avoid the identity of the judge being known but it is difficult in regional courts to address that concern.[158]

156 Proposed model, Items Two and Three.

157 *Criminal Procedure Act 1986*, s 132(4).

158 Ms Penny Musgrave, Director, Criminal Law Division, Department of Justice and Attorney General, Evidence, 11 August 2010, p 5.

4.4 There were two areas of concern identified by Inquiry participants in relation to the timeframe for applications included in the proposed model. These issues related to the length of the timeframe, and whether the timeframe would in fact prevent an accused from engaging in forum shopping, particularly in rural and regional courts.

Length of the time frame

4.5 Some Inquiry participants were concerned that the 28 day time frame was too long, arguing that it should be shortened to 14 days to allow for instances where either the prosecution or the defence were briefed on the matter in question close to the trial date.

4.6 In this regard, the Law Society of NSW argued that the timeframe for requesting a judge alone trial should be shortened from the 28 days proposed in the model to not less than 14 days before the commencement of the trial:

> It would be more appropriate if applications could be made not less than 14 days before the commencement of the trial, rather than 28 days, to cater for matters that are assigned close to the trial date.[159]

4.7 Mr Andrew Wilson, Manager, Practice Department, Law Society of NSW, explained that this reduction in the time frame would acknowledge situations where either the prosecution or defence counsel are briefed late in the matter, whilst limiting instances where 'justice shopping' may occur:

> Whilst it is quite unusual it does happen commonly … that a solicitor and barrister are briefed late in a hearing. So whilst the 28 days is there to prevent justice shopping and forum shopping, the submission from the Law Society is that if its dropped to 14 days there is still plenty of time to prevent justice shopping and there is time to allow for those late briefings of solicitors without having to go to the court and seek leave ….[160]

4.8 NSW Young Lawyers was also supportive of shortening the timeframe from the original 28 day period, to 14 days.[161]

4.9 The Queensland Law Society was generally supportive of the 28 day timeframe, highlighting that the proposed model provides that an application for a judge alone trial *can* be made later than 28 days before the trial with the leave of the court.[162]

4.10 The Queensland Law Society argued that this exception is essential to protect the rights of the accused to receive a fair trial, including in instances where counsel is briefed close to the trial date or there has been extensive adverse publicity relating to the case:

> … this provision would benefit a Legal Aid case where counsel has not yet been briefed and an election for a judge alone has not yet been considered. This provision may also benefit an accused who is involved in a high profile trial. In this instance, the accused may have the option of electing to have a judge alone trial after careful assessment of the media response closer to the trial date. We understand that this

159 Submission 8, Law Society of NSW, p 1.

160 Mr Andrew Wilson, Manager, Practice Department, Law Society of NSW, Evidence, 12 August 2010, p 2.

161 Submission 9, NSW Young Lawyers, p 1.

162 Submission 15, Queensland Law Society, p 2; Proposed model, Item Three.

> proposal may have a negative impact on both party and court costs, however, we consider that this provision is essential to preserve the accused's right to a fair trial.[163]

4.11 Ms Musgrave suggested that it may be preferable for the matter of the timing of the application to be managed by the courts themselves rather than by legislation, which would allow for the development of a flexible approach that was responsive to differences in court listing practices:

> The Committee may consider that ultimately the timing of such applications is a matter of courts administration, best left to the courts for management by way of Practice Note, rather than via legislation. Such an approach may allow sufficient flexibility to acknowledge differing listing practices, but also ensure that the issue of whether a judge alone trial is appropriate is considered at the relevant time, i.e., when a trial is listed. This is when the court can make the most practical use of information such as the likely nature and length of the trial.[164]

Forum shopping

4.12 A second issue raised in relation to the timeframe provision was whether it would in fact have the effect of deterring the accused from engaging in 'judge' or 'forum' shopping. The terms 'judge' and 'forum' shopping were sometimes used interchangeably during this Inquiry leading to some confusion.

4.13 The consideration of whether or not to apply for a judge alone trial is a consideration of which 'forum' it is believed would best facilitate the outcome desired by the applicant. 'Judge shopping' in its most commonly used sense involves an accused using available procedural mechanisms to attempt to orchestrate their appearance before a particular judge.

4.14 In the context of this Inquiry the two concepts are interrelated. One of the general concerns expressed about the proposed model is that it will encourage the accused to consider whether to make an application for a judge alone trial ('forum shopping') on the basis of the identity of a particular judge that may be likely to hear the case ('judge shopping'). For the sake of clarity in this report the term 'forum shopping is used to describe this situation.

4.15 As noted at paragraph 4.3, Ms Musgrave observed that minimising the opportunity for forum shopping is one of the primary intents of the 28 day time frame.

4.16 The Department of Justice and Attorney General advised that two aspects of the proposed model – the 28 day time frame and requiring the consent of the court before an accused can withdraw consent for a judge alone trial – will reduce the risk of the accused determining whether or not to make an application for a judge alone trial based on the identity of the trial judge:

> … the time restriction under point 2 of the proposed model, and the limitations on the withdrawal of consent once given, under point 10 of the model, should

163 Submission 15, p 2.

164 Answers to questions on notice taken during evidence 11 August 2010, Ms Penny Musgrave, Director, Criminal Law Division, Department of Justice and Attorney General, pp 12-13.

> significantly mitigate against the risk of the accused basing his or her decision to opt for a judge alone trial or a jury trial on the known identity of the trial judge.[165]

4.17 Some Inquiry participants were concerned that an accused's decision to make an application for a judge alone trial may be influenced by their desire to have their matter heard by a particular judge. In this regard, it was suggested that an accused facing a jury trial may make an application for a judge alone trial on the basis of knowledge or an assumption about the particular judge who may preside over the trial.

4.18 Mr Nicholas Cowdery QC, Director of Public Prosecutions, suggested that defence counsel would be inclined to engage in forum shopping, in an attempt to ensure that the matter was heard in the forum that is more likely to provide a favourable outcome for the accused:

> The question really I think is that defence representatives in particular will seek to take advantage of an opportunity that presents itself. If, when the crunch time comes, they decide that a judge is going to be more favourable to them than a judge and jury, they will make an application for a judge-alone trial.[166]

4.19 Mr Cowdery observed that the issue of forum shopping was an infrequent problem in NSW.[167] Mr Cowdery continued to note that applications for judge alone trials are more likely be based on the defence's assessment of the substance and nature of the case, rather than if a judge or jury would more be lenient:

> How frequently does the problem arise? I think very infrequently in terms of forum shopping. I think if an application is going to be made by the defence for a judge-alone trial, it is on the grounds of the substance and the nature of the case rather than trying to guess that the judge is going to be more lenient than a jury.[168]

4.20 Mr Malcolm McCusker QC, a barrister from Western Australia, noted that in his experience forum shopping was rare, but acknowledged that it was possible that people preferred one judge over another on the basis of how a judge conducts themselves during a trial, rather than their perceptions of honesty or dishonesty:

> … I do not know whether it happens much if at all in NSW but I have never come across an instance where it happened or was allowed to happen. But I think sometimes people say, "I prefer Judge X to Judge Y", not for reasons to do with that judge's perception of honesty or dishonesty but for reasons to do with the way the judge conducts himself or herself in court.[169]

4.21 Some Inquiry participants also argued that the 28 day application time frame would not prevent applicants in regional and rural courts from knowing the identity of the trial judge when an application for a judge alone trial is made, because judges are rostered to appear because in regional and rural courts far in advance.

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165 Submission 16, Department of Justice and Attorney General, pp 2-3.

166 Mr Nicholas Cowdery QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Evidence, 11 August 2010, p 21.

167 Mr Cowdery, Evidence, 11 August 2010, p 21.

168 Mr Cowdery, Evidence, 11 August 2010, p 21.

169 Mr Malcolm McCusker QC, Evidence, 13 August 2010, p 8.

4.22 Ms Musgrave acknowledged that the three tiers of court system that exist in NSW – inner Sydney, outer Sydney, and regional areas – makes it difficult to ensure that the proposed model is equally applicable and effective in all courts:

> … in some regional courts you might have circuit sittings or you might have a judge sitting in Wollongong permanently or sitting up in Newcastle permanently. It is almost as though there are three tiers. You have a metropolitan region, where it rotates all the time; you have the outer metropolitan, where you might have a fixed judge; and then you have the broader regional areas where you have circuit court sittings. It is difficult to find a model that fits all and you do not want to prejudice those regional areas by saying, "You cannot have a judge-alone trial because you will never be able to make an application when the identity of the judge is not known."[170]

4.23 Mr Cowdery highlighted that while the issue of forum shopping could be overcome in central Sydney courts by enacting the 28 day time frame for applying for a judge alone trial, it is more problematic in outer Sydney, where judges are rostered to appear six or twelve months in advance:

> In the Downing Centre 16 or 17 courts are sitting at any one time. Any judge, on a Monday or Wednesday, can come into any court to commence a trial. You do not know who it is going to be and you do not find out, usually, until the day of the trial. You might find out the day before but usually not until the day of the trial. So, the opportunities for making a considered decision in order to manipulate that situation in some way in Sydney are non-existent, really. So, 28 days would be fine in Sydney, as it is called, the Downing Centre.
>
> In Sydney west – Campbelltown, Parramatta and Penrith – the situation is somewhat different and, again, it is different between Parramatta and the other two. Judges are usually rostered into those courts for six months or twelve months at a time and there is some movement, some rotation. But you know who the judge is going to be or who the judges are going to be for at least the next half year.[171]

4.24 Mr Cowdery further noted that in regional and rural areas the identity of judges is known well in advance, meaning that the 28 day application period would not overcome concerns that the identity of the trial judge may influence an accused's decision to apply for a judge alone trial:

> It is different in the country. Country is a bit of a mix. In Wollongong, Newcastle and Lismore we have resident judges and they do not change. In Wollongong it is one judge doing trials. In Newcastle it is one or two. In Lismore it is one. So, again, you know who the judge is going to be, and 28 days or six months would not make much difference. On the country circuits, the rosters for country circuits are usually drawn up six months in advance or for six-month blocks, and it is possible to know who is going to be in a particular country town for a particular sitting. So, 28 days would not be sufficient to cover that situation in relation to country circuit courts. So, it is a mixed bag.[172]

170 Ms Musgrave, Evidence, 11 August 2010, pp 5-6.

171 Mr Cowdery, Evidence, 11 August 2010, pp 20-21.

172 Mr Cowdery, Evidence, 11 August 2010, p 21.

4.25 Mr Mark Ierace SC, Senior Public Defender, NSW Public Defenders Office, suggested that an argument may be advanced that a provision was needed in the proposed model to exclude the option of trial by judge alone if the identity of the judge is know in advance, in order to prevent judge shopping:

> It may be argued that a provision is needed that will have the effect of excluding the option of trial by judge alone where the identity of the judge is publicly known in advance; that is, in order to avoid the Defence engaging in "judge shopping", by engineering adjournments until the trial comes before a judge regarded as "pro-Defence", then seeking a trial by judge alone before that judge.[173]

4.26 However, Mr Ierace noted that such a provision would prevent applications for judge alone trials in many regional and rural courts:

> Such a provision would have the effect of precluding applications for judge alone orders in regional and some metropolitan District Courts, since the identity of the rostered judge is usually publicly known well in advance. At present there are trials by judge alone in these courts where the judge's identity is known in advance, where both parties are in agreement, but this practice could not continue with such a legislative provision.[174]

4.27 Mr Ierace observed that '… many busy courts such as Lismore (where there is a permanent judge), Gosford, and perhaps Newcastle, Wollongong and Penrith as well, may be precluded by such a prerequisite'.[175] Mr Ierace emphasised that '[i[t is desirable that there be equality of options for the parties, regardless of whether they appear in a country or city court'.[176]

Committee comment

4.28 The proposed model states that applications for a judge alone trial must be made not less than 28 days before the commencement of the trial. This differs from the current situation, where an application for a judge alone trial must be made before the date fixed for the person's trial.

4.29 The Committee notes the concerns of Inquiry participants with regards to the 28 day time frame for submitting applications for a judge alone trial. These concerns related to the length of the time frame and the ability of the timeframe to prevent an accused from engaging in forum shopping, particularly in rural and regional courts.

4.30 The Committee acknowledges the concerns of some Inquiry participants that the 28 day time frame will not prevent forum shopping from occurring in courts in outer Sydney, and in regional and rural areas of NSW. The Committee, however, believes that justice should be administered consistently across NSW, and the fact that judges in these areas are often rostered to appear well in advance means that it would be challenging to design a time frame provision that would take into account these circumstances.

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173 Submission 6, NSW Public Defenders Office, p 5.

174 Submission 6, p 5.

175 Submission 6, p 6.

176 Submission 6, p 6.

4.31 The Committee considers that, on balance, the 28 day time frame is appropriate. The timeframe will also serve to reduce the need to summons a jury when a judge alone trial has been requested. This is because the provision will, in most instances, maximize the number of instances where the identity of the trial judge is not known.

4.32 The Committee notes that the proposed model includes a provision that allows applications to be made later than the 28 days before the trial, with the leave of the court. This will allow counsel, in instances where they have been briefed late on a matter, to apply for a judge alone trial if they deem it to be in the best interest of their client.

Determining applications for judge alone trials

4.33 The current model for judge alone trials provides that only an accused person may elect to be tried by a judge alone, and that the election may only be made with the consent of the ODPP.[177] The proposed model opens the application process to both parties and removes the ODPP's 'veto' power.

4.34 Under the proposed model, if both parties are in agreement, the court must order that the trial proceeds before a judge sitting alone.[178] If the prosecution applies for a judge alone trial and the accused does not consent, then the application is denied and the matter must proceed to a trial with a jury (subject to the jury tampering exception as set out in Item Six of the proposed model).[179]

4.35 If the accused applies for a judge alone trial and the prosecution does not consent, then the court must determine whether or not the matter should proceed without a jury based on an 'interests of justice' test.[180]

4.36 The jury tampering provision is considered in Chapter 6, while the 'interests of justice' test is considered in Chapter 5.

4.37 This section describes the current provisions for determining applications for judge alone trials, as set out in Prosecution Guideline 24, and then examines the following aspects of the proposed model that relate to the determination of applications for judge alone trials:

- allowing both parties to request a judge alone trial
- granting the accused the right to veto applications for judge alone trials made by the prosecution
- including a provision to require the informed consent of the accused.

4.38 Inquiry participants had a range of views, and identified a number of concerns, with these aspects of the proposed model.

177 *Criminal Procedure Act 1986*, s 132(1) and (3).

178 Proposed model, Item Four.

179 Proposed model, Item Five.

180 Proposed model, Item Seven.

4.39 The Committee notes that it has considered in Chapter 3 the shift in decision making power from the ODPP to the courts in relation to several aspects of the proposed model.

Current provisions for determining applications for judge alone trials

4.40 The current judge alone provision in the *Criminal Procedure Act 1986* provide that an election for a judge alone trial may only be made with the consent of the DPP.[181] Mr Cowdery advised that the DPP considers requests for a judge alone trial with reference to the standards set out in Prosecution Guideline 24:

> At present the NSW criminal justice system has a regime whereby an accused may seek a trial by judge alone. The Crown Prosecutor briefed in the matter and therefore with full knowledge of the facts and circumstances of the alleged crime and the antecedents of the accused, acting under delegation, will consider the application pursuant to my Prosecution Guideline 24.[182]

4.41 Prosecution Guideline 24 is set out in Appendix 4 of this report.

4.42 The principle consideration of Prosecution Guideline 24 is '… the achieving of justice by the fairest and most expeditious means available'.[183]

4.43 Prosecution Guideline 24 provides that each application for a judge alone trial should be considered on its merits, with no presumption in favour of granting a request for a judge alone trial. Consent will not be given if there are concerns that the accused is attempting to engage in judge shopping. The Guideline also states that consideration should be given to the community's role in the administration of justice:

> It should be borne in mind that the community has a role to play in the administration of justice by serving as jurors and those expectations and contributions are not lightly to be disregarded … Consent is not to be given where the election has not been made in accordance with section 132(4) of the *Criminal Procedure Act 1986*.[184]

4.44 The Guideline provides that jury trials are preferable in situations where the matter requires the consideration of community values such as reasonableness, provocation, dishonesty, indecency or substantial impairment:

> Trials in which judgment is required on issues raising community values - for example: reasonableness, provocation, dishonesty, indecency, substantial impairment under section 23A of the *Crimes Act 1900* -or in which the cases are wholly circumstantial or in which there are substantial issues of credit should ordinarily be heard by a jury.[185]

4.45 A jury trial may also be preferable in instances '… where the interests of the alleged victim require a decision by representatives of the community'.[186]

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181 *Criminal Procedure Act 1986*, s 132(3).

182 Submission 5, Office of the Director of Public Prosecutions, p 1.

183 Submission 5 - Appendix 1, Office of the Director of Public Prosecutions, p 1.

184 Submission 5- Appendix 1, p 1.

185 Submission 5 - Appendix 1, p 1.

186 Submission 5 - Appendix 1, p 1.

4.46 Prosecution Guideline 24 also outlines the type of cases which may be better suited to judge alone trials, including cases where:

- evidence is of a technical nature
- there are likely to be lengthy arguments over the admissibility of evidence in the course of the trial
- there is a real and substantial risk that directions by the trial judge or other measures will not be sufficient to overcome prejudice arising from pre-trial publicity or other cause
- the only issue is a matter of law
- the offence is of a trivial or technical nature
- witnesses or the accused person/s may so conduct themselves as to cause a jury trial to abort
- significant hurt or embarrassment to any alleged victim may be reduced.[187]

4.47 In his submission to the Inquiry, the Honourable Justice Blanch, Chief Judge of the NSW District Court, advised that the judge alone provision was inserted into the *Criminal Procedure Act 1986,* during his tenure as DPP.[188] Justice Blanch noted that the original prosecution guideline relating to the judge alone provision stated that there was to be a presumption in favour of granting the accused a judge alone trial if the accused so requested:

> At the time the legislation was framed, there was concern that there should be some safeguard against judge shopping by the representatives of accused persons. The simplest way of achieving that was to give to the prosecution a right to veto the election by an accused for a trial by judge alone. The decision to do that, however, was based on my undertaking that I would issue a guideline to prosecutors making it clear there was a presumption in favour of consenting to the election by the accused.[189]

4.48 Justice Blanch advised that the original guideline stated that '[n]ormally the Crown will give consent if the accused elects', and that '… the Crown should refuse consent where it is clear the election is made as part of a "judge selecting" exercise'.[190]

4.49 Justice Blanch advised that at some point following his departure from the ODPP, the Guideline was altered to state that there was to be *no* presumption in favour of granting an accused's request for a judge alone trial:

> At some stage after I ceased to be the Director of Public Prosecutions, the Director's guideline with respect to judge alone trials was changed … it specifically states there is no presumption in favour of consent and the guideline sets out various considerations in relation to exercising a veto of the accused's election going beyond the original concern about judge shopping.[191]

187 Submission 5 - Appendix 1, p 1.

188 Submission 2, Hon Justice R O Blanch AM, p 1.

189 Submission 2, p 1.

190 Submission 5 - Appendix 1, p 1.

191 Submission 2, p 1.

4.50 When asked on this change in the Guideline, Mr Cowdery advised that following his appointment as DPP, he and a committee comprising of senior lawyers from the DPP undertook a review of all the Prosecution Guidelines. This review found that the existing guideline relating to judge alone trials was too generous, and sought to clearly identify the circumstances under which a request for a judge alone trial should be granted:

> I was appointed in 1994. In the financial year 1995/96 I conducted the first review of the prosecution policy and prosecution guidelines … The process of review involves senior lawyers in the office, so it involved the deputy directors, the senior Crown prosecutor, the solicitor for public prosecutions, the deputy solicitors for public prosecutions and I think at least one Crown prosecutor, perhaps more … the committee thought that that was too generous, too liberal a statement of the policy or the guidelines that should be followed … We then set about identifying what are the circumstances when it would be appropriate to give consent and that was when guideline 24 was created ….[192]

4.51 Mr Cowdery indicated that there have not been any significant changes to the Guideline since 1995/96:

> There has not been any significant change to guideline 24. There was a change when the section was changed to 132 and there have been one or two other changes, for example, when significant impairment was changed from diminished responsibility and so on, but by and large it has remained pretty much the same since 1995/96.[193]

4.52 Mr Ierace advised that defence counsels rarely apply for a judge alone trial, on the basis that since Prosecution Guideline 24 was amended, requests for a judge alone trial have seldom been granted:

> It has been the experience of counsel for the defence over many years that when consent is sought of the DPP for trial by judge alone, it has rarely been forthcoming. When the section was first introduced, applications by the Defence for trial by judge alone often resulted in agreement between the parties that a particular trial was suitable. There was a marked change of DPP policy in the early 1990's, after which it became increasingly clear to Defence counsel that there was little point in seeking agreement, unless the case was exceptional … [194]

4.53 Mr Ierace predicted that if the proposed model were implemented, there would be a significant increase in the number of requests for judge alone trials:

> … defence counsel would perhaps not immediately but within a reasonably short period begin to, as a matter of course, turn their mind to that possibility and make application. It is not always successfully, I imagine, but there would be a significant increase in applications …[195]

4.54 Mr Ierace suggested that if the proposed model were introduced, the initial response to applications by the judiciary would provide guidance over the long term as to the most appropriate type of cases in which to request a judge alone trial:

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192 Mr Cowdery, Evidence, 11 August 2010, pp 18-19.

