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The Director
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

2nd September, 2010

Dear Sir/Madam,

Re: Judge Alone Trials under s 132 Criminal Procedure Act, 1986 (Inquiry)

Transcript and Answers to Questions on Notice

Thank you very much for the opportunity to give evidence before the Committee on 11th August, 2010.

As requested, I return the amended transcript.

I also provide the following answers to the questions on notice, adopting the numbering of the questions you have sent to me:

1. I disagree with the Department of Justice and Attorney General's submission that *'there is no reason to believe the prosecution is better placed to weigh the competing interests then the judiciary.'* There are two important issues that this statement fails to appreciate:
    a. The comment fails to take into account the separate roles of the prosecutor and the judge in the context of the adversarial system that we have. The judge needs to remain detached at all times from the interests of the parties; the judge's role is often likened to that of a 'referee' in criminal proceedings. 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.

b. 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.

2. 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 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.

3. In my view the current arrangements are quite satisfactory to deal with jury tampering. The proposed model requiring judge alone trial if the court finds a 'risk of jury tampering' is unsuitable. 'Risk' is imprecise, and there is very little evidence of significant tampering in New South Wales. The proposal would imperil an accused's right and the community's right to insist upon jury trial. This right, and the procedural equality of the parties to insist upon it, should not be diminished by vague concerns. There are other perfectly adequate measures that can be taken against risk of jury tampering.

4. Defendants would choose judge alone trials in any case where they believed this would enhance their chances of acquittal; that is their one and only concern, and the one and only concern of defence counsel is to bring about that result within the parameters of ethical conduct. Accused and their counsel are not concerned about the 'interests of the community' (nor, in the adversarial system should they be). I have no doubt that the proposals, if introduced, would lead to more applications for judge alone trials. I expect this to occur in trials involving distasteful accusations, such as sexual assault prosecutions, matters involving extreme violence, notorious crimes, and matters where the accused is associated with anti-social groups (such as bikie gangs). Such matters generally should be heard by juries.

5. I agree that if any accused wants a jury trial and the matters are to be heard together, then a jury trial should be held.

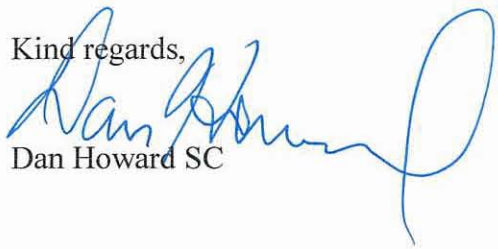
6. I think it is fundamental to procedural fairness, that there be procedural equality and equal rights on both sides of the adversarial system. You cannot have one process for defendants, and another for the community (prosecution). In my view, both parties should be able to insist upon trial by jury as a fundamental right. 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. I disagree with the Director's suggestion. If an accused wants trial by jury, he or she should be able to insist upon it as a fundamental right.

In relation to Ms. Hale's question on notice asked during my evidence, I provide the following answer:

Cases where the demeanour or behaviour of an accused, suffering from a mental illness or condition, might be significant enough such that it could possibly prejudice a jury against them (for example, if they caused a disturbance or had difficulty controlling their emotions or conforming their behaviour to the courtroom), would generally be very likely to involve persons whose fitness for trial is in question, and would be captured by the 'fitness for trial' provisions in the Mental Health (Forensic Provisions) Act, 1990. The question of a person's fitness or unfitness for trial is dealt with by judge alone, and the proceedings are non-adversarial, with neither party having the onus of proof. Defence counsel, generally speaking, have an obligation to raise the issue if it is significant. Therefore, the process is quite different to the hearing of a criminal trial. In the type of case you have suggested, competent defence counsel would find ways of enlisting the assistance of the judge and the prosecutor to permit the accused to have appropriate breaks and to find opportunities to use strategies to assist the accused to remain calm. These could be raised and discussed in the absence of the jury without any resulting prejudice.

Finally, I enclose the feedback questionnaire as requested.

Kind regards,



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