THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

7 September 2010

Dear Ms Cummins

Inquiry into judge alone trials under s132 of the *Criminal Procedure Act 1986* – response to questions on notice

This letter responds to your letter of 17 August 2010. Your letter contained two separate sets of questions on notice. The first were questions originally provided to us prior to our *viva voce* evidence. The second were questions posed by the Hon. John AJAKA during our evidence.

Dealing with the original questions first, our responses are as follows:

1. The question specifically asks about whether the judiciary is as well placed 'determining the merits' of one form of trial over another. On that basis, the judiciary is just as well placed. There are other inherent difficulties in the proposed approach, such as increased cost (necessarily, since the application requires a full hearing), but those do not impact on the judiciary's ability to weigh the competing interests;

2. The question is broken into three parts:

    a. A judge will determine who is the more fair decision maker in the context of the particular case. That may reflect poorly on both judges and juries. As indicated above, 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. The prosecution will also be placed in the invidious position of submitting that it does not, in effect, believe that a judge is the appropriate decision-maker.

    b. 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.

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c. No. NSW Young Lawyers would not support any suggestion that particular categories of offences ought to be dealt with by judge alone trial.

Turning next to the questions raised by the Hon. Mr Ajaka. In part, those questions were answered *viva voce*. Otherwise, the questions and their respective answers follow:

Question: ***Firstly, in relation to point six, would it better to say "identifiable substantial risk which is not rectifiable"? Does it need the three limbs, that it is a real risk, an identifiable risk, as suggested by the Law Society, and that it is not rectifiable, which is your suggestion?***

Answer: Yes, it requires a three-limbed test. The evidence in relation to jury tampering must expose an identifiable, substantial risk, but before the court takes the course of ordering a judge alone trial, the court *must* consider whether it can remediate that substantial risk in some other fashion.

Question: ***Secondly, one of the real differences that has been raised between a judge-alone trial compared with a judge and jury is that a jury simply gives a verdict and not reasons, nor should it ever give reasons, whereas a judge is placed in the precarious situation of having to give very detailed reasons. Will that cause a delay for a verdict or will the judge say "I hereby pronounce you guilty and I will tender my reasons later" and someone waits for that to occur?***

Answer: The present practice in relation to judge alone trials ought to prevail. NSW Young Lawyers is not aware of any unnecessary delay caused by the current practice.

Question: ***What is being sought today is that the defendant, with learned counsel, has decided to say, "I do not want a trial by jury" for whatever reason. Should the Crown have the right to veto it or should the judge make that decision?***

Answer: NSW Young Lawyers sees no reason in principle why the Crown ought to have an absolute veto.

Question: ***My question is: is the fundamental right of a trial by jury an inherent right of the accused only, or is there some fundamental inherent right that the community has a right, via the Crown, to demand a trial by jury?***

Answer: 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. Our original submission cites a number of cases where the High Court of Australia has recognised the value of community participation in the criminal justice process, and NSW Young Lawyers supports those views. It is a question of semantics whether one describes that as a "fundamental inherent right"; a debate that the Committee would prefer not to submit on.

We thank the Standing Committee for the opportunity to comment further on our evidence. As ever, we would be pleased to assist the Standing Committee further on this, and any other issue.

If you have any questions in relation to the matters raised in this letter, please contact Thomas Spohr, Chair of the Young Lawyers Criminal Law Committee (crimlaw.chair@younglawyers.com.au) or Pouyan Afshar, President of NSW Young Lawyers (president@younglawyers.com.au).

Yours faithfully

Thomas Spohr | Chair, Criminal Law Committee; Executive Councillor
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