193 Mr Cowdery, Evidence, 11 August 2010, pp 18-19.

194 Submission 6, p 1.

195 Mr Mark Ierace, Senior Public Defender, NSW Public Defenders Office, Evidence, 11 August 2010, p 28.

> If it transpired – let us assume that the proposed model was legislated – then at least initially I think there would be a number of applications made in the Supreme Court in murder trials and then we would be guided in the first instance by the response of the list judge, presuming that is where the application was made, and ultimately by the response of the Court of Criminal Appeal.[196]

Committee comment

4.55 The Committee notes that under the current provision for judge alone trials in section 132 of the *Criminal Procedure Act 1986*, the determination of applications for judge alone trials is dependent on the internally developed prosecutions guidelines of the ODPP.

4.56 The Committee notes that the guideline has not been substantially amended since 1995/96. However, there is no mechanism to prevent the ODPP from modifying the basis upon which applications for judge alone trials are granted or refused.

4.57 The Committee notes the significant change in the content of the Prosecution Guideline relating to judge alone trials between the current and the former DPP, with the removal of the presumption in favour of granting consent to an application for a judge alone trial. The Committee also notes the advice from Mr Ierace that defence counsels rarely apply for a judge alone trial under the current provisions, because it is considered unlikely that such an application would be granted.

Allowing both parties to request a judge alone trial

4.58 Under the proposed model, either the prosecution or the accused may apply for a judge only trial.[197] This differs from the present process, with the *Criminal Procedure Act 1986* currently stipulating that only the accused can apply for a judge alone trial.[198]

4.59 Inquiry participants were generally supportive of this aspect of the model. For example, Mr McCusker observed that the right to apply for a judge alone trial should not be restricted to the defence, because the prosecution may be able to identify a number of reasons as to why a trial should proceed before a judge sitting alone:

> … I agree that it should be open to either party to apply for a judge only trial. That should not be a right confined to the accused, as there may be circumstances which the prosecution can point to, demonstrating that in the interests of justice there should be a judge only trial. For example:
>
> (a) the length of the trial;
> (b) its complexity;
> (c) pre-trial publicity tending to create prejudice either for or against the accused;
> (d) a significant possibility of jury tampering;
> (e) allied to that, a real possibility of jury intimidation, either directly or implicitly, as, for example, in "bikie trials".[199]

196 Mr Ierace, Evidence, 11 August 2010, p 26.

197 Proposed model, Item One.

198 *Criminal Procedure Act 1986*, s 132(1)(a).

199 Submission 3, Mr Malcom McCusker QC, p 1.

4.60 The ODPP expressed the view that if the proposed model were to be implemented, '… then the Crown should also have the right to apply, without the need for defence consent'.[200]

4.61 The Queensland Law Society supported this aspect of the proposed model, noting that it mirrored the current position in Queensland where either party can apply for a judge alone trial.[201]

4.62 The Western Australian Attorney General advised that under the Western Australian judge alone trial provisions either party may make an application for a judge alone trial.[202]

Committee comment

4.63 The Committee considers that allowing either the prosecution or the defence to apply for a judge alone trial is an appropriate provision to include in the proposed model for judge alone trials. The Committee believes that such a provision contributes to the procedural fairness and equality of the model by allowing either party to apply for a judge alone trial in situations where this may be the most appropriate form of trial to determine criminal matters.

Ability of the accused to veto prosecution applications for judge alone trials

4.64 Under the proposed model, if the prosecution applies for a judge alone trial and the accused does not consent, the application is denied and the matter must proceed to a trial with a jury (subject to the jury tampering exception, discussed in detail in Chapter 6).[203]

4.65 Currently, the *Criminal Procedure Act 1986* provides that while the prosecution cannot apply for a judge alone trial, it can refuse to consent to an accuseds' application for a judge alone trial.[204] This means that the right of veto for applications for judge alone trials currently rests with the ODPP.

4.66 The proposed model removes the veto power of the ODPP, with the matter to be determined by the court (on the basis of the 'interests of justice' test, discussed in detail in Chapter 5).

4.67 The proposed model also places a power of veto in the hands of the accused, in that the only time a judge alone trial would proceed without the accused's consent is if there is a risk of jury tampering. Some Inquiry participants expressed concern that the accused should have such influence over the determination of the mode of trial, while other Inquiry participants contended that the right of the accused to a mode of trial of their choice is a critically important element of the proposed model.

4.68 This section examines the arguments present by Inquiry participants both in support of and in opposition to the proposal to provide the accused with the right to veto the prosecutions application for a judge alone trial.

200 Submission 5 - Appendix 2, Office of the Director of Public Prosecutions, p 5.

201 Submission 15, p 1.

202 Submission 12, Western Australian Attorney General and Minister for Corrective Services, p 1.

203 Proposed model, Items Five and Six.

204 *Criminal Procedure Act 1986*, s 132(3).

4.69 Mr Cowdery argued that granting the accused an 'unfettered veto'[205] over the choice of the mode of trial may hinder the administration of justice, and be an inappropriate power to grant to an individual with a vested interest in the outcome of the trial:

> I am submitting that it is an inappropriate power to provide to an accused person because in some cases it may hamper the administration of justice … It would potentially, in some cases, result in longer and more expensive trials having to be conducted before a jury in circumstances where justice could still be done perfectly properly more quickly and more cheaply before a judge alone. It may be that victims would be exposed to embarrassing or humiliating scrutiny. It may be that in the case of truly exceptional cases where there is horrific material that has to be dealt with by a jury, a jury is going to be unnecessarily subjected to that. I think that sort of power of veto is inappropriate to repose in somebody who has an individual interest in the conduct of the case.[206]

4.70 Mr Daniel Howard SC suggested that the proposal to require the consent of the accused would result in a procedural imbalance, whereby the accused was unfairly empowered at the expense of the prosecution:

> The proposal has the serious flaw of upsetting the fine balance of the adversary system, by empowering the accused at the expense of the prosecutor, to have more than an equal say in the matter - the accused can veto trial by judge alone, the Crown cannot. How is that fair? What will victims and the broader community think of this? Both parties have an entirely equal interest in the outcome and should have entirely equal procedural rights. The proposal significantly weakens the procedural equality of the Crown and will engender considerable discomfort among members of the general community, who, through the loss of procedural equality for the prosecutor, are losing their right to insist upon trial by jury.[207]

4.71 Mr Howard argued that if the accused was to be given the right to refuse a judge alone trial if the prosecution applies for one, so to should the prosecution be given the same right in the interests of procedural fairness:

> I think it is fundamental to procedural fairness, that there be procedural equality and equal rights on both sides of the adversarial system. You cannot have one process for defendants, and another for the community (prosecution). In my view, both parties should be able to insist upon trial by jury as a fundamental right.[208]

4.72 Mr Cowdery also contended that the responsibilities placed on the ODPP as representatives of the whole community means that the ODPP is required to take into account far broader considerations than the accused when considering the most appropriate mode of trial:

> The accused is interested in only one thing: getting the best outcome for the accused and the accused's representatives. That is our system; that is the way it works. The Crown has much more onerous responsibilities. The Crown is not there to obtain a conviction. That is not the role of the prosecution. The prosecution is there to present its case as firmly, strongly and fairly as possible and to deal with whatever might be

205 Mr Cowdery, Evidence, 11 August 2010, p 20.

206 Mr Cowdery, Evidence, 11 August 2010, p 20.

207 Answers to questions on notice taken during evidence 11 August 2010, Mr Daniel Howard SC, p 9.

208 Answers to questions on notice taken during evidence 11 August 2010, Mr Howard, p 3.

> put up by the defence and ultimately to make the submissions that are appropriate. In doing all of that the Crown must have regard to the fact that it represents not one person, not the prosecutor, not the policeman in charge of the case, not the victim. The Crown represents the whole community. Everything the Crown does must be in the general public interest. So, a lot of duties and obligations on the Crown are not on the accused.[209]

4.73 However, other Inquiry participants were supportive of the proposal that the accused should have to give consent if the prosecution applies for the trial to proceed before a judge sitting alone. They argued that because the accused has a fundamental right to a trial by jury, only the accused should be able to waive their right to a trial by jury.

4.74 The Department of Justice and Attorney General advised that under the proposed model, the rights of the accused are not endangered because, with the exception of the jury tampering provision, the accused must willingly waive their right to a trial by jury:

> The rights of the accused are not threatened under the proposed model. Under the model, where the prosecution applies for a trial by judge alone, it must only be ordered with the consent of the accused, with the only exception being circumstances where there is a real risk of jury tampering. In most cases, it will be the accused that applies for a trial by judge alone. By doing so, he or she willingly waives the right to a trial by jury …[210]

4.75 Mr Ierace similarly suggested that because a trial by jury is a right of the accused, it is therefore the right of the accused, not the prosecution, to forego right to a trial by jury:

> It is not a matter of balance being required between the accused and the prosecution because the underlying principle is the right of an accused to trial by jury. If the accused chooses to forego that right then it does not follow, to my mind, that the prosecution should equally have that right for a trial by judge alone.[211]

4.76 Mr McCusker was of the view that '[i]f an accused applies for a judge only trial then the trial should be by judge alone'[212], arguing that because the right to a trial by jury belongs to the accused, it is therefore up to the accused to relinquish the right to a trial by jury:

> … in my view if an accused asks for a judge alone trial, then he or she should be entitled to it because it is a right to trial by jury, as it is often said. If it is a right, why should the accused not be entitled to waive the right and say, "I don't want a trial by jury."? [213]

4.77 Legal Aid NSW supported the proposal to require the consent of the accused to a trial by a judge sitting alone, suggesting that the rights of the accused are eroded if they do not have to consent to the mode of trial by which their matter will be determined:

> It is the view of Legal Aid NSW that the proposed model as set out in the Terms of Reference is appropriate. Of particular importance is the requirement that the consent

209 Mr Cowdery, Evidence, 11 August 2010, p 22.

210 Submission 16, p 3.

211 Mr Ierace, Evidence, 11 August 2010, p 25.

212 Submission 3, p 2.

213 Mr McCusker, Evidence, 13 August 2010, p 6.

> of the accused is obtained before an order is made for a trial to proceed by judge alone. Without this requirement the right of an accused to a trial by jury is eroded.[214]

4.78 The Australian Human Rights Commission argued that it was essential that the proposed model retained the requirement to have the accused consent to a judge alone trial, because it would not be appropriate to override the right of the accused to a trial by jury if that is their preferred mode of trial:

> The requirement that the accused must consent for a trial to be by judge-alone (but for the jury tampering exception) must be maintained in any model for amendments to s 132 of the *Criminal Procedure Act 1986*. This requirement provides essential and appropriate protection to the accused's right to have a trial by jury and it would not be appropriate for a trial to be by judge-alone without the accused's consent.[215]

4.79 The Australian Human Rights Commission noted that the judge alone provisions in Western Australia, Queensland, South Australia and the ACT all require the consent of the accused for a judge alone trial to proceed:

> The Commission contends that in accordance with the proposed amendment, it is essential and appropriate that the consent of the accused must be required for a judge-alone trial. This practice reflects the position in Western Australia, Queensland, South Australia and the ACT.[216]

4.80 Mr Stephen Odgers SC, Chair, Criminal Law Committee, NSW Bar Association, noted that there is nothing 'inherently wrong' with granting the accused the power to veto an application for a judge alone trial, suggesting that it was an example of the right the accused possesses, but that is not afforded to the prosecution. Mr Odgers observed that it was not unusual for the accused to have such additional rights, noting that the accused also has the right to silence and can decline to testify at their trial:

> … in any event, so it is said, an accused person has a number of procedural rights in our system of justice which the Crown does not have. It is not a completely balanced system in which the accused and prosecution are treated completely equally. As we all know, the accused has a right to silence and cannot be required to testify. That is a right the accused has which prosecution witnesses obviously do not have, and the prosecution just has to accept that there are certain procedural rights that the accused has in our system which means it is not a purely adversarial system in which both are treated equally. So, to the extent that this might give greater power to the accused, even on this analysis, there is nothing inherently wrong in that.[217]

4.81 Some Inquiry participants suggested that in instances where the prosecution applies but the accused does not consent, the matter should not automatically proceed to a trial before a jury. For example, Mr McCusker argued that in instances where the prosecution has requested a judge alone trial and the accused has not consented, a judge should determine how the trial is to proceed:

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214 Submission 10, Legal Aid NSW, p 1.

215 Submission 17, Australian Human Rights Commission, p 8.

216 Submission 17, p 8.

217 Mr Stephen Odgers SC, Chair, Criminal Law Committee, NSW Bar Association, Evidence, 12 August 2010, p 38.

> It should be open to the prosecution to apply for a judge only trial. If the accused opposes it, then the accused should be given the right to be heard. So there should not be an automatic right on the part of the prosecution if the accused opposes it. But it still should be open to the judge, despite the opposition, to say that for the following reasons there should be a judge alone trial.[218]

4.82 Mr McCusker emphasised that '[t]he accused's failure to consent to the prosecution application should be no more than a factor to be taken into account by the court, when considering the prosecution's application'.[219]

4.83 The Law Society of NSW observed that if the prosecution has applied for a judge alone trial, but the accused does not consent to that application, then the manner by which the trial should be proceed should rightly be determined by the courts:

> In an adversarial system, where the presumption of innocence applies, and the accused has a right to a trial by jury, any departure from this right should be by agreement, or at the initiative of the accused or, where the accused does not consent the issue should be determined by the court in the interests of justice.[220]

Committee comment

4.84 The Committee notes that under the current model for judge alone trials, the prosecution cannot apply for a judge alone trial, but can refuse to consent to an accuseds' application for a judge alone trial. This means that the right of veto for applications for judge alone trials currently rests with the ODPP.

4.85 The proposed model provides that *either* party may apply for a judge alone trial. If the prosecution applies for a judge alone trial and the accused does not consent, the matter must proceed to a trial with a jury (subject to the jury tampering exception). The power to veto any requests by the prosecution for a judge alone trial therefore shifts to the accused under the proposed model.

4.86 The Committee acknowledges that Inquiry participants made compelling arguments both in support of allowing the accused to have such influence over the determination of the mode of trial, whilst others argued that it was an inappropriate power to confer upon the accused.

4.87 Those Inquiry participants who were opposed to the requirement that the accused must consent to a prosecution application to have their trial proceeding before a judge sitting alone argued that granting the accused an 'unfettered veto' was an inappropriate power to grant to an individual with a vested interest in the trial outcome. It was also argued that it was procedurally unfair for the accused to have the right to veto an application, while the prosecution did not possess the same power of veto.

4.88 Those Inquiry participants who supported the requirement that the accused must consent to their trial proceeding before a judge sitting alone contended that, because it is the accused who has a right to a trial by jury, that right should only be able to be taken away with their consent.

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218 Mr McCusker, Evidence, 13 August 2010, p 6.

219 Submission 3, p 2.

220 Answers to questions on notice taken during evidence 12 August 2010, Law Society of NSW, p 1.

It was argued that without the accused's consent to the mode of trial by which their matter will be determined, the rights of the accused would be eroded.

4.89 The Committee notes that the judge alone trial provisions in Western Australia and Queensland require the consent of the accused for the trial to proceed before a judge sitting alone.

4.90 The Committee considers that, if the proposed model were to be implemented in NSW, it is appropriate that the consent of the accused be required for a judge alone trial to proceed, subject to a jury tampering provision (as discussed in Chapter 6). This will ensure that the rights of the accused to a jury trial are protected.

Informed consent

4.91 The *Criminal Procedure Act 1986* currently requires that a judge alone trial can only proceed if the '[j]udge is satisfied that the person, before making the election, sought and received advice in relation to the election from an Australian legal practitioner'.[221]

4.92 However, the proposed model does not require the accused to have received advice from a lawyer before making an application for a judge alone trial.

4.93 The Australian Human Rights Commission said that the requirement for legal advice '… provides an essential mechanism to ensure that any election by an accused for a judge-alone trial is an informed one'.[222] The Commission noted that the judge alone provisions in South Australia, Queensland and the ACT all require the 'informed consent' of the accused to a judge alone trial.[223]

4.94 In this regard:

- the *Juries Act 1927* (SA) requires that the presiding judge must be satisfied that the accused, before making an election for a judge alone trial, sought and received advice in relation to the election from a legal practitioner.[224]
- the *Criminal Code Act 1899* (Queensland) requires that the court must be satisfied that the accused person properly understands the nature of the application.[225]
- the *Supreme Court Act 1933* (ACT) requires that the accused must elect in writing to undergo a judge alone trial, and that the accused must produce a certificate signed by a legal practitioner stating that the accused has received advice in relation to the election, and that the election has been made freely.[226]

221 *Criminal Procedure Act 1986*, s 132(1)(b).

222 Submission 17, p 8.

223 Submission 17, p 8. The relevant sections of each of the Acts are: *Juries Act 1927* (SA), s 7(1)(b); *Criminal Code 1899* (Qld), s 615(3); and *Supreme Court Act 1933* (ACT), s 68B(1)(b).

224 *Juries Act 1927* (SA), s 7(1)(b).

225 *Criminal Code Act 1899*, s 615(3).

226 *Supreme Court Act 1933* (ACT), s 68(B)(1)(a) and (b).

