NSW GOVERNMENT
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RECEIVED
8 SEP 2010
LAW & JUSTICE

Ms Cathryn Cummins
Principal Council Officer
Standing Committee on Law and Justice
Parliament House
Macquarie Street
Sydney NSW 2000

6 SEP 2010

Dear Ms Cummins

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

I write in relation to the transcript of my appearance before the Committee on 11 August 2010.

Please find attached the corrected transcript and responses to the questions on notice arising from my appearance and the additional questions from members.

Yours sincerely

Penny Musgrave
Director
Criminal Law Review

Answers to additional questions on notice – Judge alone trials inquiry

Questions on Notice arising from the transcript

a) Statistics regarding the number of judge alone trials (p.2)

The figures provided by BOCSAR for judge alone trials and the percentage they make of total trials for each year from 1993 through to 2007 are:

1993: 85 judge alone trials, 6.55% of 1298.
1994: 86 judge alone trials, 7.73% of 1112.
1995: 34 judge alone trials, 3.68% of 925.
1996: 28 judge alone trials, 3.04% of 922.
1997: 16 judge alone trials, 1.74% of 922.
1998: 40 judge alone trials, 4.11% of 974.
1999: 49 judge alone trials, 5.51% of 890.
2000: 39 judge alone trials, 4.72% of 826.
2001: 41 judge alone trials, 5.14% of 797.
2002: 45 judge alone trials, 6.57% of 685.
2003: 30 judge alone trials, 4.42% of 678.
2004: 38 judge alone trials, 5.89% of 645.
2005: 29 judge alone trials, 4.38% of 662.
2006: 37 judge alone trials, 6.25% of 592.
2007: 43 judge alone trials, 7.88% of 546.

b) Operation of the provisions in Western Australia and Queensland (p.5,6)

Information has been requested from Western Australia and will be forwarded to the Committee as soon as it is received. It is noted that the Attorney General of Western Australia made a submission to the inquiry indicating that the provisions are working as they should.

The Queensland Department of Justice and Attorney General has provided some statistics regarding the take up of their judge-alone provisions since their introduction in 2008.

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

c) 28-day notice period (p.7)

Information from the Sheriff's Office indicates that jury summonses are sent about one month in advance of a trial date. While in large courts, the summonses are for multiple trials, in regional courts, these summonses are for individual trials, and hence it would be preferable if the determination of whether a trial was to be by judge-alone could take place before this.

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, ie, 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

d) Appeal mechanism (p.10)

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 alone trial it would need to be prior to the trial itself commencing.

e) Sentencing material (p.11)

I have attached a copy of the Sentencing Information Package prepared by the NSW Sentencing Council and the Department.

Additional questions on notice:

1. Under the proposed model, if there is a risk of jury tampering the trial must proceed as judge alone. Several submissions have raised concerns about this aspect of the proposed model. For example, the NSW Public Defender suggests that existing provisions are sufficient to overcome the threat of jury tampering.
   a) How does the legal system currently mitigate against the risk of jury tampering?
   b) Are the current provisions insufficient to deal with any threats that may be posed?
   c) What would be the benefits of including the jury tampering provision in the proposed model?

a) There are a number of ways the system protects jurors. There are offences under the *Jury Act 1977* for unlawfully identifying a juror (s68) and soliciting information from or harassing a juror (s68A).

Separately, and as outlined in the submission of the Senior Public Defender, the judge in a criminal trial has the authority to make orders necessary to ensure the security of the court, and this has been held to extend to the security of the jury. The court is not therefore limited in the type of orders that it may make, providing that they are justifiable in the circumstances.

Orders such as those described by the Senior Public Defender (ie providing transport for jurors and sequestering them whilst they consider there verdict) are very rare, but have been upheld by the Court of Criminal Appeal on the basis that there were exceptional and special circumstances which warranted them. *R v Richards; R v Bijkerk*, [1999] NSWCCA 114

b) It is impossible to say whether the current provisions are sufficient to deal with threats. They appear to have been so far, but that is not a guarantee. Whether provisions are adequate should be a matter for the judge in each case, and the aim of the model is to equip judges with the best machinery in this regard. Courts have in the past had to react to allegations of jury tampering and this will likely continue to be managed by the methods I have already mentioned. A number of the submissions note however that jury tampering is not currently seen as a problem in NSW and it is not anticipated that this particular aspect of the provision will be used frequently, if at all.

c) The benefit of including an exception for jury tampering in the model is that it recognises that there may be limited circumstances where there is a concern from the outset that the soundness of a jury verdict in a particular case may ultimately be questionable, perhaps because of the history of the particular matter and the accused. It is the only exception put forward to the principle that an accused has a right to a jury trial.

2. Both Western Australia and Queensland have provisions for judge alone trials. Each model requires the consent of the accused to be given for the trial to proceed as judge alone.

a) Is the decision as to whether or not a trial proceeds as judge alone appellable in these jurisdictions? If the decision is appellable, what have been the outcomes of any appeals?
b) What has been the community/media reaction to judge alone trials in these jurisdictions?

a) 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 pr-trial hearing.

The 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.

b) The Department is not aware of any particularly adverse or positive reactions to the judge alone provisions.

3. In regards to the application process for judge alone trials, is it envisaged that the judge determining the application for a judge alone trial will be excluded from acting as the trial judge?

a) If the judge determining the application for a judge alone trial is excluded from acting as the trial judge, how will single magistrate courts deal with this situation?
b) Would it be possible for applications for a judge alone trial to be determined through a central process, whereby applications are sent to the Chief Judge for determination?

It is not envisaged that the judge determining the application for a judge alone trial will be excluded from acting as the trial judge. As indicated in the answers given before the committee, 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. Further, as indicated by the question, excluding the judge who determined the application may cause difficulties in regional courts where only one judge is available.

4. The proposed model is silent on whether the decision for a trial to proceed as judge alone or not is appellable.

a) Should this decision be appellable?
b) If it was determined that the decision should be appellable, would this require a specific legislative amendment or are current appeal processes and associated provisions sufficient?

As indicated above, it is envisaged that the appeal provisions for interlocutory judgements and orders in the Criminal Appeal Act would apply, without amendment.

5. What are the current pre-trial disclosure requirements for both the prosecution and the defence?

a) What impact will the proposed model have on these pre-trial disclosures?

The pre-trial disclosure requirements are found in Part 3 of Chapter 3 of the *Criminal Procedure Act*. I have attached a copy of an article published in the Law Society Journal earlier this year which outlined changes made in 2009 as a result of the deliberations of the Trial Efficiency Working Group. It is not envisaged that any changes to the provisions relating to judge alone trials would have any impact on pre-trial disclosure.

6. The proposed model states that, when determining the 'interests of justice', the courts will consider objective community standards, such as reasonableness, negligence, indecency, obscenity or dangerousness (Item 8). The Queensland Law Society suggests that it is not 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 account a wide range of factors'. What do you think of this comment?

A: As stated before the Committee, it is not proposed in the model adopted in NSW that the 'interests of justice' would be exhaustively defined. 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.