4.95 The Western Australia judge alone trial provisions make no comment on the need for the accused to provide informed consent for a judge alone trial.[227]

4.96 The Australian Human Rights Commission argued that a similar mechanism may need to be inserted into the proposed model to ensure that the accused gives informed consent to the matter proceeding before a judge sitting alone:

> The Commission submits that appropriate mechanisms may need to be included in any proposed amendments to ensure that the accused may make an informed application for a judge-alone trial and can also give informed consent to an application by the prosecution for a judge-alone trial.[228]

4.97 The Australian Human Rights Commission suggested that in order to demonstrate that 'informed consent' has been given in instances where the accused is legally represented, the accused should be required to provide a certificate signed by a legal practitioner stating that they have received appropriate advice and made the consent freely. If the accused is not legally represented, the court should be satisfied that they understand the nature of the applications:

> If the accused is legally represented, they must be required to produce a certificate signed by a legal practitioner stating that the legal practitioner has advised the accused in relation to the application or consent and that the accused person has made the application or election freely. If the accused person is not legally represented, the court must be satisfied that the accused person properly understands the nature of the application or election.[229]

4.98 No other Inquiry participants commented on the need for the accused to make an *informed* consent for a judge alone trial to proceed.

Committee comment

4.99 While only one Inquiry participant raised this issue as an area of concern, the Committee feels that the argument from the Australian Human Right Commission that informed consent must be given for a judge alone trial to proceed is persuasive.

4.100 The Committee notes that section 132 of the *Criminal Procedure Act 1986* currently requires that a judge alone trial can only proceed if the '[j]udge is satisfied that the person, before making the election, sought and received advice in relation to the election from an Australian legal practitioner'.

4.101 The Committee believes that, if the proposed model is implemented, a similar provision requiring the informed consent of the accused after receiving advice from an Australian legal practitioner, should be included as part of the legislation.

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227 See *Criminal Procedure Act 2004* (WA), s 118.

228 Submission 17, p 8.

229 Submission 17, p 9.

Suggested instances where a judge alone trial may be preferable

4.102 Section 132 of the *Criminal Procedure Act 1986* as currently drafted does not specify that any particular type of crime must be heard by a judge sitting alone. However, as noted in paragraph 4.46, Prosecution Guideline 24 identifies a number of cases which may be better suited to trial by judge alone.

4.103 The Department of Justice and Attorney General outlined the circumstances under which a trial may be better suited to being heard by a judge sitting alone:

> Cases which may be better suited to trial by judge alone include where the evidence is of a technical nature, there are concerns that directions from the judge or other measures will be insufficient to overcome jury prejudice resulting from pre-trial publicity, where the witnesses or accused may conduct themselves so as to cause a jury trial to abort, or where the offence is of a trivial or technical nature.[230]

4.104 During the course of the Inquiry, some Inquiry participants identified two instances where judge alone trials may be a more suitable option than a jury trial: heinous crimes, and crimes where the evidence is of a technical nature. It was argued that these cases should be specifically identified as being better suited to a judge alone trial if the proposed model were adopted.

Heinous crimes

4.105 Some Inquiry participants argued that crimes involving particularly heinous acts should always be heard by a judge sitting alone because jurors, who are ordinary members of the community, should not be exposed to the potential emotional trauma that may result from the consideration of abhorrent facts. It was also noted that victims of such crimes may find a jury trial more distressing.

4.106 In this regard, the ODPP suggested that occasionally crimes with particularly repugnant facts are brought to trial, and that it would be appropriate for this type of trial to be held before a judge sitting alone, regardless of the wishes of the accused:

> From time to time cases arise where the facts are truly abhorrent - where extreme and confronting conduct must be proved by the Crown. One such case is to hand now: David Shane Whitby, who has been charged with numerous offences of aggravated sexual and indecent assault of a number of young children. He videorecorded himself performing the most depraved and atrociously cruel sexual acts upon very young children (two to eight years of age). Viewing the recordings, I am told, would be likely to leave even citizens of ordinary fortitude disturbed and traumatised.
>
> Especially in cases of that kind, I suggest, the Crown should have the power to seek trial by judge alone.[231]

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230 Submission 16, p 3.

231 Submission 5 - Appendix 2, p 5. On 8 October 2010 Mr Whitby was found guilty of 120 offences committed against eight children, and was subsequently imprisoned for a minimum of 26 years. The trial was held without a jury. See '"Vile" Whitby jailed for at least 26 years for child sex crimes', *The Sydney Morning Herald* <www.smh.com.au/nsw/vile-whitby-jailed-for-at-least-26-years-for-child-sex-crimes-20101008-16art.html> (accessed 8 October 2010)

4.107 Mr Peter Breen concurred with Mr Cowdery, suggesting that a judge sitting alone was better equipped to deal with 'horrendous' facts than a jury:

> The Director of Public Prosecutions, Mr Cowdery, outlined a particular scenario in his written submission. It is a current case where the facts are horrendous. It involves sexual exploitation of children. To show that information to a jury, according to the Crown Prosecutor, would have such an impact on the jury – psychologically, personally and in every other way you could imagine – that it is not in the public interest for that to happen and the case should go before a judge-alone trial.[232]

4.108 Mr Howard Brown, Deputy President, Victims of Crime Assistance League (VOCAL) noted that in cases involving the sexual assault of children, appearing before a judge sitting alone can be less confronting than appearing before a jury:

> Our view, especially in sexual assault matters involving children under the age of 14, is that a judge-alone trial is by far and away the best way to proceed purely and simply because of the matters where we have been involved in those cases where young girls have been the victims. I do not know whether this was just luck but the judges involved in that particular process—bearing in mind that these particular children were giving their evidence in a CCTV room so they were not actually directly confronting the perpetrator—but the sensitive manner and the dignity in which they treated those children was absolutely exceptional and those kids have come out of that process far less damaged than we anticipated and we believe that was because they did not have to go through that process of that humiliation to which you referred with a jury.[233]

4.109 Prosecution Guideline 24 recognises that there may be instances where a jury trial could be highly traumatic for the victim of crime, and states that a case may be better suited to a trial by judge alone in instances where 'significant hurt or embarrassment to any alleged victim may thereby be reduced'.[234]

4.110 Mr Brown highlighted that VOCAL often received requests from jury members for post-trial counselling, but that it was not equipped to provide jurors with the support that they needed to overcome any trauma that may have resulted as a consequence of exposure to distressing evidence during a trial:

> One of the problems we have as an organisation is that we are constantly being confronted by jurors who come to us because they have no avenue or venue for seeking assistance for counselling after they have been through a trial. They come to us because they see us as a victim support organisation and they identify themselves as a victim … we have had five cases where all 12 jurors have come to us en masse because of the trauma to which they have been exposed. I have to be perfectly frank with you. As an organisation we are not set up to be approached by 12 jurors because we have really strict rules about confidentiality and things of that nature and you cannot debrief an entire jury because it would be completely inappropriate.[235]

232 Mr Peter Breen, Evidence, 11 August 2010, p 39.

233 Mr Howard Brown, Deputy President, Victims of Crime Assistance League, Evidence, 12 August 2010, p 33.

234 Submission 5 - Appendix 1, p 1.

235 Mr Brown, Evidence, 12 August 2010, p 34.

4.111 Mr Brown observed that this demonstrated a 'major failure within the system'[236] and suggested that it would be beneficial to provide some form of support to jurors after the conclusion of their jury service:

> I, myself, receive psychiatric counselling once a month as a formal debrief so that I deal with the things and the abhorrent crimes that I have dealt with in a month. I go and have a professional debrief, normally between two and three hours, to ensure that I am not carrying too much garbage myself. We do not provide that to our jurors and some of our jurors endure some of the most horrific of circumstances. We basically say, "Thank you for all the assistance you have provided to this court. Go away and heal thyself." … In an ideal world the officers of the ODPP, the judges and the jurors should all be entitled and given free access to counselling to deal with the trauma to which they are exposed …[237]

4.112 However, other Inquiry participants considered that it is not necessary to distinguish crimes of this nature from other crimes in the proposed model. It was noted in this regard that the courts have range of measures at their disposal to protect the emotional health of jurors.

4.113 For example, Ms Mary Macken, President, Law Society of NSW, observed that the Law Society did '… not think it is appropriate to distinguish between offences that are more or less distressing'.[238] The Law Society of NSW acknowledged that the role of jurors could be difficult, but that it was not appropriate to distinguish between offences that were more or less distressing:

> The role of the juror is one which can be demanding, difficult, and is fundamental to the legitimacy of the justice system. I respectfully disagree with the point made in submission cited, it is not appropriate to distinguish in this context between offences which are more or less distressing.[239]

4.114 Mr Howard suggested that juries are generally resilient enough to cope with any evidence that is presented during the course of a trial, but noted that a juror could request to be excused if they felt that they could not handle the emotional stress:

> Life can be ugly at times, and juries are robust enough to face up to that fact. Judges can and do give clear warnings to prospective jurors about any unpleasantness that is likely to arise in a trial, and prospective jurors can seek to be excused in such circumstances - this is not uncommon.[240]

4.115 Mr Howard argued that it may be appropriate to identify certain types of offences that should *presumptively* be held before a jury, singling out sexual assault cases against children as an example of such cases:

> I think if a model were to come in, it might also be important to single out certain types of cases … that should presumptively be before a jury. For example, child sexual assault … Those are cases where the interest of the victim to have the community decide an issue can at times be incredibly important. I think there would be classes of

236 Mr Brown, Evidence, 12 August 2010, p 34.

237 Mr Brown, Evidence, 12 August 2010, p 31.

238 Ms Mary Macken, President, Law Society of NSW, Evidence, 12 August 2010, p 10.

239 Answers to questions taken on notice during evidence, 12 August 2010, Law Society of NSW, p 3.

240 Answers to questions on notice taken during evidence 11 August 2010, Mr Howard, p 3.

> cases, not just objective community standards to which you could put a word like "reasonable" or "ordinary", particularly classes of cases in which there should be, if this were to be brought in, a presumption against it being done any way other than by a jury trial.[241]

4.116 Mr Ierace outlined a number of different options available to a trial judge to assist the jury to cope with any distressing evidence:

> For those trials with highly distressing evidence where the accused wishes to exercise his or her right to trial by jury, the Courts have at their disposal a range of measures to assist. There are sometimes objective signs of extreme distress or trauma (such as jurors becoming teary or agitated) observable to others in the courtroom. Often during such testing evidence, the trial judge directs the jury that they may take a break when they feel the need to, or simply requires the jury to take short breaks. When such evidence is anticipated in advance of the empanelling of the jury, the trial judge may inform the panel of this, and advise that an application to be excused will be sympathetically considered, if a member does not feel up to the task.[242]

4.117 Indeed, Mr Ierace argued that these types of 'distressing' crime are 'more deserving' of a jury trial, because if found guilty, the accused will be subject to the maximum penalties available in the criminal justice system and that in this regard the right to a trial by jury should be preserved:

> Common between these categories of cases that typically involve distressing evidence is that they concern charges with maximum penalties at or towards the top of the range; life, or 25 years imprisonment. Where the interests of the accused in this sense are most at stake; the right to trial by jury is the more deserving of retention. If, however, an accused person freely chooses to waive that right following legal advice, this principle is not disrespected.[243]

4.118 When questioned on the comment of Mr Ierace that that where cases involve distressing evidence the right to trial by jury is the more deserving of retention, Mr Cowdery responded that there was a clear distinction between 'distressing' and 'truly abhorrent' evidence, and that there needed to be a mechanism to protect jurors from having to consider particularly disturbing evidence:

> "Truly abhorrent facts" are not the same as "distressing evidence". Courts and juries deal with distressing evidence daily … My point, a different point, is that very occasionally, as in the Whitby case referred to in my submission, there comes along a case where people of ordinary fortitude would likely be greatly disturbed by exposure to the facts and that is an unfair burden to place on ordinary members of the community … Such cases are not frequent, but a safety valve needs to be provided for them.[244]

241 Mr Daniel Howard SC, Evidence, 11 August 2010, p 50.

242 Submission 6, p 4.

243 Submission 6, p 4.

244 Answers to questions on notice taken during evidence 11 August 2010, Mr Nicholas Cowdery QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, p 6.

Highly technical issues

4.119 The second area highlighted by Inquiry participants as warranting a judge alone trial in preference to a jury trial was where the evidence to be presented during the course of the trial was of a highly technical nature. There was a difference of opinion among Inquiry participants on this issue, with some arguing that juries may not fully understand the nature and implications of highly technical evidence. Other Inquiry participants suggested that an integral role of both counsels was to ensure that any evidence presented is comprehensible to a jury, and that highly technical evidence was therefore not a sufficient reason to hold the trial before a judge sitting alone.

4.120 Mr Cowdery advised that evidence of a technical nature, such as scientific or medical evidence where there may be contested expert opinions, was the primary reason for the DPP granting requests for a judge alone trial.[245] Prosecution Guideline 24 states that a case may be better suited to a trial by judge alone in cases where:

> The evidence is of a technical nature, or where the main issues arise (in cases other than substantial impairment under section 23A of the Crimes Act 1900) out of expert opinions (including medical experts).[246]

4.121 Mr Cowdery explained that the ODPP considers that when evidence is of a highly technical nature a judge sitting alone is to a jury because a judge can more quickly understand the complexities of the evidence:

> We take the view that if the principal evidence is of a technical nature and there are issues that need to be resolved about that, a judge alone is in a better position to master the evidence, to master the issues and to make the decisions that need to be made rather than having twelve laypeople coming to perhaps uncertain or conflicting views about aspects of the evidence and about the issues to be determined and ending up in a state of confusion. There is also the aspect that when you have got that sort of evidence it requires very much longer to satisfactorily lay it out for a jury than it does for a judge. Judges are usually able to pick up the core of the evidence and the nature of the issues more quickly. So there are benefits, we think, in preferring or leaning on the side of a judge-alone trial where there is evidence of that kind, which is the central part of the evidence, the central part of the case. [247]

4.122 Mr Ierace highlighted that a benefit of having a judge sitting alone to hear matters that are of a technical or complex nature is that the judge is able to directly pose questions or request clarification from the counsel and witnesses, whereas a jury has to submit questions through the judge:

> The advantage, I think, for the procedure of trial by judge alone where there is technical evidence is that in such cases, that is trial by judge alone, in my experience there is more of an exchange between the judge and counsel at the Bar table and also between the judge and witnesses. The jury, of course, have the opportunity of asking questions of witnesses, usually, depending on the particular judge, in the form of handing a written question to the judge and the judge can then ask that question of the witness, but the freer exchange where a judge can simply in the middle of

245 Mr Cowdery, Evidence, 11 August 2010, p 15.

246 Submission 5 - Appendix 1, p 1.

247 Mr Cowdery, Evidence, 11 August 2010, p 15.

> examination by counsel clarify something with the witness means that the understanding of technical evidence is better facilitated …[248]

4.123 Mr McCusker observed that there may be occasions when counsel is unable to break down technical evidence into an easily understandable format, and that lengthy trials place an additional burden on jurors that could be overcome by simply allowing the trial to proceed before a judge sitting alone:

> As good as defence and prosecuting counsel may be, there are some matters that are so complex it is impossible for the average person – and I beg to differ about peers because they might not be peers at all – on a jury to have little prospect of understanding it. … I think there is a very strong case for saying at least in instances where it is obviously complex there should not be a jury trial. If it is going to take a lot longer to explain it to a jury that still might not get it, and I suspect do not, why not have a trial before a judge who will get it quicker, and if he or she does not understand they will press defence counsel and prosecuting counsel to explain points which again a jury cannot do?[249]

4.124 However, other Inquiry participants suggested that juries were able to understand the complexities of technical issues, and that it was the incumbent upon the counsel to present their evidence in a simple, comprehensible manner.

4.125 In this regard, Ms Macken emphasised the need for both the prosecution and the defence counsel to present their evidence to the jury in a manner that was clear and easily comprehensible:

> The complexity of the issue is one that we think comes down to the skill of both the prosecution and defence in dealing with the issues in a sufficiently clear and concise way that the jury can understand the issues of fact put before them. There might be other things that can be done to educate the jury prior to the trial. It really does come down to the skill of the prosecution and the defence. We do not accept that either complexity or distressing material should change the process.[250]

4.126 Mr Breen observed that in his opinion, the requirement for counsel to outline their evidence as simply as possible results in a clearer trial process, where all parties in the proceedings are forced to avoid using legalistic or technical jargon, and juries are able to develop a better understanding of the evidence at hand:

> I am not so sure about technical issues. The jury has had a pretty good record when it comes to sorting out technical issues … the jury is independent and quite often has a simple view of things. It forces the court – prosecution, defence and judge – to keep it simple so the jury can understand.[251]

4.127 Mr Howard suggested that having juries involved in the determination of complex matters not only ensures that the process is comprehensible to the community, but also assists to ensure that the community remains connected to the trial process:

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248 Mr Ierace, Evidence, 11 August 2010, p 29.

249 Mr McCusker, Evidence, 13 August 2010, p 8.

250 Ms Macken, Evidence, 12 August 2010, p 10.

251 Mr Breen, Evidence, 11 August 2010, p 40.

> I do not believe that cases that are complex because of expert issues, like DNA or complex accounting issues, should be removed from juries. I think it is very important that the legal process is able to remain in touch with the community. It has to work at making the process comprehensible to the community. Once we lose touch with the real people out there by having too many judge-alone trials, we will lose touch with them, and I think the law will lose respect.[252]

4.128 Mr Ierace noted that while '… lengthy trials of complex technical evidence can be challenging to jurors (and also judges and trial counsel), the jury system has demonstrated a capacity to overcome such obstacles'.[253] Mr Ierace highlighted that recent legislative amendments will improve the ability of the jury system to deal with lengthy and complex trials:

> The amendments to the *Jury Act* permitting the empanelling of additional jurors in long trials, the recent legislative amendments that pick up the recommendations of the NSW Law Reform Commission Report No 117 ("Jury Selection"), which will enhance the education level of jury panels, and perhaps most importantly the "case management" amendments to the *Criminal Procedure Act*, will all have a positive impact on the ability of the jury system to even better deal with long, complex trials. There is also likely to be fewer occasions of technical forensic evidence being unnecessarily challenged by defence counsel, consequent to the current review of "briefing out" procedures by NSW Legal Aid.[254]

Committee comment

4.129 The Committee notes that some Inquiry participants have identified two instances where a judge alone trial may be preferable to a jury trial: in cases involving heinous crimes, or cases involving highly technical evidence. The Committee acknowledges that whilst some argued that these two categories of crime warranted consideration by a judge sitting alone, others argued that these types of cases do not need to be singled out as being better suited for judge alone trials.

4.130 The Committee does not consider it necessary that the proposed model for judge alone trials, if implemented, should identify particular cases or trial types that should be heard before a judge sitting alone in preference to a jury. The 'interests of justice' test (as discussed in Chapter 5) is sufficiently wide for these factors, where relevant, to be taken into consideration.

4.131 The Committee notes that it would be difficult to define what constitutes 'truly abhorrent' or 'highly technical' evidence. The Committee considers that it is more appropriate that the prosecution and defence counsels are allowed discretion in deciding when it is appropriate to apply for a judge alone trial, after considering the evidence involved in each individual matter, and for the courts to determine the matter.

252 Mr Howard, Evidence, 11 August 2010, p 50.

253 Submission 6, p 5.

254 Submission 6, p 5.

Chapter 5 Court decisions based on an 'interests of justice' test

This Chapter discusses the 'interests of justice' test which would be applied by the court under the proposed model in instances where the accused applies for a judge alone trial but the prosecution does not consent, to determine whether or not to agree to the application. The Chapter examines the views expressed by Inquiry participants about this aspect of the model, whether the factors to be considered under the 'interests of justice' test need to be explicitly defined and whether the decision made by the courts in this regard would be appealable. Also examined is the exchange of information prior to the commencement of the trial that would be required under this aspect of proposed model. There were two issues raised by Inquiry participants in this regard: the impact on pre-trial disclosures; and whether the judge who determines the application for a judge alone trial should be excluded from acting as the trial judge.

'Interests of justice' test

5.1 Under the proposed model, if the accused applies for a judge alone trial but the prosecution does not consent, the court must determine whether or not the matter should proceed without a jury based on an 'interest of justice' test.[255]

5.2 The proposed model also sets out some circumstances in which the 'interests of justice' would permit the court to refuse an application. In this regard, the model states that, when considering the 'interests of justice', the court may refuse to make an order where 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.[256]

5.3 Currently, under section 132 of the *Criminal Procedure Act 1986,* the Office of the Director of Public Prosecutions (ODPP) determines applications for judge alone trials using Prosecution Guideline 24. Under the Guideline, each application is to be considered on its merits and the principal consideration when determining applications is '… the achieving of justice by the fairest and most expeditious means available'.[257] A number of other considerations are set out in the Guideline including that trials in which judgment is required on issues raising community values such as reasonableness, provocation, dishonesty, indecency or substantial impairment should ordinarily be heard by a jury.[258]

5.4 The discussion of this aspect of the proposed model during the Inquiry involved consideration of the nature of the 'interests of justice' test, whether the list of objective community standards in the proposed model limits the test and a whether any additional criteria should be included.

5.5 It was noted that the 'interests of justice' is at the heart of the heart of the criminal justice system. For example, Mr Malcolm McCusker QC, a barrister from Western Australia, noted that an 'interests of justice' test is used throughout the criminal justice system:

255 Proposed model, Item Seven.

256 Proposed model, Item Eight.

257 Submission 5 - Appendix 1, Office of the Director of Public Prosecutions, p 1.

258 Submission 5 - Appendix 1, p 1.

> The "interests of justice" test is used in other aspects of the criminal justice system. As but one example, a judge may decide, "in the interests of justice", to allow an accused to reopen his or her defence after it has been closed, because there is a particularly important piece of evidence which has been discovered or overlooked.[259]

5.6 Mr Nicholas Cowdery QC, Director of Public Prosecutions, advised that his offices uses a similar 'public interest' test:

> My Office uses a "general public interest" formula, but it could equally refer to the interests of justice. I suppose it could be said that the interests of justice are what are required to be served by the entire justice system at every step of the way.[260]

5.7 Mr Cowdery also noted that the factors identified in the 'interests of justice' test in the proposed model '… include some but not all of the factors that Crown Prosecutors presently take into account, thereby perhaps lowering the requisite standard to determine of a judge alone trial is appropriate'.[261]

5.8 NSW Young Lawyers suggested that rather than an 'interests of justice' test, it may be more appropriate to have a balancing test, whereby the courts weigh up the interests of the community in having a jury trial with the rights of the accused to have their choice of trial:

> NSW Young Lawyers favours a balancing test rather than the "interests of justice" test as proposed. That is, between the interests of the community in a jury trial (and the attendant input into objective values such as indecency etc) and the rights of the accused to nominate the form of their own trial.[262]

5.9 Mr Thomas Spohr, Chair and Executive Councillor, NSW Young Lawyers Criminal Law Committee, elucidated on this suggestion, arguing that the test should include consideration of the right of the community to participate in criminal trials, in order to ensure that verdicts reached in judge alone trials were not seen as superior to verdicts reached in jury trials:

> The balancing act that we see taking place is between the rights of the community to participate in the criminal justice process and the rights of the individual generally to be tried by the means that they think is fairest to them. If the test recognises those competing interests—and the interests of justice test might need to be clarified in some respects—that may alleviate the need for a presumption. It is absolutely important that the legislation does not under any circumstances leave the impression that a judge alone verdict is better in some way.[263]

5.10 As noted in paragraphs 5.1 and 5.2, the proposed model includes not only the broad provision which requires the courts to make its determination based on the 'interests of justice' (Item Seven), but also sets out some circumstances in which the 'interests of justice' would permit the court to refuse an application involving factual issues that require the application of objective community standards (Item Eight).

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259 Answers to questions on notice taken during evidence 13 August 2010, Mr Malcolm McCusker QC, p 2.

260 Answers to questions on notice taken during evidence 11 August 2010, Mr Nicholas Cowdery QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, p 4.

261 Submission 5, Office of the Director of Public Prosecutions, p 1.

262 Answers to questions on notice taken during evidence 11 August 2010, NSW Young Lawyers, p 1.

263 Mr Thomas Spohr, Chair and Executive Councillor, NSW Young Lawyers Criminal Law Committee, Evidence, 12 August 2010, p 18.

5.11 In regard to Item Eight, some Inquiry participants questioned the necessity of listing the factors which the courts may consider when applying the 'interests of justice' test.

5.12 For example, the Queensland Law Society suggested that it was not necessary to clearly define what matters would be considered under an 'interests of justice' test, because the 'interests of justice' are a fluid concept that can encompass a range of scenarios:

> The Society is supportive of the inclusion of an 'interests of justice' test. However, we do not consider that is necessary to define what issues will be considered in the interests of justice. The interests of justice is a broad and dynamic concept which is flexible enough to take into account a wide range of factual scenarios.[264]

5.13 Mr McCusker concurred that the factors to be considered under the 'interests of justice' test should not be strictly defined, noting that to do so may restrict the number of instances where the test can be applied:

> … it is not necessary to define what issues are to be considered 'in the interests of justice'. To do so may unnecessarily restrict the application of this concept, and exclude its operation in a case where, but for the restriction, it would be considered 'just' for it to be applied.[265]

5.14 The Law Society of NSW observed that while the judge alone trial provisions in Western Australia refers to the potential length or complexity of the trial as factors to be considered when determining how a trial should proceed, the model does not restrict the judiciary to considering only those factors:

> The Western Australian model, which requires the interests of justice test to be applied, but also (without limiting the test) refers to the potential complexity or length or both, of the trial, points to a factor that the courts would take into account as a matter of course.[266]

5.15 Mr Mark Ierace SC, Senior Public Defender, NSW Public Defender, endorsed the use of the word 'may' in Item Eight in the model as significant to ensure that judges are able to apply discretion when considering the 'interests of justice':

> … at least the factors listed in the model are prefaced by words to the effect that the Court *may* refuse to make an order because of them; not that it *must* decline an order for a trial by judge alone. If the factors are to remain listed, it is important that the discretion allowed by the word *may* remain.[267]

5.16 In relation to this discussion, it was explained by the Department of Justice and Attorney General that the inclusion of the factors listed in Item Eight of the proposed model was not intended to create an exhaustive list of factors for the courts to consider.

5.17 In this regard, Ms Penny Musgrave, Director, Criminal Law Division, Department of Justice and Attorney General, advised that it was not intended that the factors listed for consideration

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264 Submission 15, Queensland Law Society, p 2.

265 Answers to questions on notice taken during evidence 13 August 2010, Mr McCusker, p 2.

266 Answers to questions on notice taken during evidence 12 August 2010, Law Society of NSW, p 2.

267 Answers to questions on notice taken during evidence 11 August 2010, Mr Mark Ierace SC, Senior Public Defender, NSW Public Defender, p 2.

under the 'interest of justice' test be an exhaustive list, and that other factors, such as pre-trial publicity, could be considered by the judiciary in determining applications for judge alone trials:

> In the model that has been proposed we would not have a restrictive list of considerations. It would be a broad interest of justice test. I would anticipate that pre-trial publicity would be one of the factors the court would take into account …[268]

5.18 Ms Musgrave emphasised that it would be an inclusive, not exhaustive, list of factors that could be considered under an 'interests of justice' test:

> … it would be a broad interests-of-justice test. They would simply be examples. Any legislation would not set out an exhaustive list; it would be an inclusive list. I hesitate to say it is more of a drafting issue but it almost becomes a drafting issue as to how best to convey that concept of objective community standard.[269]

5.19 Ms Musgrave noted that it was not unusual for legislation to provide an inclusive list of factors than can be considered: 'There are many examples of inclusive lists in procedural legislation and they exist as a guide to the matters that fall within the test, without limiting matters that may be taken into consideration'.[270]

5.20 One Inquiry participant suggested that the objective community standards considered under the 'interests of justice' test should be expanded to include a factor in addition to reasonableness, negligence, indecency, obscenity and dangerousness. In this regard, Mr Cowdery recommended that if the proposed model were introduced, the issue of dishonesty should be included as one of the objective community standards to be considered under the 'interests of justice' test, because of the central importance of the community in determining what constitutes dishonest conduct:

> … the Committee should have regard also to the issue of dishonesty as one of the issues that arise where community standards need to be applied. The reason for that is there is no definition of dishonesty. Courts are told that dishonesty is what is judged by the community to have been dishonest in the circumstances. So that is a quality or a concept that we would submit requires the input of the community as well.[271]

5.21 Mr Cowdery emphasised that as the *Crimes Act 1900* defines dishonest as ' dishonest according to the standards of ordinary people and known by the defendant to be dishonest', dishonesty is most appropriately determined by a jury of ordinary people:

> The *Crimes Act 1900* defines 'dishonest' in section 4B: "dishonest means dishonest according to the standards of ordinary people and known by the defendant to be dishonest according to the standards of ordinary people." Accordingly, it is necessary for the trier of fact to decide the standards of ordinary people. A jury of ordinary

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268 Ms Penny Musgrave, Director, Criminal Law Division, Department of Justice and Attorney General, Evidence, 11 August 2010, p 6.

269 Ms Musgrave, Evidence, 11 August 2010, p 8.

270 Answers to questions on notice taken during evidence 11 August 2010, Ms Penny Musgrave, Director, Criminal Law Division, Department of Justice and Attorney General, p 4.

271 Mr Nicholas Cowdery, Director of Public Prosecutions, Office of the Director of Public Prosecutions, Evidence, 11 August 2010, p 14.

> people is in the best position to determine what are the standards of ordinary people.[272]

5.22 Other Inquiry participants did not agree that dishonesty should be included as an additional factor to be considered under the 'interests of justice' test. For example, Mr Ierace argued the inclusion of dishonesty would broaden the criteria to be considered to such an extent that the majority of crimes would be captured:

> I am not in favour of including it in the criteria because if the Committee does that, then it really begs the question: what is left? If dishonesty incorporates types of offences involving fraud, if it is that broad, then the net that is cast for crimes excluded is such that there is not a lot left … If we are speaking of dishonesty crimes that involve an element of dishonesty, that is a very large number of crimes.[273]

5.23 When questioned on the proposal from the DPP to include 'dishonesty' as a factor, the Law Society of NSW indicated that it '… is of the view that the factors to be taken into account by the judiciary do not need to be specifically delineated'.[274]

Committee comment

5.24 The Committee notes that the 'interests of justice' is a concept at the heart of the criminal justice system and we are of the view that it is an appropriate test to include in the proposed model. The courts are well used to applying this concept and it allows sufficient discretion to enable the courts to consider the full range of relevant factors when determining whether to approve an application made by the accused for a judge alone trial which the prosecution objects to.

5.25 The Committee notes the advice from the Department of Justice and Attorney General that the inclusion of the factors listed in Item Eight of the proposed model was not intended to create an exhaustive list of factors for the courts to consider. Rather, the list outlines a number of inclusive factors that may be considered by the courts, without constraining the courts to consider only these issues. The Committee considers this to be appropriate and notes that the factors are similar to those included in the current Prosecution Guideline 24. The Committee also concurs that the use of 'may' in Item Eight is appropriate.

5.26 The Committee draws no conclusion in relation to the suggestion to include 'dishonesty' in the examples of 'objective community standards' in the proposed model.

Would a court's decision be appealable?

5.27 Some Inquiry participants queried whether decisions made by the courts under the proposed model would be appealable. This issue was raised as an argument against the proposed model, as an increased ability for an accused to appeal during the trial process could result in significant delays in the administration of justice.

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272 Answers to questions on notice taken during evidence 11 August 2010, Mr Cowdery, p 5.

273 Mr Mark Ierace SC, Senior Public Defender, NSW Public Defenders Office, Evidence, 11 August 2010, p 32.

274 Answers to questions on notice taken during evidence 12 August 2010, Law Society of NSW, p 14.

5.28 The discussion amongst Inquiry participants about appeals focused on whether or not a decision of the courts in applying the 'interest of justice' test would and should be appealable. This section explores this issue. Some Inquiry participants noted that an increase in judge alone trials could also result in an increased number of appeals as a consequence of the requirement for judges to produce a written judgment outlining the relevant principles of law and findings of fact. This issue is discussed in Chapter 3.

5.29 An appeal is any proceeding taken to rectify an erroneous decision of a court by bringing it before a higher court.[275] While a final order determines the rights of the parties, an interlocutory order leaves something further to be done to determine those rights.[276] An interlocutory appeal is, therefore, an appeal made to a decision that is prior to the final decision reached by a court. An appeal of a judge's decision to grant or refuse an application for a judge alone trial would be an interlocutory appeal.

5.30 Mr Cowdery indicated that under the existing model for judge alone trials, it is not possible for the accused to appeal a decision by the ODPP to hold a jury trial, citing the Milat case in support of this position:

> That decision is not reviewable and in one of the decisions of the Supreme Court involving Ivan Milat, one of the M judgements, that was a point that was taken and Justice Dunford ruled that that decision was not reviewable by the Supreme Court.[277]

5.31 However, Ms Musgrave advised that under the proposed model, the provisions contained in section 5F of the *Criminal Appeal Act 1912* means that it would be possible to appeal a decision from a judge to either grant or refuse an application for a judge alone trial:

> Section 5F of the *Criminal Appeal Act* applies to proceedings (including committal proceedings) for the prosecution of offenders on indictment in the Supreme Court or in the District Court, and provides for Crown appeals against an interlocutory judgement or order, and appeals by any other party with the leave of the Court of Criminal Appeal or certification from the judge.
>
> These provisions should apply to the judge-alone provisions. There is no time limit on when such an appeal can be made, but clearly in the case of a judge along trial it would need to be prior to the trial itself commencing.[278]

5.32 Mr Cowdery concurred that the decision would likely be appealable under section 5F of the *Criminal Appeal Act 1912,* and noted that this would probably result in significant delays to the trial process:

> … if interlocutory appeals were able to be brought from decisions made by a court exercising the interests of justice test then that could significantly delay and complicate the process of criminal trials. It has not been tested, of course, but it is quite likely that a decision whether or not to allow a trial without a jury is an interlocutory order under section 5F of the Criminal Appeal Act and interlocutory appeals of that kind could be

275 Bird R (ed), *Osborn's Concise Law Dictionary*, 7th edition, 1989, p 28.

276 Bird R (ed), *Osborn's Concise Law Dictionary*, 7th edition, 1989, p 187.

277 Mr Cowdery, Evidence, 11 August 2010, p 14.

278 Answers to questions on notice taken during evidence 11 August 2010, Ms Musgrave, p 2.

> expected if people had decisions that they were not happy with. So that would further delay and complicate the process.[279]

5.33 Mr McCusker advocated for the judge's decision as to how a trial proceeds to be final as is the case in Western Australia, on the basis that allowing the decision to be appealable could lead to lengthy delays: 'I think that the decision should be final. It would lead to too many interruptions in the criminal process … Western Australia's legislation provides that the judge's decision is final'.[280]

5.34 Mr Ierace noted that while the decision would be appealable, it is likely that over time fewer appeals would eventuate as a body of judgments developed to provide guidance as to the basis for a judge's decision in certain instances:

> … it is a decision, an order, that is appealable under section 5F of the Criminal Appeal Act and inevitably that would happen, but over time we would see guidance being provided by the Court of Criminal Appeal to judges in how the power should be exercised … with the passage of time one could expect fewer appeals being made from the decision of the judge whether it in the Supreme Court or the District Court simply because over time it would become more commonly understood what was reasonably within the ambit of the judge to decide the issue.[281]

5.35 Ms Musgrave agreed, suggesting that an initial spate of appeals would likely dwindle as greater direction was provided to explain why judges made certain decisions:

> There will inevitably be, if you put in an appeal right, a rash of appeals and determination by a higher authority as to whether it was appropriate. But that does give you guidance on how you should be making a decision. It is a bit like the appeals about Commonwealth trials. There was that rash of High Court decisions, determinations made and there is nothing since.[282]

5.36 Mr Cowdery suggested that allowing an avenue for appeal was important to ensure rigorous decision making, despite the fact that such appeals could result in a lengthy appeals process:

> … it is quite conceivable that a judge may make an order, one way or another in a case where it is regarded as important by either party, that is wrong, that is mistaken, that perhaps misconstrues material that has been put before the judge, that perhaps misinterprets things, and perhaps just gets something plain wrong. I mean, it does happen. That is why we have appeal proceedings in relation to all aspects of our process. To shut out the right of appeal might be a bit harsh and counter-productive.[283]

5.37 Mr Cowdery observed that it may be prudent to allow an appeal to only be brought by leave of the appeal court, but noted that this would also result in delays to the trial process:

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279 Mr Cowdery, Evidence, 11 August 2010, p 14.

280 Mr Malcolm McCusker QC, Evidence, 13 August 2010, p 9.

281 Mr Ierace, Evidence, 11 August 2010, p 26.

282 Ms Musgrave, Evidence, 11 August 2010, p 11.

283 Mr Cowdery, Evidence, 11 August 2010, p 23.

> A sort of half-way house, I suppose, would be where an appeal could only be brought by leave of the appeal court, but again you would still have the same sort of delay and disruption if that process is to be followed as well.[284]

5.38 Mr Cowdery advised that in both Western Australia and Queensland, there is no interlocutory appeal available from an order for a judge alone trial:

> The Queensland DPP has informed me that there is no interlocutory appeal available from a "no jury order" made under sections 614 and 590AA of the Criminal Code.
>
> The Western Australia DPP has informed me that there is no interlocutory appeal available from an order for judge alone trial under section 118 of the Criminal Procedure Act 2004.[285]

5.39 However, Ms Musgrave noted that in certain circumstances in Queensland, a judge presiding over a trial may give leave to allow the decision to be re-opened, or referred to the Court of Appeal for consideration of a point of law relating to the conduct of the trial or pre-trial hearing:

> In Queensland, applications for judge alone trials are made under section 590AA of the Criminal Code as a pre-trial direction/ruling. A direction or ruling under that section is binding unless the judge presiding at the trial or pre-trial hearing, for special reasons, gives leave to re-open the direction or ruling. A direction or ruling must not be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence. However, section 668A of the Criminal Code allows the Attorney-General to refer to the Court of Appeal for its consideration and opinion a point of law that has arisen in relation to a direction or ruling under section 590AA given by another court as to the conduct of a trial or pre-trial hearing.[286]

5.40 Despite this provision, Ms Musgrave indicated that '[t]he Department of Justice and Attorney General in Queensland has advised that they are not aware of any appeals or re-opening of judge-alone trial orders'.[287]

Committee comment

5.41 The Committee is concerned that if court decisions about applications for judge alone trials based on an 'interest of justice' test, and potentially other decisions made under the proposed model such as in relation to jury tampering, are appealable, there may be lengthy delays in the administration of justice. Such delays would be to the detriment of the accused, the victim and the community, and would also detract from any efficiencies that might be gained by having a judge only trial. The Committee notes that both the Department of Justice and Attorney General and the Director of Public Prosecutions also expressed concern about the potential impact of lengthy delays.

5.42 If the proposed model for judge alone trials is to be pursued, the Attorney General is encouraged to closely consider the approaches taken in Western Australia and Queensland

284 Mr Cowdery, Evidence, 11 August 2010, p 23.

285 Answers to questions on notice taken during evidence 11 August 2010, Mr Cowdery, p 1.

286 Answers to questions on notice taken during evidence 11 August 2010, Ms Musgrave, p 3.

287 Answers to questions on notice taken during evidence 11 August 2010, Ms Musgrave, p 3.

where no interlocutory appeals are available from an order for judge alone trial. The Committee notes that Queensland tightly restricts the right of the accused to appeal the decision of the courts to order a judge alone trial to instances where there may have been an error in the consideration of a point of law.

5.43 The Committee acknowledges that removing, or tightly restricting, the ability to appeal court determinations of applications for judge alone trials may be disagreed with by some. Nonetheless, the Committee considers that it may be essential in order to ensure that the administration of justice in not unnecessarily hampered by lengthy appeals.

Exchange of information prior to trial

5.44 Inquiry participants raised two issues in relation to the impact of the proposed model on the exchange of information between counsel and the judiciary prior to the commencement of the trial. First, some Inquiry participants were concerned about the impact on the pre-trial disclosure process of having to persuade the court as to whether or not an application for a judge alone trial should be granted based on the interests of justice. Following from this some Inquiry participants questioned whether the judge who determines the application for a judge alone trial should be precluded from also acting as the trial judge.

Impact on pre-trial disclosures

5.45 Some Inquiry participants were concerned that, in having to persuade a court to either grant or refuse an application for a judge alone trial on the basis of the interests of justice, prosecution and defence counsel would be required to disclose elements of their case which may not later be considered appropriate to be before by the trial judge or known to the opposing side.

5.46 In regard to pre-trial disclosures in criminal cases, Ms Musgrave advised that the requirements for pre-trial disclosures were amended in 2009, to improve the efficiency of complex criminal trials: '… it is hoped the commencement of these new provisions will secure the more efficient disposition of complex criminal trials, to the benefit of all who participate in the criminal justice system'.[288]

5.47 The options available to the courts under these pre-trial disclosure requirements include the mandatory exchange of information, pre-trial hearings and conferences and court ordered pre-trial disclosure, with courts to determine what provisions to apply in each case:

> The regime incorporates multiple tiers of case management, from the mandatory exchange of information at the lower end, to pre-trial hearings and conferences, through to court ordered pre-trial disclosure at the higher end, and provides courts with powers to ensure the efficient management and conduct of the trial … The new tiers do not represent a strict hierarchy. It will be open to courts to immediately order pre-trial disclosure where it appears to be in the interests of the administration of justice, and the courts may waive the requirements of the Division.[289]

[288] Answers to questions on notice taken during evidence 11 August 2010 - Appendix B, Ms Penny Musgrave, Director, Criminal Law Division, Department of Justice and Attorney General, p 6.

[289] Answers to questions on notice taken during evidence 11 August 2010, Ms Musgrave, p 4.

5.48 Ms Musgrave advised that, if the proposed model for judge alone trials were to be implemented, it was not envisaged that there would be any impact on the pre-trial disclosure requirements that are outlined in the *Criminal Procedure Act 1986*.[290]

5.49 Other Inquiry participants did not share this view. Mr Cowdery was concerned, for example, that in having to apply the 'interests of justice' test to determine applications for judge alone trials, a judge will need to be informed of certain matters, which either the prosecution or defence counsel may not consider appropriate to be presented to the trial judge:

> I also note that to apply the "interests of justice" test a Judge will have to be informed of certain information about the case and the accused. This information may later be viewed by the Crown or the defence as inappropriate to be before the trial Judge leading to extraneous applications and the possibility of undue prejudice in the mind of the Judge.[291]

5.50 Mr Spohr from NSW Young Lawyers indicated that the prosecution when presenting its reasons for wanting a judge alone trial, will have to disclose its case to the judge, which may mean that the judge becomes aware of sensitive material that they might not otherwise have become aware of during the trial itself:

> … the determination by the judge will require the prosecutor to turn up and say, "Here is the trial." They have to literally produce the entire trial as they propose to present it and put it in front of a judge and say, "Looking at this evidence, this is what should or should not go before a jury". That is another issue because if that judge then determines that it is to be by a judge-alone trial, they may have seen evidence that is highly prejudicial. There are all sorts of issues … but the fact of it is that the prosecutor will be required to present the trial in presumably a summary concise form to the judge in order to make this determination. There is no other way for it to take place.[292]

5.51 Mr Cowdery raised concerns that a judge may be unable to set aside information that they become aware of during the application process for a judge alone trial, which may adversely impact on the conduct of the trial:

> Such information might include the accused's criminal history, prejudicial information about his or her disposition and conduct (e.g. that might presage disruptive conduct during a trial), personal information about the sensitivities of a victim/witness that might be relevant to his or her credit, prejudicial publicity about an accused person, etc. The point is that the previous disclosure to a judge of information that might not be admissible in the course of a trial, for the purpose of assisting a weighing of the interests of justice in proceeding with or without a jury, may operate on the judge's mind in an unacceptable way during the trial (however it proceeds). That risk is better avoided completely. Judges are human, too and constitute a jury of one in a judge alone trial.[293]

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290 Answers to questions on notice taken during evidence 11 August 2010, Ms Musgrave; *Criminal Procedure Act 1986*, Part 3.

291 Submission 5, pp 1-2.

292 Mr Spohr, Evidence, 12 August 2010, p 23.

293 Answers to questions on notice taken during evidence 11 August 2010, Mr Cowdery, p 5.

5.52 Mr Daniel Howard SC argued that it was 'problematic' to have the same judge determine both the application for a judge alone trial and then the trial itself, and for the facts of the case to be 'ventilated' in front of both the judge and the defence:

> If this proposal were brought in, and I am not advocating for it at all, I think that issue would certainly have to be addressed. It would be problematic if you had the same judge determining both issues. The forum where the issue of judge-alone trial was determined would have to be one where everybody was heard and submissions could be made … Imagine having a *voir dire* before a judge on the issue of whether the trial should be judge alone or not when the prosecution feels these alibi issues are ones that go to the credit and credibility of witnesses that a jury should determine, not a single judge. You would have to ventilate your evidence in front of the judge and the defence would know what it was, and that would be disastrous for alibi cases. That is just one example.[294]

5.53 Mr Howard highlighted that the issue may pose a particular problem when the prosecution has information that could discredit a defence witness, but early disclosure of that information could jeopardize the effectiveness of that information for the prosecution:

> The case where an accused raises an alibi – the prosecutor may have obtained evidence, that discredits the defence alibi witnesses, that the prosecutor wishes to place before a jury (juries are particularly adept at determining issues of witness credit in alibi cases); the prosecution is not obliged to disclose such material to the defence; yet in order for a judge to determine whether it is 'in the interests of justice' to hold a jury trial, it would be necessary for such material to be disclosed, thereby destroying its effectiveness to the prosecution.[295]

Precluding the judge determining the application from acting as the trial judge

5.54 Due to the disclosure of information before the trial, as discussed above, some Inquiry participants suggested that the judge who determines the application for a judge alone trial should be precluded from acting as the trial judge. It was argued that this action was necessary to ensure that the judge who determines the application does not allow the trial verdict to be influenced by their prior knowledge of the case.

5.55 For example, Mr Breen suggested that separate judges should determine the application for a judge alone trial and act as the trial judge because the judge who determines the application is likely to be privy to details of the case which may have an ongoing influence on their decision making process:

> I also believe that the judge that decides that question should not be the trial judge. It should be a separate judge because the trial judge is going to be influenced in that argument about whether or not there should be a judge-alone trial. He or she is going to be influenced by the evidence adduced by the parties to argue the cause as to whether or not there should be a judge-alone trial, and that could prejudice the accused.[296]

294 Mr Daniel Howard SC, Evidence, 11 August 2010, p 46.

295 Submission 11, Mr Daniel Howard SC, p 3.

296 Mr Peter Breen, Evidence, 11 August 2010, p 36.

5.56 Mr Breen emphasised his concerns that the accused may be disadvantaged if the same judge were to hear the trial as determined the application for a judge alone trial, because the judge may have preconceived opinions as to the accused's innocence or guilt:

> There is no doubt in my mind that a judge is going to be influenced in his or her decision by the application, particularly if there is some problem with the accused that is going to jeopardise their situation and trial and then information has to be put to the judge in the context of the application for a judge-alone trial. I do not think that is a fair situation to the accused.[297]

5.57 Mr Howard Brown, Deputy President, Victims of Crime Assistance League (VOCAL) also expressed support for a different judge determining the application and hearing the trial because of concerns about the potential 'contamination' of a judge's view prior to the trial commencing:

> … our preference would be that a completely different judge deal with one aspect of it before we get to the trial so that there could be no risk and no additional avenue of appeal on the basis of contamination of the judge's view by prior knowledge of certain factors.[298]

5.58 Mr McCusker concurred that to overcome these concerns the judge who determines the application for a judge alone trial should not be the trial judge: 'I would add that the application should be made, in each case, to a judge who will not be the trial judge'.[299]

5.59 Mr Spohr agreed that the judge who hears the application for a judge alone trial should not be the judge that hears the trial itself. However, Mr Spohr further noted that there may be practical issues in rural and regional areas with ensuring that two different judges hear the two elements of the trial:

> … the judge who hears the application for a judge-alone trial under the model, if there is to be one, ought not be the judge that hears the matter if it goes by judge alone. It is, in our view, inappropriate that a judge hears evidence that a particular accused person, for example, is going to tamper with the jury and then, having determined that a person is going to tamper with the jury, then put in the position where they need to make a determination as to the guilt or innocence of that person in a different context. So that subject to practicalities, and those are particularly evident in regional areas, in our view in all circumstances where it is practicable, a different judge ought to hear the application for a judge-alone trial if a judge is going to be making that decision.[300]

5.60 The Law Society of NSW also noted that excluding the judge determining the application from acting as the trial judge may cause difficulties for areas where there is only one judge, such as in regional and rural NSW.[301]

5.61 Similarly, Mr Peter Breen recognised the particular challenges that would be faced in rural and regional Australia in having two different judges determine the two elements of the trial.

297 Mr Breen, Evidence, 11 August 2010, p 36.

298 Mr Howard Brown, Deputy President, Victims of Crime Assistance League, Evidence, 12 August 2010, p 34.

299 Submission 3, Mr Malcom McCusker QC, p 1.

300 Mr Spohr, Evidence, 12 August 2010, p 23.

301 Answers to questions taken on notice during evidence, 12 August 2010, Law Society of NSW, p 5.

Mr Breen suggested that to overcome this issue, an application for a judge alone trial could be made via an application form to a judge in another area

> I recognise that in country NSW there is only one judge … those applications for judge-alone trials are done on the papers. If that is the case, there is no reason why an application for a judge-alone trial could not be made to another judge in another area based on the papers.
>
> But I think that it is important, certainly in the city, if there is going to be an application for a judge-alone trial that that judge should be a different judge from the judge who is going to be hearing the trial.[302]

5.62 These concerns were not shared by all Inquiry participants however as some participants argued that a judge was trained to exercise neutrality in their decision making processes, and would be able to set aside any information that they had become aware of while determining applications for judge alone trials.

5.63 For example, Mr Andrew Wilson, Manager, Practice Department, Law Society of NSW, noted that the defence would likely have the same disclosure concerns but that ultimately, the judge is trained to undertake an impartial decision making process:

> … the defence would have exactly the same problems and difficulties of having to disclose its case when arguing for the trial be not by jury when the judge is hearing it. A judge is well-equipped and chosen by society to represent and made those decisions.[303]

5.64 The Law Society of NSW noted that any prior knowledge of the case would be unlikely to influence a judge's decision as they are required to act impartially: '… it is inherent in the judicial office that a judge must discharge the functions of office with impartiality and integrity'.[304]

5.65 Ms Musgrave indicated that it was not envisaged that there would be a strict rule in place to prevent the same judge who determines the judge alone application from subsequently hearing the case, largely due to logistical and equality issues:

> There would not be a fixed rule because of the difficulty with regional listings. In the city it would be unlikely. In country sittings or the wider metropolitan area it may be the same judge … There are probably two considerations. One is entirely a practical one with listings. It is very difficult to get matters in front of a handful of judges who may be sitting in Sydney and with the regional applications it would be very difficult to get them in front of that person. The other thing is if the judge is applying an interests of justice test, part of which is objective community standards, I think there is some merit in having all members of the judiciary contributing to that decision.[305]

5.66 Ms Musgrave argued that it would not be desirable to introduce a centralised decision making process for judge alone applications:

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302 Mr Breen, Evidence, 11 August 2010, p 36.

303 Mr Andrew Wilson, Manager, Practice Department, Law Society of NSW, Evidence, 12 August 2010, p 6.

304 Answers to questions taken on notice during evidence, 12 August 2010, Law Society of NSW, p 5.

305 Ms Musgrave, Evidence, 11 August 2010, p 11.

> It is not envisaged that the judge determining the application for a judge alone trial will be excluded from acting as the trial judge … a centralised process for determining judge alone applications is neither necessary nor desirable, given the general nature of the interests of justice test, which should be applicable by any judge … excluding the judge who determined the application may cause difficulties in regional courts where only one judge is available.[306]

Committee comment

5.67 Some Inquiry participants expressed concern that in presenting arguments in relation to an application for a judge alone trial on the basis of the interest of justice test, prosecution and defence counsel would be required to disclose their evidence to both the judge and the opposing counsel before the commencement of the trial itself. For example, the prosecution may possess information that could discredit a defence witness, but early disclosure could jeopardize the effectiveness of that information for the prosecution.

5.68 The Committee notes the suggestion from some Inquiry participants that the judge who determines the application for a judge alone trial should be excluded from acting as the trial judge. It was argued that this would alleviate concerns that a judges' knowledge of the matter, derived through their determination of the application for a judge alone trial, could potentially influence their decisions or verdict during the trial.

5.69 Other Inquiry participants argued that a judge is trained to exercise impartiality in decision making, and would therefore be unlikely to allow any information that they had become aware of while determining an application for a judge alone trial to influence their final verdict.

5.70 The Committee acknowledges the advice from the Department of Justice and Attorney General that when the proposed model was developed, it was not envisaged that the judge determining the application for a judge alone trial would be excluded from acting as the trial judge. The Committee also acknowledges that preventing the same judge from hearing both matters would cause significant problems in regional and rural areas of NSW, where there is often only one judge.

5.71 The Committee notes that in the two other Australian jurisdictions in which the decision whether to proceed by jury or judge sitting alone is made by the courts, the judge who determines the application for a judge alone trial is not precluded from acting as the trial judge.

5.72 Whilst the Committee acknowledges the concerns of Inquiry participants, we consider it critical that the same standard of justice is consistently applied across the State. Whilst it may be possible to ensure in metropolitan areas that the same judge does not hear the application for a judge alone trials as hears the trial itself, it is not practical to apply the same standard of justice in regional and rural areas.

5.73 The Committee is confident that the judiciary will act impartially throughout the stages of the trial process, including in instances where they may be required to both determine an application for a judge alone trial and then act as the trial judge.

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306 Answers to questions on notice taken during evidence 11 August 2010, Ms Musgrave, p 4.

Chapter 6 Jury tampering and other issues

This Chapter considers the three remaining elements of the proposed model which concern jury tampering, multiple accused and the process for withdrawing an application for a judge alone trial.

Jury tampering

6.1 A jury tampering provision is included in the proposed model set out in the Inquiry terms of reference. Under Item Six of the model, if one of the parties applies and the court finds that there is a *risk* of jury tampering, the court *must* order that the matter proceed before a judge sitting alone (emphasis added).

6.2 Therefore, if the prosecution applies for a judge alone trial and the court finds there is a risk of jury tampering, the court must agree to the application, even if the accused does not consent.

6.3 A number of concerns were raised by Inquiry participants regarding this provision. These include whether such a provision is necessary, whether the risk threshold should be higher, and whether attempts should first be made to remove or mitigate the risk of jury tampering before compelling an accused who does not consent to have a judge alone trial.

Current situation

6.4 There are currently no formal protocols to guide the courts in dealing with issues of jury tampering in NSW. Mr Nicholas Cowdery QC, Director of Public Prosecutions (DPP), advised that in the absence of such protocols, the way in which issues of jury tampering are currently managed in NSW depends on the circumstances:

> … depends very much on the individual circumstances - what form the tampering takes, what communications are made and to whom, what is the state of knowledge of any participant. In a worst case, the problem may be simply addressed by discharging one jury and empanelling another, with additional safety mechanisms put in place.[307]

6.5 The Department of Justice and Attorney General advised that there are a number of ways the NSW criminal justice system currently protects jurors. For example, under the *Jury Act 1977* (NSW) it is an offence to unlawfully identify a juror,[308] or solicit information from or harass a juror.[309]

6.6 In addition, the judge in a criminal trial has the authority to make orders necessary to ensure the security of the court and its jury. Orders the court can make in this regard include

307 Answers to questions on notice, Mr Nicholas Cowdery QC, Director of Public Prosecutions, Question 2b, p 3.

308 *Jury Act 1977* (NSW), s 68.

309 *Jury Act 1977* (NSW), s 68(A).

providing transport for jurors, sequestering the jury while they consider their verdict,[310] or – if the risk of jury tampering is coming from the accused – imposing strict bail conditions.[311]

Necessity of the jury tampering provision

6.7 It was suggested by some Inquiry participants that a formal jury tampering provision in relation to requests for judge alone trials is unnecessary, on the basis that the current provisions are adequate, and that there is a very low incidence of jury tampering.

6.8 For example, Mr Cowdery expressed that he was satisfied that the existing measures available to courts are sufficient to deal with any threats of jury tampering that may arise.[312]

6.9 Likewise, Mr Daniel Howard SC stated: 'In my view the current arrangements are quite satisfactory to deal with jury tampering ... There are other perfectly adequate measures that can be taken against [this] risk'.[313] Legal Aid NSW also deemed jury tampering to be adequately dealt with under existing provisions in the *Jury Act 1977* (NSW).[314]

6.10 On the other hand, the Department of Justice and Attorney General considered it 'impossible' to say whether the current provisions are adequate to deal with such threats, noting that while they appear to have worked so far, there is no guarantee that they will continue to be adequate in the future.[315]

6.11 Mr Howard also raised a concern that the inclusion of such a jury tampering provision could encourage accused persons to engage in jury tampering to ensure that their trial proceeds before a judge alone.[316]

6.12 Mr Mark Ierace SC, Senior Public Defender, NSW Public Defender's Office, advised that usually the risk of jury tampering 'cannot be attributed to the accused, although the effect of it may be in his or her interest.'[317] Nonetheless Mr Ierace conceded that:

> … it is not inconceivable that there may be occasions when jury tampering is undertaken by those interested in a conviction in the misguided interests of securing a successful prosecution.[318]

310 Answers to questions on notice, NSW Department of Justice and Attorney General, Question 1a, p 2.

311 Mr Thomas Spohr, Chair and Executive Councillor, NSW Young Lawyers Criminal Law Committee, Evidence, 12 August 2010, p 21.

312 Answers to questions on notice, Mr Cowdery, Question 2b, p 3.

313 Answers to questions on notice, Mr Daniel Howard SC, Question 3, p 2.

314 Submission 10, Legal Aid NSW, p 1.

315 Answers to questions on notice, NSW Department of Justice and Attorney General, Question 1b, p 3.

316 Submission 11, Mr Daniel Howard SC, p 9.

317 Submission 6, NSW Public Defenders Office, p 2.

318 Submission 6, p 2.

6.13 Several Inquiry participants noted that there is a low incidence of jury tampering in NSW.[319] For example, Mr Cowdery commented that jury tampering in the state 'is virtually unheard of. I have not had one instance drawn to my attention in the almost 16 years that I have been DPP'.[320]

6.14 Mr Ierace told the Committee that he was unaware of any solid evidence to suggest that the incidence of jury tampering has increased in recent years. Nevertheless he expressed the view that a legislative provision for a trial by judge alone may be appropriate in cases where court orders are unable to overcome the threat of jury tampering.[321] (Overcoming the threat of jury tampering will be considered later in this Chapter).

6.15 The Department of Justice and Attorney General said that it did not anticipate that the proposed jury tampering provision would be used frequently, if at all;[322] however it maintained that the inclusion of such a provision was necessary for the few cases where jury tampering is an issue.[323] Ms Musgrave described the provision as a 'safety net',[324] and further noted: '[T]he aim of the model is to equip judges with the best machinery in this regard.'[325]

Adequacy of the threshold

6.16 The primary issue raised during the Inquiry regarding the proposed jury tampering provision concerned the risk threshold. A number of participants argued that the proposed requirement for there to be a *risk* of jury tampering set too low a threshold. As put by Legal Aid NSW: '[A] mere risk of jury tampering is a relatively low bar to set as the precondition for a mandatory judge-only trial'.[326]

6.17 Concern was also raised about the imprecise nature of the term 'risk'.[327] For example, Mr Cowdery questioned:

> Does that mean "any risk" - in which case there could be significant disruption to the trial process - or is it intended to mean a "likely risk" or "probable risk" or some such, more reasonable, concept?[328]

6.18 Another participant, Mr Pouyan Afshar, President, NSW Young Lawyers Criminal Law Committee, pointed out that there is always a risk that juries could be tampered with.[329] This point was also raised by Ms Mary Macken, President of the Law Society of NSW:

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319 Answers to questions on notice, Mr Howard, Question 3, p 2; Answers to questions on notice, Mr Malcolm McCusker QC, Question 2b, p 2; Answers to questions on notice, Mr Cowdery, Question 2a, p 2; Submission 6, p 2.

320 Answers to questions on notice, Mr Cowdery, Question 2a, p 2.

321 Submission 6, p 2.

322 Answers to questions on notice, NSW Department of Justice and Attorney General, Question 1b, p 3.

323 Ms Penny Musgrave, Director, Criminal Law Division, Department of Justice and Attorney General, Evidence, 11 August 2010, p 10.

324 Ms Musgrave, Evidence, 11 August 2010, p 10.

325 Answers to questions on notice, NSW Department of Justice and Attorney General, Question 1b, p 4.

326 Submission 10, p 1.

327 Answers to questions on notice, Mr Howard, Question 3, p 2.

328 Answers to questions on notice, Mr Cowdery, Question 22, p 3.

> … there will always be a risk of jury tampering per se. So it takes away the element of discretion from the court. They could always just say that the matter should be sent to a judge sitting alone because there will always be a risk of jury tampering.[330]

6.19 As such, various suggestions were made to the Committee to raise the proposed threshold by qualifying the word 'risk'. For instance, Ms Macken suggested that it should be an 'identifiable risk' or 'demonstrable risk'.[331] Mr Thomas Spohr, Chair and Executive Councillor, NSW Young Lawyers Criminal Law Committee, also suggested that it be an 'identifiable risk', or alternatively a 'real' or 'substantial' risk.[332]

6.20 In response to questioning from the Committee regarding these suggestions, Ms Musgrave from the Department of Justice and Attorney General replied:

> I cannot see an issue with that ... There are a lot of processes in place already to deal with jury tampering and this is really the safety net, so I would see no significant problem with having the words "identifiable", "real" or "substantial" placed there.[333]

6.21 Inquiry participants referred to jury tampering provisions in other jurisdictions for guidance. For example, the Westernn Australia and Queensland models (i.e. the models closest aligned to the proposed NSW model) both set a higher risk threshold. In Western Australia, the *Criminal Procedure Act 2004* (WA) provides that a superior court may order a judge alone trial if it considers that it is 'likely' that jury tampering would be committed.[334] In Queensland, the *Criminal Code 1899* (QLD) provides that the court may make a no jury order if there is a 'real possibility' that jury tampering would occur.[335]

6.22 Reference was also made to jury tampering provisions in the United Kingdom and New Zealand. The United Kingdom sets a very high risk threshold under the *Criminal Justice Act 2003* (UK), providing that a judge must make an order for a judge alone trial if he or she is satisfied that the following two conditions are fulfilled:

- if there is evidence of a *real and present* danger that jury tampering would take place,[336] and
- notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be *so substantial* as to make it necessary in the interests of justice for the trial to be conducted without a jury (emphasis added).[337]

329 Mr Pouyan Afshar, President, NSW Young Lawyers Criminal Law Committee, Evidence, 12 August 2010, p 15; Ms Mary Macken, President, Law Society of NSW, Evidence, 12 August 2010, p 4.

330 Ms Macken, Evidence, 12 August 2010, p 4.

331 Ms Macken, Evidence, 12 August 2010, p 4.

332 Mr Spohr, Evidence, 12 August 2010, p 16.

333 Ms Musgrave, Evidence, 11 August 2010, p 10.

334 *Criminal Procedure Act 2004* (WA), s 118(5)(b).

335 *Criminal Code 1899* (Qld), s 615(4)(b).

336 *Criminal Justice Act* (UK), s 44(4).

337 *Criminal Justice Act* (UK), s 44(5).

6.23 The United Kingdom Act provides the following examples of cases where there may be evidence of a real and present danger that jury tampering would take place:

- a case where the trial is a retrial and the jury in the previous trial was discharged because jury tampering had taken place[338]
- a case where jury tampering has taken place in previous criminal proceedings involving the defendant or any of the defendants,[339] or
- a case where there has been intimidation, or attempted intimidation, of any person who is likely to be a witness in the trial.[340]

6.24 In New Zealand, the *Crimes Act 1961* (NZ) provides that a court may proceed to a trial by judge alone where it is satisfied that:

> … there are reasonable grounds to believe (a) that intimidation of any person or persons who may be selected as a juror or jurors has occurred, is occurring, or may occur, and (b) that the effects of intimidation can be avoided effectively only be making (such) an order ... [341]

6.25 As noted by Mr Ierace, the provisions in the United Kingdom and New Zealand 'go way beyond' mere risk when dealing with the issue of jury tampering.[342] Mr Ierace recommended that the proposed NSW provision be re-drafted along the lines of these overseas jurisdictions, and expressed his preference for the United Kingdom provision.[343]

6.26 The Australian Human Rights Commission also expressed support for the United Kingdom provision, stating that the provision has been tested and considered in recent cases, and provides 'an appropriate balance between the right of the accused to have a jury trial and the need to ensure that the trial is unaffected by tampering with jurors.'[344]

6.27 On the other hand, Mr Andrew Wilson, Manager, Practice Department, Law Society of NSW did not support the UK provision. Mr Wilson argued that the requirement to find 'evidence of a real and present danger that jury tampering would take place' is much harder to prove than an 'identifiable risk', and asserted: 'I think the words stating "identifiable risk" defines it enough and gives the court the discretion when hearing the application to see whether the risk is identifiable or not'.[345]

Committee comment

6.28 The Committee notes the concerns expressed by some Inquiry participants that a mere 'risk' of jury tampering is too low a threshold to justify an order for a judge alone trial without the

338 *Criminal Justice Act* (UK), s 44(6)(a).

339 *Criminal Justice Act* (UK), s 44(6)(b).

340 *Criminal Justice Act* (UK), s 44(6)(c).

341 *Crimes Act 1961* (NZ), s 361E.

342 Mr Mark Ierace SC, Senior Public Defender, Public Defenders Office, Evidence, 11 August 2010, p 30.

343 Submission 6, p 3.

344 Submission 17, Australian Human Rights Commission, p 7.

345 Mr Andrew Wilson, Manager, Practice Department, Law Society of NSW, Evidence, 12 August 2010, p 4.

acccused's consent, given that this would be remove an accused's right to a jury trial. We note the observation made by some participants that there is always a risk of jury tampering.

6.29 The Committee therefore considers that the risk threshold in the proposed model is insufficient. We believe that it is essential that the threshold be raised if the model is to be implemented.

6.30 Numerous suggestions were submitted during this Inquiry regarding how the provision should be amended, such as raising the threshold to an 'identifiable' or 'real' or 'substantial' risk. We note that some support was also expressed for the provision to be re-drafted along the lines of the United Kingdom provision regarding jury tampering in judge alone trials.

6.31 Given that there was no clear consensus raised during the Inquiry regarding these suggestions, the Committee leaves it to the NSW Attorney General to decide how best to describe the threshold.

6.32 On a separate point, the Committee queries the wording of Item 6 in the proposed model, which provides that if *either party* applies for a judge alone trial and the court finds there is a risk of jury tampering, the court must order that the matter proceed before a judge sitting alone. As one would presume that if an accused, or someone associated with him or her, wished to tamper with a jury they would not apply for a judge alone trial, the effect of this wording would appear to be somewhat superfluous.

6.33 The Committee notes that the Western Australian and Queensland models (which the proposed NSW model is closely aligned to) do not contain such wording, and instead simply provide that a court may make an order for a judge alone trial if it considers that jury tampering is likely to occur. If the proposed model is to be implemented, this point should be considered by the drafters of the legislation.

Removing the risk of jury tampering

6.34 Under the proposed model, if a risk of jury tampering is identified, the court *must* order that the trial proceed to a judge alone. This lack of discretion by the court was criticised by some Inquiry participants, who argued that there should be scope for the court to first make attempts to remove such risks, and only if those risks could not be overcome should an order be made for a trial by judge alone against the accused's consent.[346]

6.35 Mr Emmanual Kerkyasharian from the NSW Young Lawyers Criminal Law Committee recommended that the provision be re-drafted into a two-step process: the first step being to identify whether the risk threshold has been passed; the second step determining whether the risk is insurmountable.[347]

346 For example, Mr Afshar, Evidence, 12 August 2010, pp 15-16.

347 Mr Emmanual Kerkyasharian, Committee Member, NSW Young Lawyers Criminal Law Committee, Evidence, 12 August 2010, p 17.

6.36 This was elaborated on by Mr Spohr, who suggested that the second step of determining whether the risk is insurmountable is more important than the semantics of the risk threshold:

> [Whether one] defines the standard as substantial risk or identifiable risk becomes less important because it is the subsequent question that determines whether or not you take that action. It does not matter how big the risk is if you can overcome it by some means (emphasis added).[348]

6.37 In addition, Mr Spohr stated:

> Our problem with the tampering test at this stage … is largely that it seems to be that if there is a risk … the right to jury trial goes out the window ... it does not seem to take into account the way in which that evidence would come to the judge's attention or the things that could be done to mitigate against that risk.[349]

6.38 The NSW Public Defenders Office highlighted that a similar two-step process exists in New Zealand and the United Kingdom, which only allow a trial by judge alone to proceed if (1) there is *more* than an opportunity, motive or suspicion of jury tampering; and (2) where all other means available to the Court to thwart such attempts are deemed incapable of removing that risk.[350]

6.39 Options available to the courts to remove or mitigate the risk of jury tampering were outlined earlier in this Chapter, and include separating the trials, remanding the accused into custody or making strict bail conditions, or, in appropriate circumstances, ordering the sequestration of the jury.[351]

6.40 Examples of such options being used were provided by Inquiry participants. For example, Mr Cowdery outlined a case he was involved in where attempted jury tampering occurred, affecting two of the jurors. In that case, the two jurors were immediately separated and discharged from the jury, before they could speak to the other jurors, and the trial proceeded with the ten remaining jurors. Mr Cowdery commented: 'So there is no need, at least in cases like that and probably more generally, for trials to proceed before a judge alone.'[352]

6.41 Another example was provided by Mr Ierace, who was also involved in a case where jury tampering attempts had been made. In that case, the trial judge made various orders to overcome the threat of tampering, including for the jurors to be transported to and from the court by the Sheriff, and for the jury to be sequestered for the duration of deciding a verdict.[353] Mr Ierace said: 'The case demonstrates that even where concerted attempts to tamper with a jury are anticipated, court orders can overcome that threat.'[354]

6.42 An alternative solution was put forward by the Australian Human Rights Commission, which noted that the jury tampering provisions in Western Australia and Queensland provide that

348 Mr Spohr, Evidence, 12 August 2010, p 16.

349 Mr Spohr, Evidence, 12 August 2010, p 16.

350 Submission 6, p 2.

351 *Jury Act 1977*, s 54(1); Submission 9, NSW Young Lawyers, p 3.

352 Answers to questions on notice, Mr Cowdery, Question 2a, pp 2-3.

353 *CCA; R v Warren Richard and Roy Bijerk* [1999] NSWCCA 114 and Submission 6, p 3.

354 Submission 6, p 3.

the courts *may* make an order (as opposed to *must*) for a judge alone trial if they consider that jury tampering is likely to occur.[355]

Committee comment

6.43 The Committee acknowledges that a range of options are available to the courts to remove or mitigate the risk of jury tampering if it is found that it is likely to occur. We note the examples provided by some Inquiry participants demonstrating that such options have successfully been exercised in the past without the need to resort to a judge alone trial, and agree that the court should be encouraged to utilise these options in the first instance.

6.44 The Committee is therefore of the view that, if the proposed model is implemented, the jury tampering provision should require that once the risk threshold has been passed, a trial by judge alone will only proceed where all other means reasonably available to the court are considered to be unable to adequately address that risk to the satisfaction of the court.

6.45 The Committee also notes that the jury tampering provisions in Western Australia and Queensland provide that the courts *may* make an order for a judge alone trial if they consider that jury tampering is likely to occur, as opposed to the proposed NSW model which provides that the courts *must* make an order for a judge alone trial. We believe that the courts in NSW should have the same discretion, and recommend that if the proposed model is implemented, the jury tampering provision should reflect this approach.

6.46 The Committee's recommendations on the issue of jury tampering are set out in Chapter 7.

Multiple accused

6.47 The proposed model states that if there are multiple accused and not all of the accused agree to a trial by judge alone, the trial must proceed before a jury, subject to the jury tampering exception.[356] In other words, if one accused person makes an application for a judge alone trial and any of the co-accused do not agree, then the application will not be granted.

6.48 The proposed provision is the same as the current provision relating to multiple accused in section 132 of the *Criminal Procedure Act 1986* (NSW).

6.49 When questioned on this aspect of the proposed model, Inquiry participants largely supported this measure, noting that it protects the right to trial by jury by ensuring that one accused cannot be compelled to have a judge alone trial as a result of their co-accused applying.

6.50 For example, Mr Cowdery noted that the provision 'recognises that trial by jury is the preferred and should be the default option – and should be preserved'.[357] The Queensland Law Society also expressed support for the provision.[358]

355 Submission 17, p 7.

356 Proposed model, Item Nine.

357 Answers to questions on notice taken during evidence 11 August 2010, Mr Cowdery, p 6.

358 Submission 15, Queensland Law Society, p 3.

6.51 Some Inquiry participants also noted that if any of the multiple accused wished to have a different mode of trial from their co-accused, it was open to each co-accused to apply to be tried separately. For instance, Mr Kerkyasharian commented:

> It is always available for one co-accused or a number of co-accused to make an application for a separate trial. The basis of that application may well be that they do not want a jury in that matter and if they can present the cogent and compelling reasons necessary to not have a jury, that may well ground the application for a separate trial, and that is a solution to the problem.[359]

6.52 Mr Kerkyasharian also stated that '… as a presumptive matter an accused should not lose their right to trial by jury simply because they have a co-accused who wants to do it another way'.[360]

6.53 Mr Malcolm McCusker QC, a barrister from Western Australia, suggested that if the multiple accused did not agree to the preferred mode of trial, the trial should proceed under a judge sitting alone unless those accused wanting a jury trial were able to demonstrate to the court that a jury trial would be in the 'interests of justice':

> Where there are multiple accused, some of whom wish to have a trial by judge alone and some of whom wish to have a trial by jury, then there should be a trial by judge alone unless those seeking a trial by jury are able to satisfy the court that this would not be in the interests of justice.[361]

6.54 Concern was raised about the effect of the proposed jury tampering provision on multiple accused. Mr Ierace noted under the suggested model, if jury tampering occurs in relation to one accused and not others, all of the accused would be forced to have a trial by judge alone. Mr Ierace said: 'That concerns me because the accused who are not suspected of having any role to play in the jury tampering would be deprived of their right to trial by jury.'[362]

6.55 Similar concerns were raised by the NSW Young Lawyers Criminal Law Committee, which argued that in such cases the automatic loss of the right to jury trial by the other co-accused 'is contrary to the spirit of the proposal'.[363]

6.56 To overcome this issue, the NSW Young Lawyers Criminal Law Committee suggested that the proposed provision be amended to allow the court to consider all options available to remove or mitigate the risk of jury tampering.[364] This option was supported by the Committee previously in this Chapter (see paragraphs 6.43 – 6.44).

6.57 Mr Ierace suggested that wherever possible the case against the accused suspected of jury tampering should be separated so that there is a separate trial in relation to that accused.[365] However, he flagged another potential issue that could arise from this suggestion, where it may be problematic to request victims to repeat their evidence:

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359 Mr Kerkyasharian, Evidence, 12 August 2010, p 21.

360 Mr Kerkyasharian, Evidence, 12 August 2010, p 21.

361 Submission 3, Mr Malcolm McCusker QC, p 2.

362 Mr Ierace, Evidence, 11 August 2010, p 30.

363 Submission 9, p 2.

364 Submission 9, p 2.

365 Mr Ierace, Evidence, 11 August 2010, p 30.

> For example, in a rape case, if one of the accused is suspected of jury tampering and not the others, you would not necessarily want the victim or victims having to give evidence more than once.[366]

6.58 Mr Ierace, while noting that such a situation would be extremely rare, highlighted it as a grey area.[367]

Committee comment

6.59 The Committee supports in principle the proposal that where there are multiple accused and not all of the accused agree to a trial by judge alone, the trial must proceed before a jury subject to the jury tampering exception. We note that on this point the proposed model does not differ from the current situation.

6.60 The Committee notes that in instances where there are multiple accused who are in disagreement as to their preferred mode of trial, they are able to request to be tried separately from each other. Sufficient protective measures would have to be in place to ensure that the proposed model does not become a de facto means of applying for a separate trial.

6.61 We acknowledge the concerns raised about the effect of jury tampering on multiple accused where the tampering only occurs in relation to one person. We agree with the NSW Young Lawyers Criminal Law Committee that one way to address this issue is to allow the court to attempt to remove or mitigate the risk of jury tampering, and note our comments at paragraphs 6.43 – 6.44.

Withdrawing a request for a judge alone trial

6.62 The final aspect of the proposed model states that once consent has been given for a judge alone trial to proceed, the request may only be withdrawn by leave of the court.[368]

6.63 Only a small number of Inquiry participants commented on this aspect of the model. Of those that did, most were supportive of this provision, and did not raise any concerns in relation to it. For example, Mr McCusker expressed support for this aspect of the model, as did the NSW Law Society, NSW Young Lawyers and Legal Aid NSW.[369]

6.64 The Queensland Law Society also supported this aspect of the model, and suggested that the withdrawal of an application also be subject to an 'interest of justice' test.[370]

Committee comment

6.65 The Committee considers it appropriate that once consent has been given for a judge alone trial to proceed, the request may only be withdrawn by leave of the court.

366 Mr Ierace, Evidence, 11 August 2010, p 30.

367 Mr Ierace, Evidence, 11 August 2010, p 30.

368 Proposed model, Item Ten.

369 Submission 3, p 3; Submission 8, Law Society of NSW, p 2; Submission 9, p 1; Submission 10, p 1.

370 Submission 15, p 3.

Chapter 7 Conclusion

This final Chapter sets out the Committee's conclusions as to whether section 132 of the *Criminal Procedure Act 1986* should be amended to allow either party in criminal proceedings to apply to the court for trial by judge alone, without the requirement that the prosecution consent and with the decision to be made by the court based on the interests of justice, and the appropriateness of the proposed model included in our terms of reference. Our conclusions are based on the analysis of the broader issues raised by Inquiry participants in relation to the proposed model and its potential impact on the criminal justice system, as examined in Chapter 3, and our examination of the various aspects of the proposed model in Chapters 4, 5 and 6.

Shift in decision making from the ODPP to the courts

7.1 The proposed model for judge alone trials shifts the application and decision making process from the Office of the Director of Public Prosecutions (ODPP) to the courts. Most significantly, where the accused applies and the prosecution does not consent then the court must determine the matter.

7.2 This shift in decision making power from the ODPP to the court was the central point of concern with the proposed model amongst Inquiry participants, and it was because of this aspect of the proposed model that many Inquiry participants formed their view on whether or not they supported the model in general.

7.3 The Committee notes that there is a distinct divide within the legal community on this fundamental element of the proposed model.

7.4 On balance, and after careful consideration, the Committee considers that the shift in decision making power from the ODPP to the court in relation to applications for judge alone trials, which is most significant in relation to situations where the accused applies and the prosecution does not consent, is appropriate.

7.5 The Committee believes that the shift in decision making power from the ODPP to the court will assist in ensuring that the determination of applications for judge alone trials is consistent and transparent. We consider that it is also a logical extension of the court's role as an arbiter of disputes between the prosecution and the defence.

Potential impact of the proposed model

7.6 Inquiry participants raised a number of complex issues related to the potential impact of the proposed model for judge alone trials on the criminal justice system and the role of the community in the system. These concerns related mainly to the efficiency of judge alone trials compared to jury trials, an increase in judicial decisions and community involvement in the criminal justice system through juries.

7.7 In relation to concerns about **efficiency**, the Committee considers that, regardless of the potential efficiencies that may be achieved by judge alone trials, economic efficiency should not be the primary consideration in evaluating the proposed model for judge alone trials. Whilst an efficient criminal justice system is important, it should not be achieved at the

expense of a system that is fair and balanced for all parties. No clear evidence was presented to demonstrate the extent of efficiency gains that could be achieved with the proposed model and many variables were raised in relation to this.

7.8 The Committee notes the concerns expressed about the implications of the **increase in judicial decisions** which would follow an increase in the number of judge alone trials. These concerns related to the workload of judges and the possibility of more appeals.

7.9 A central area of discussion throughout the Inquiry was the potential impact of the proposed model on **community involvement in the criminal justice system**, with Inquiry participants identifying a number of issues in this regard.

7.10 The Committee notes the debate among Inquiry participants on the ability of judges and jurors to reflect objective community standards in the determination of trials, and on the perceived legitimacy of verdicts reached by juries and by a judge sitting alone. The Committee also notes the concerns that a jury may not be as representative of an accused's peers as is commonly presumed.

7.11 The Committee believes that both juries and judges bring different attributes and strengths to deliberations in criminal trials, and that neither judges nor juries can be considered superior, or inferior, to the other.

7.12 Furthermore, the Committee does not consider that the proposed model would result in judge alone trials replacing jury trials as the preferred mode of trial for the majority of matters in the criminal justice system.

7.13 The discussion of the potential impact of the proposed model was very useful for the Committee in understanding the issues and the benefits of the current versus the proposed model. While many valid points were made during this discussion, the Committee believes that these issues do not significantly detract from the proposed model.

The proposed model for judge alone trials

7.14 While the Committee was able to draw some general conclusions about the proposal to amend section 132 of the *Criminal Procedure Act 1986* on the basis of the discussion in Chapter 3, we felt that it was important to consider each aspect of the proposed model in detail before reaching our final conclusions.

7.15 On balance, and after much deliberation, the Committee considers that the proposed model for judge alone trials set out in our terms of reference provides a fair and transparent system for both the accused and the prosecution to apply for a judge alone trial.

7.16 The Committee believes that the proposed model does not impact greatly on the right of the community to participate in the criminal justice system as some suggested, but rather, provides a transparent and equitable process for both the accused and the prosecution to request a judge alone trial in instances where the interests of justice would be best served by a judge sitting alone.

7.17 The Committee notes that Prosecution Guideline 24, which is currently used by the ODPP to determine if applications for judge alone trials should be granted or refused, outlines similar factors that would be considered by the courts in determining applications under the proposed model.

7.18 However, there is no mechanism to prevent the ODPP from modifying the basis by which applications for judge alone trials are granted or refused. For instance, the Committee notes the significant change in the content of the prosecution guideline relating to judge alone trials between the current and the former DPP, with the removal of the presumption in favour of granting consent to an application for a judge alone trial.

7.19 The Committee considers that shifting this decision making power to the courts, as outlined in the proposed model, will ensure consistency in the determination of applications for judge alone trials.

7.20 Accordingly, the Committee recommends that the Attorney General should amend section 132 of the *Criminal Procedure Act 1986* so as to allow either party in criminal proceedings to apply to the court for trial by judge alone, without a requirement that the prosecution consents to the application, with the decision to be made by the court based on the interests of justice.

7.21 The Committee also recommends that the proposed model set out in the terms of reference for the Committee's inquiry form the basis of the amendment. In the main the Committee has agreed with most aspects of the proposed model and we refer to the detailed discussion in Chapters 4, 5 and 6 in this regard.

7.22 Our careful consideration of the model has, however, led us to identify three areas where the model can be improved. These improvements relate to the need for the accused to provide informed consent to applications for judge alone trials, the jury tampering exception, and the 'interests of justice' test.

Recommendation 1

That the Attorney General seek to amend section 132 of the *Criminal Procedure Act 1986* so as to allow either party in criminal proceedings to apply to the court for trial by judge alone, without a requirement that the prosecution consents to the application, with the decision to be made by the court based on the interests of justice.

That the proposed model set out in the terms of reference for the Committee's inquiry form the basis of the amendment, with the inclusion of the changes set out in Recommendations 2, 3, 4, 5 and 6.

Informed consent

7.23 The Committee notes that section 132 of the *Criminal Procedure Act 1986* currently requires that a judge alone trial can only proceed if the '[j]udge is satisfied that the person, before making the election, sought and received advice in relation to the election from an Australian legal practitioner'.

7.24 The Committee believes that the Attorney General in developing the legislative amendment to section 132 of the *Criminal Procedure Act 1986* should ensure that a similar provision requiring the informed consent of the accused after receiving advice from an Australian legal practitioner is included.

Recommendation 2

That the Attorney General, in developing the legislative amendment to section 132 of the *Criminal Procedure Act 1986*, include a provision requiring the informed consent of the accused after receiving advice from an Australian legal practitioner, to an application for a judge alone trial.

The jury tampering provision

7.25 The Committee notes the concerns of Inquiry participants that a mere 'risk' of jury tampering is too low a threshold to justify an order for a judge alone trial, given that the effect of this provision would be to remove an accused's right to a jury trial.

7.26 The Committee considers that the risk threshold in the proposed model set out in our terms of reference is insufficient. We believe that it is essential that the threshold in the legislative amendment to implement the proposed model must be raised.

7.27 The Committee is also of the view that the jury tampering provision in the proposed model should require that once the risk threshold has been passed, a trial by judge alone will only proceed where all other means reasonably available to the court are considered to be unable to adequately address that risk to the satisfaction of the court.

Recommendation 3

That the Attorney General, in developing the legislative amendment to section 132 of the *Criminal Procedure Act 1986*, include:

- a higher risk threshold than is included in the proposed model set out in the Inquiry terms of reference, and
- a requirement that once the risk threshold has been passed, a trial by judge alone will only proceed where all other means reasonably available to the court are considered to be unable to adequately address that risk to the satisfaction of the court.

7.28 The Committee further notes that the jury tampering provisions in Western Australia and Queensland provide that the courts *may* make an order for a judge alone trial if they consider that jury tampering is likely to occur, as opposed to the proposed NSW model which provides that the courts *must* make an order for a judge alone trial. We believe that the courts in NSW should have the same discretion, and recommend that if the proposed model is implemented, the jury tampering provision should reflect this approach.

Recommendation 4

That the Attorney General, in developing the legislative amendment to section 132 of the *Criminal Procedure Act 1986*, ensure that the jury tampering provision provides that the courts '*may* make' an order for a judge alone trial if they consider that jury tampering is likely to occur, rather than '*must* make'.

The 'interests of justice' test

7.29 The Committee's third concern with the proposed model related to the 'interests of justice' test that the court must apply in instances where the accused has applied for a judge alone trial but the prosecution has not consented. We consider that the factors listed in any legislative amendment to implement the proposed model should not be an exhaustive list, but merely indicative of the types of factors that a judge may consider when determining applications for judge alone trials.

7.30 An inclusive list of factors to be considered by the courts under the 'interests of justice' test will allow the courts to exercise discretion as to what factors will be applied in each scenario, and acknowledges that some factors will be more relevant in certain matters than others.

Recommendation 5

That the Attorney General, in developing the legislative amendment to section 132 of the *Criminal Procedure Act 1986*, ensure that it contains an inclusive, not exhaustive, list of factors to be considered by the courts when applying the 'interests of justice' test.

7.31 The other issue emanating from the application by the courts of the 'interests of justice' test is whether the court's decision in this regard is, or should be, appealable. The Committee notes that if this decision, and potentially other decisions made under the proposed model such as in relation to jury tampering were appealable, it could result in lengthy delays in the administration of justice.

7.32 The Committee notes the advice from both the Department of Justice and Attorney General and the DPP that the decision of the courts in applying the 'interests of justice' test would be appealable under section 5F of the *Criminal Appeal Act 1912*.

7.33 The Committee believes that prior to the implementation of the proposed model for judge alone trials, the Attorney General should consider the approaches taken in Western Australia and Queensland where no interlocutory appeals are available from an order for judge alone trial.

7.34 While removing, or tightly restricting, the ability to appeal the court's determination of applications for judge alone trials may be disagreed with by some, we consider that on balance it may be appropriate to ensure that the administration of justice in not unnecessarily hampered by lengthy appeals.

Recommendation 6

That the Attorney General, in developing the legislative amendment to section 132 of the *Criminal Procedure Act 1986*, consider the approach taken in Western Australia and Queensland, where no interlocutory appeals are allowed from a court's decision in relation to an application for a judge only trial.

Concluding remarks

7.35 The Committee wishes to once again express our appreciation to Inquiry participants for their contributions to this Inquiry. The Committee values the thoughtful, compelling and, at times, challenging arguments presented by them in relation to both the individual elements of the model and the potential impact of the model on the criminal justice system.

7.36 The Committee considers that, subject to our recommended changes, the proposed model will provide a transparent and appropriate method of applying for, and determining, applications for a judge alone trial in NSW.

7.37 While the Committee has supported the proposed model for judge alone trials, this should not be taken as support for judge alone trials as a replacement for jury trials. The Committee believes that both modes of trial have an essential role to play in our criminal justice system.

Appendix 1 Submissions

No	Author
1	Confidential
2	The Hon Justice RO Blanch AM, Chief Judge, NSW District Court
3	Mr Malcolm McCusker AO QC
4	Mr Peter Breen
5	Office of the Director of Public Prosecutions
6	NSW Public Defenders Office
7	Victims of Crime Assistance League Inc NSW
8	Law Society of NSW
9	NSW Young Lawyers
10	Legal Aid NSW
11	Mr Daniel Howard SC
12	The Hon Christian Porter MLA, Western Australia Attorney General and Minister for Corrective Services
13	Homicide Survivors Support After Murder Group Incorporated
14	Her Honour Chief Judge Patricia M Wolfe, District Court of Queensland
15	Queensland Law Society
16	NSW Department of Justice and Attorney General
17	Australian Human Rights Commission

Appendix 2 Witnesses

Date	Name	Position and Organisation
Wednesday 11 August 2010 **Jubilee Room** **Parliament House, Sydney**	Ms Penny Musgrave	Director, Criminal Law Review Division, Department of Justice and Attorney General
	Mr Nicholas Cowdrey AM QC	Director of Public Prosecutions, Office of the Director of Public Prosecutions
	Mr Mark Ierace SC	Senior Public Defender, NSW Public Defenders Office
	Mr Peter Breen	
	Mr Daniel Howard SC	
Thursday 12 August 2010 **Jubilee Room** **Parliament House, Sydney**	Ms Mary Macken	President, Law Society of NSW
	Mr Andrew Wilson	Manager, Practice Department, Law Society of NSW
	Mr Thomas Spohr	Chair, NSW Young Lawyers Criminal Law Committee
	Mr Pouyan Afshar	President, NSW Young Lawyers
	Mr Emmanuel Kerkyasharian	Committee member, NSW Young Lawyers Criminal Law Committee
	Mr Howard Brown	Deputy-President, Victims of Crime Assistance League Inc NSW (VOCAL)
	Mr Stephen Odgers SC	Chair, Criminal Law Committee, NSW Bar Association
Friday 13 August 2010 **Waratah Room** **Parliament House, Sydney** ***(via videoconference)***	Mr Malcolm McCusker AO QC	

Appendix 3 Tabled documents

Wednesday 11 August 2010
Public Hearing, Jubilee Room, Parliament House, at 9.30 am

1 Document entitled 'Criminal Code of Canada, Part XIX – Trial without a jury, s.568' – tabled by Mr Daniel Howard SC

2 Document entitled 'The Effectiveness and Efficiency of Jury Decision-making' by Young, Tinsley and Cameron, Criminal Law Journal, April 2000, vol. 24 – tabled by Mr Daniel Howard SC

3 Document entitled ' Juror understanding of judicial instructions in criminal trials' by Lily Trimboli, Crime and Justice Bulletin, NSW Bureau of Crime Statistics and Research, September 2008, no. 119' – tabled by Mr Daniel Howard SC.

Appendix 4 Prosecution Guideline 24[371]

An accused person may elect to be tried by a judge alone, subject to the consent of the Director or his delegate (see section 132 of the *Criminal Procedure Act 1986*).

Each case is to be considered on its merits. There is no presumption in favour of consent. It should be borne in mind that the community has a role to play in the administration of justice by sewing as jurors and those expectations and contributions are not lightly to be disregarded. Consent is not to be given where the principal motivation appears to be "judge shopping". Consent is not to be given where the election has not been made in accordance with section 132(4) of the *Criminal Procedure Act 1986* (see *R v Coles* (1993) 31 NSW LR 550).

Predictions of the likelihood of conviction by either jury or judge alone or of a jury disagreement are not to be considered. The principal consideration is the achieving of justice by the fairest and most expeditious means available. Trials in which judgment is required on issues raising community values - for example: reasonableness, provocation, dishonesty, indecency, substantial impairment under section 23A of *the Crimes Act 1900* -or in which the cases are wholly circumstantial or in which there are substantial issues of credit should ordinarily be heard by a jury.

Cases which may be better suited to jury trial include those where the interests of the alleged victim require a decision by representatives of the community.

Cases which may be better suited to trial by judge alone include cases where:

- the evidence is of a technical nature, or where the main issues arise (in cases other than substantial impairment under section 23A of the *Crimes Act 1900*) out of expert opinions (including medical experts);
- there are likely to be lengthy arguments over the admissibility of evidence in the course of the trial;
- there is a real and substantial risk that directions by the trial judge or other measures will not be sufficient to overcome prejudice arising from pre-trial publicity or other cause;
- the only issue is a matter of law;
- the offence is of a trivial or technical nature;
- witnesses or the accused person/s may so conduct themselves as to cause a jury trial to abort; and/or
- significant hurt or embarrassment to any alleged victim may thereby be reduced.

The power to consent has been delegated by the Director to all Crown Prosecutors and Trial Advocates. Where uncertainty exists as to whether or not to consent, reference should be made to the Director or a Deputy Director, the Senior Crown Prosecutor or a Deputy Senior Crown Prosecutor.

[371] Submission 5 - Appendix 1, Office of the Director of Public Prosecutions, p 1.

Appendix 5 Minutes

Minutes No 42
Tuesday 11 May 2010
Room 1136, Parliament House, Sydney, at 2.00 pm

1. Members present
Ms Robertson *(Chair)*
Mr Clarke *(Deputy Chair)*
Mr Ajaka
Mr Donnelly
Ms Voltz

2. ***

3. ***

4. New terms of reference
The Committee noted correspondence received from the Attorney General on 27 April 2010 referring terms of reference for an inquiry into whether s.132 of the *Criminal Procedure Act 1986* should be amended to allow parties in criminal proceedings to apply to the court for a trial by judge alone, without requiring the prosecution's consent.

The Committee deliberated.

Resolved, on the motion of Mr Ajaka: That the Committee adopt the terms of reference received from the Attorney General on 27 April 2010 for an inquiry into judge alone trials under s.132 of the *Criminal Procedure Act 1986*.

Resolved, on the motion of Mr Ajaka: That, in accordance with paragraph 5(2) of the resolution establishing the Standing Committees dated 10 May 2007, the Chair inform the House that it has adopted the terms of reference received from the Attorney General on 27 April 2010 for an inquiry into judge alone trials under s.132 of the *Criminal Procedure Act 1986*.

Resolved, on the motion of Mr Ajaka: That the Committee note the indicative timeline prepared by the Secretariat in consultation with the Chair.

Resolved, on the motion of Mr Ajaka: That a press release announcing the commencement of the Inquiry and the call for submissions be distributed to media outlets throughout NSW on Wednesday 12 May 2010.

Resolved, on the motion of Mr Ajaka: That the Inquiry and the call for submissions be advertised in *The Sydney Morning Herald* and *The Daily Telegraph* and any other appropriate publications as determined by the Secretariat.

Resolved, on the motion of Mr Ajaka: That the Committee write to stakeholders identified by the Secretariat in consultation with the Committee informing them of the Inquiry and inviting them to make a submission.

Resolved, on the motion of Mr Ajaka: That hearings for the inquiry be held on a date to be determined by the Secretariat in consultation with the Committee and that the witnesses that are to be invited to appear be determined by the Secretariat in consultation with the Committee.

5. ***

6. ***

7. Adjournment
The Committee adjourned at 2.10 pm until Monday 31 May 2010, at 9.30 am.

Teresa McMichael
Clerk to the Committee

Minutes No. 44
Friday 11 June 2010
Room 814-815, Parliament House, Sydney, at 9.30 am

1. Members present
Ms Robertson *(Chair)*
Mr Clarke *(Deputy Chair)*
Mr Ajaka
Mr Donnelly
Ms Voltz

2. Apologies
Ms Hale

3. ***

4. Deliberative meeting

4.1 ***

4.2 Inquiry into judge alone trials under s132 of the *Criminal Procedure Act 1986*

Submissions
Resolved, on the motion of Mr Ajaka: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of Submission Nos 2 and 3.

Resolved on the motion of Mr Ajaka: That, Submission No. 1 be kept confidential.

Hearing dates
Resolved, on the motion of Mr Ajaka: That the Committee set aside 11 and 12 August 2010 for public hearings for the Inquiry into judge alone trials.

Report deliberative
Resolved, on the motion of Mr Ajaka.: That the Committee set aside Friday 29 October 2010 to deliberate the Chair's draft report.

4.3 ***

5. Adjournment
The Committee adjourned at 4.30 pm *sine die*.

Rachel Callinan
Clerk to the Committee

Minutes No 45
Monday 21 June 2010
Room 814-815, Parliament House, Sydney, at 9.30 am

1. Members present
Ms Robertson *(Chair)*
Mr Clarke *(Deputy Chair)* (at 10.15 am)
Mr Ajaka
Mr Donnelly
Ms Voltz
Ms Hale (until 3.25 pm)

2. ***

3. Deliberative meeting

3.1 ***

3.2 Inquiry into judge alone trials under s132 of the *Criminal Procedure Act 1986*

Correspondence
The Committee noted the following items of correspondence received:

- 31 May 2010 – From Judge Brendan Butler AM SC, Chief Magistrate, Magistrates Court of Queensland to the Chair, stating that the Magistrates Courts of Queensland do not exercise the election that is the subject of the Inquiry
- 3 June 2010 – From Heather Kay, Executive Officer, Law Reform Commission WA, to the Chair, regarding a review that was undertaken by the commission that considered the issue of trial by judge alone
- 3 June 2010 – From His Honour Judge Mark Marien SC, President, Children's Court of NSW, to the Chair, regarding the inapplicability of s132 of the *Criminal Procedure Act* as the Children's Magistrate sits alone in conducting criminal proceedings.

Submissions
Resolved, on the motion of Mr Clarke: That, according to section 4 of the Parliamentary Papers *(Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of Submission Nos 4 and 5.

4. Adjournment
The Committee adjourned at 5.19 pm until Tuesday 29 June 2010 at 9.30 am.

Rachel Callinan
Clerk to the Committee

Minutes No 46
Tuesday 29 June 2010
Room 1102, Parliament House, Sydney, at 9.30 am

1. Members present
Ms Robertson *(Chair)*
Mr Clarke *(Deputy Chair)*
Mr Ajaka
Mr Donnelly
Ms Hale
Ms Voltz

2. Minutes
Resolved, on the motion of Mr Ajaka: That Draft Minutes Nos 44 and 45 be confirmed.

3. ***

4. ***

5. Inquiry into judge alone trials under s132 of the *Criminal Procedure Act 1986*
Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of Submission Nos 5 and 6.

6. Adjournment
The Committee adjourned at 11.46 am until Wednesday 11 August 2010.

Madeleine Foley
Clerk to the Committee

Minutes No 47
Monday 19 July 2010
Christine Robertson's Office, Parliament House, Sydney, at 4.05 pm

1. Members present
Ms Robertson *(Chair)*
Mr Clarke *(Deputy Chair)*
Mr Donnelly

2. Apologies
Mr Ajaka
Ms Hale
Ms Voltz

3. Inquiry into judge alone trials under s132 of the *Criminal Procedure Act 1986*

3.1 Submissions
Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of Submission No.'s 7-16.

3.2 Witnesses
Resolved, on the motion of Mr Clarke: That the Committee invite the following witnesses to give evidence at the hearings to be held on 11 and 12 August 2010:
- Justice Blanch, Chief Judge, NSW District Court
- Mr Malcolm McCusker AO QC
- Mr Peter Breen
- Director of Public Prosecutions
- NSW Public Defender
- Victims of Crime Assistance League (VOCAL)
- Law Society
- NSW Young Lawyers
- Mr Daniel Howard SC
- Department of Justice and Attorney General
- Senior judicial officer, NSW Supreme Court
- NSW Bar Association.

4. ***

5. ***

6. Adjournment
The Committee adjourned at 4.10 pm until Wednesday 11 August 2010 at 9.30 am.

Rachel Callinan
Clerk to the Committee

Minutes No 48
Wednesday 11 August 2010
Jubilee Room, Parliament House, Sydney, at 9.30 am

1. Members present
Ms Robertson *(Chair)*
Mr Clarke *(Deputy Chair)*
Mr Ajaka
Mr Donnelly
Ms Voltz
Ms Hale (from 9.45am)

2. Public hearing – Inquiry into judge alone trials under s132 of the *Criminal Procedure Act 1986*

The witnesses, the public and media were admitted.

The Chair made an opening statement regarding procedural matters.

The following witness was sworn and examined:
- Ms Penny Musgrave, Director, Criminal Law Review Division, Department of Justice and Attorney General.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:
- Mr Nicholas Cowdery AM QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:
- Mr Mark Ierace SC, Senior Public Defender, NSW Public Defenders Office.

The evidence concluded and the witness withdrew.

3. Deliberative meeting

3.1 Minutes
Resolved, on the motion of Mr Donnelly: That Draft Minutes No 47 be confirmed.

3.2 ***

3.3 ***

3.4 Inquiry into judge alone trials under s132 of the *Criminal Procedure Act 1986*

3.4.1 Correspondence
The Committee noted the following items of correspondence received:
- 22 June 2010 – From Mr Graeme Henson, Chief Magistrate of the Local Court NSW, re the appropriateness of the Court to comment on the terms of reference
- 24 June 2010 – From Chris Burns, Acting Minister for Justice & Attorney-General, Northern Territory, regarding the making of a submission
- 13 July 2010 – From Simon Corbell MLA, Attorney General, ACT, advising that he will not be making a submission
- 14 July 2010 – From Mr Dein APM, A/Deputy Commissioner, Specialist Operations, NSW Police Force, advising that NSW Police will not be making a submission
- 26 July 2010 – From Ms Greenwood, CEO, Supreme Court NSW, advising that the Chief Justice will not be making a submission and has declined the invitation to appear as a witness.

3.4.2 Additional witness
Resolved, on the motion of Mr Clarke: That the Committee invite Mr Stephen Odgers SC from the NSW Bar Association to give evidence at the hearing to be held 12 August 2010.

4. Public hearing (continued) – Inquiry into judge alone trials under s132 of the *Criminal Procedure Act 1986*

Ms Voltz left the meeting.

The witnesses, the public and media were admitted.

The following witness was sworn and examined:
- Mr Peter Breen.

The evidence concluded and the witness withdrew.

Ms Voltz rejoined the meeting.

The following witness was sworn and examined:
- Mr Daniel Howard SC.

Mr Howard tendered the following documents:
- Criminal Code of Canada, Part XIX – Trial without a jury, s.568
- 'The Effectiveness and Efficiency of Jury Decision-making' by Young, Tinsley and Cameron, Criminal Law Journal, April 2000, vol. 24
- 'Juror understanding of judicial instructions in criminal trials' by Lily Trimboli, Crime and Justice Bulletin – Contemporary Issues in Crime and Justice, September 2008, no. 119.

The evidence concluded and the witness withdrew.

The public hearing concluded at 4.00 pm. The public and the media withdrew.

Acceptance of tendered documents
Resolved, on the motion of Mr Donnelly: That the Committee accept the following documents tendered during the public hearing by Mr Howard:
- Criminal Code of Canada, Part XIX – Trial without a jury, s.568
- 'The Effectiveness and Efficiency of Jury Decision-making' by Young, Tinsley and Cameron, Criminal Law Journal, April 2000, vol. 24
- 'Juror understanding of judicial instructions in criminal trials' by Lily Trimboli, Crime and Justice Bulletin – Contemporary Issues in Crime and Justice, September 2008, no. 119.

5. Adjournment
The Committee adjourned at 4.05 pm until Thursday 12 August 2010 at 10.45 am.

Rachel Callinan
Clerk to the Committee

Minutes No 49
Thursday 12 August 2010
Jubilee Room, Parliament House, Sydney, at 10.45 am

1. Members present
Ms Robertson *(Chair)*
Mr Clarke *(Deputy Chair)*
Mr Ajaka
Mr Donnelly
Ms Voltz
Ms Hale

2. Inquiry into judge alone trials under s132 of the *Criminal Procedure Act 1986*

The witnesses, the public and media were admitted.

The Chair made an opening statement regarding procedural matters.

The following witnesses from the Law Society of NSW were sworn and examined:
- Ms Mary Macken, President
- Mr Andrew Wilson, Manager, Practice Department.

The evidence concluded and the witnesses withdrew.

The following witnesses from NSW Young Lawyers were sworn and examined:
- Mr Pouyan Afshar, President

- Mr Thomas Spohr, Chair, Young Lawyers Criminal Law Committee
- Mr Emmanuel Kerkyasharian, Committee member, Young Lawyers Criminal Law Committee.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:
- Mr Howard Brown, Vice-President, Victims of Crimes Assistance League Inc (VOCAL).

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:
- Mr Stephen Odgers SC, Chair, Criminal Law Committee, NSW Bar Association.

The evidence concluded and the witness withdrew.

The public hearing concluded at 3.28 pm. The public and the media withdrew.

3. ***

4. Adjournment
The Committee adjourned at 3.30 pm until Friday 13 August 2010 at 11.20 am.

Rachel Callinan
Clerk to the Committee

Minutes No 50
Friday 13 August 2010
Waratah Room, Parliament House, Sydney, at 11.25 am
(Video conference)

1. Members present
Ms Robertson *(Chair)*
Mr Clarke *(Deputy Chair)*
Mr Donnelly
Ms Hale

2. Apologies
Mr Ajaka
Ms Voltz

3. Inquiry into judge alone trials under s132 of the *Criminal Procedure Act 1986*

The witnesses, the public and media were admitted.

The Chair made an opening statement regarding procedural matters.

The following witness was sworn and examined via video conference:
- Mr Malcolm McCusker AO QC.

The evidence concluded and the witness withdrew.

The public hearing concluded at 12.40 pm. The public and the media withdrew.

4. ***

5. Adjournment
The Committee adjourned at 12.40 pm *sine die*.

Cathryn Cummins

Clerk to the Committee

Minutes No 51
Monday 20 September 2010
Room 1102, Parliament House, Sydney, at 10.00 am

1. Members present
Ms Robertson *(Chair)*
Mr Clarke *(Deputy Chair)*
Mr Ajaka
Mr Donnelly
Mr Shoebridge
Ms Voltz

2. ***

3. ***

4. Minutes

Resolved, on the motion of Mr Donnelly: That Draft Minutes Nos 46, 48, 49 and 50 be confirmed.

5. ***

6. Inquiry into judge alone trials under s132 of the *Criminal Procedure Act 1986*

6.1 Correspondence
The Committee noted the following items of correspondence sent:
- 3 September 2010 – To Mr S. Kerkyasharian AM, President, NSW Anti-Discrimination Board, from Chair, seeking input to the inquiry
- 3 September 2010 – To Ms C. Branson QC, President and Human Rights Commissioner, Australian Human Rights Commission, from the Chair, seeking input to the inquiry.

6.2 Answers to questions on notice
Resolved, on the motion of Mr Donnelly: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of the answers to questions on notice provided by the following witnesses/organisations:
- Office of the Director of Public Prosecutions (26 August 2010)
- Peter Breen (27 August 2010)
- Mr Dan Howard SC (3 September 2010)
- Department of Justice & Attorney General (8 September 2010)
- NSW Young Lawyers (9 September 2010).

7. ***

8. Adjournment
The Committee adjourned at 10.50 am until Monday 25 October 2010 at 9.30am.

Rachel Callinan
Clerk to the Committee

Minutes No. 52
Monday 25 October 2010
Room 1102, Parliament House, Sydney, at 9.35 am

1. Members present
Ms Robertson *(Chair)*

Mr Clarke *(Deputy Chair)*
Mr Donnelly
Ms Voltz

2. Minutes
Resolved, on the motion of Mr Donnelly: That Draft Minutes No 51 be confirmed.

3. ***

4. ***

5. Inquiry into judge alone trials under s132 of the *Criminal Procedure Act 1986*

5.1 Submissions
Resolved, on the motion of Ms Voltz: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of Submission No 17.

5.2 Correspondence
The Committee noted the following items of correspondence received:
- 17 September 2010 – From Ms Penny Musgrave, Director, Criminal Law Review, Department of Justice and Attorney General to the Secretariat, forwarding information on the number of judge alone trials in Western Australian since 2004
- 7 October 2010 - From Ms Tracie Harvey, Executive Services Officer, Anti-Discrimination Board of NSW to the Secretariat, advising that the Board will not be making a submission to the inquiry into judge alone trials.

5.3 Publication of documents
Resolved, on the motion of Ms Voltz: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of answers to Questions on Notice and other information, received from:
- Mr Malcolm McCusker QC (20 September 2010)
- Public Defender's Office (27 September 2010)
- Law Society of NSW (28 September 2010)
- Ms Musgrave (17 September 2010).

6. ***

7. Adjournment
The Committee adjourned at 10.20 am until Friday 29 October 2010 at 9.30 am.

Rachel Callinan
Clerk to the Committee

Draft Minutes No 53
Friday 29 October 2010
Room 1102, Parliament House, Sydney, at 9.30 am

1. Members present
Ms Robertson *(Chair)*
Mr Clarke *(Deputy Chair)*
Mr Ajaka
Mr Donnelly
Mr Shoebridge
Ms Voltz

2. Minutes
Resolved, on the motion of Mr Donnelly: That Draft Minutes No 52 be confirmed.

3. Inquiry into judge alone trials under s132 of the *Criminal Procedure Act 1986*

3.1 Correspondence

The Committee noted the following items of correspondence received:

- 11 October 2010 – From Mr V Rodziewicz, Library Manager, Russell Fox Library, ACT Supreme Court, to Secretariat, advising of the number of judge alone trial held in the ACT since 2008
- 12 October 2010 – From Mr V Rodziewicz, Library Manager, Russell Fox Library, ACT Supreme Court, to Secretariat, advising of the number of trials listed in the ACT since 2008
- 12 October 2010 – From Mr V Rodziewicz, Library Manager, Russell Fox Library, ACT Supreme Court, to Secretariat, providing information regarding the ACT since 2008.

3.2 Publication of documents

Resolved, on the motion of Ms Voltz: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of correspondence received from Mr Rodziewicz.

3.3 Chair's draft report

The Chair's tabled her draft report entitled Inquiry into judge alone trials under s.132 of the *Criminal Procedure Act 1986*, which, having been previously circulated, was taken as being read.

Chapter 1 read.

Resolved, on the motion of Ms Voltz: That Chapter 1 be adopted.

Chapter 2 read.

Resolved, on the motion of Mr Clarke: That Chapter 2 be adopted.

Chapter 3 read.

Resolved, on the motion of Mr Ajaka: That Chapter 3 be adopted.

Chapter 4 read.

Resolved, on the motion of Mr Shoebridge: That Chapter 4 be adopted.

Chapter 5 read.

Resolved, on the motion of Mr Donnelly: That Chapter 5 be adopted.

Chapter 6 read.

Resolved, on the motion of Mr Shoebridge: That paragraph 6.44 be amended by omitting the words 'there should be an additional requirement that the risk of jury tampering be insurmountable before an order for a judge alone trial can be granted.' and inserting instead 'a trial by judge alone will only proceed where all other means reasonably available to the court are considered to be unable to adequately address that risk to the satisfaction of the court.'.

Resolved, on the motion of Mr Ajaka: That paragraph 6.60 be amended by inserting at the end of the paragraph 'Sufficient protective measures would have to be in place to ensure that the proposed model does not become a de facto means of applying for a separate trial.'.

Resolved, on the motion of Ms Voltz: That Chapter 6, as amended, be adopted.

Chapter 7 read.

Resolved, on the motion of Mr Clarke: That Recommendation 1 be adopted.
Resolved, on the motion of Mr Ajaka: That Recommendation 2 be amended by inserting the words 'after receiving advice from an Australian legal practitioner, ' after the word 'accused'.

Resolved, on the motion of Mr Ajaka: That Recommendation 2, as amended, be adopted.

Resolved, on the motion of Mr Shoebridge: That paragraph 7.27 be amended by omitting the words 'there should be an additional requirement that the risk of jury tampering be insurmountable, before an order for a judge alone trial can be made.' and inserting instead 'a trial by judge alone will only proceed where all other means reasonably available to the court are considered to be unable to adequately address that risk to the satisfaction of the court.'.

Resolved, on the motion of Mr Shoebridge: That Recommendation 3 be amended by omitting the words 'a trial by judge alone will only proceed where all other means available to the court are deemed incapable of removing that risk.' in the second dot point and inserting instead 'a trial by judge alone will only proceed where all other means reasonably available to the court are considered to be unable to adequately address that risk to the satisfaction of the court.'

Resolved, on the motion of Mr Shoebridge: That Recommendation 3, as amended, be adopted.

Resolved, on the motion of Mr Donnelly: That Recommendation 4 be adopted.

Resolved, on the motion of Ms Voltz: That Recommendation 5 be adopted.

Resolved, on the motion of Mr Shoebridge: That paragraph 7.34 be amended by omitting the words 'it may be essential' and inserting instead 'on balance it may be appropriate'.

Resolved, on the motion of Mr Donnelly: That Paragraph 7.33 and Recommendation 6 be amended by omitting the word 'closely'.

Resolved, on the motion of Mr Donnelly: That Recommendation 6, as amended, be adopted.

Resolved, on the motion of Mr Ajaka: That Chapter 7 be adopted.

Resolved, on the motion of Ms Voltz: That the draft report, as amended, be the report of the Committee and presented to the House according to Standing Order 226(1).

Resolved, on the motion of Ms Voltz: That the Committee present the report to the House, together with transcripts of evidence, submissions, tabled documents, answers to questions on notice, minutes of proceedings and correspondence relating to the Inquiry, except for documents kept confidential by resolution of the Committee.

Resolved on the motion of Mr Ajaka: That the Committee Secretariat corrects any typographical and grammatical errors prior to tabling.

The Chair advised that the Chair's Foreword and the media release announcing the tabling of the report into judge alone trials under s.132 of the *Criminal Procedure Act 1986* would be circulated to the Committee via email.

The Chair advised that a press conference to announce the tabling of the report into judge alone trials under s.132 of the *Criminal Procedure Act 1986* would be held at a time to be confirmed with the Committee.

4. Adjournment

The Committee adjourned at 10.00 am until 2.00 pm on Monday 8 November 2010 in Room 1102.

Rachel Callinan
Clerk to the Committee