Submission
No 11

INQUIRY INTO JUDGE ALONE TRIALS UNDER S. 132 OF THE CRIMINAL PROCEDURE ACT 1986

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

30th June, 2010

Dear Sir/Madam,

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

SUBMISSION

I would be grateful if the Committee would consider this submission in their deliberations over this reference.

By way of background, I have been a lawyer practising in NSW since 1976 and I have an extensive background in criminal law and jury trials. I went to the bar in 1988 and did many trials as defence counsel. I was a Crown Prosecutor from 1992-2007, the last five years of which was as a Deputy Senior Crown Prosecutor, and I prosecuted countless trials in that time, of all variety of charges and complexity.

In 2008-9 I was Director of the National Prosecutions Program in the Faculty of Law, University of Wollongong, where I directed the Master of Laws (Criminal Prosecutions) Program.

I am currently conjoint Associate Professor in the School of Psychiatry at the University of New South Wales where I teach Psychiatry & The Criminal Law in the Masters of Forensic Mental Health Program. I am a part time member of the NSW Mental Health Review Tribunal. I am a member of the Criminal Law Committee of

the NSW Bar Association. I am co-author of *"Crime & Mental Health Law in NSW"* (Lexis -Nexis 2005).

I therefore make this submission from the perspective of one with extensive experience of jury trials, the criminal law and academia.

1. The Terms of reference propose the removal of the present requirement of the consent of the Prosecution to trial by Judge Alone. This is a profoundly bad idea and to adopt it would be an egregious mistake for many reasons that I will endeavour to express succinctly.

2. It is unfortunate that so few citizens understand the unique role and functions of the criminal prosecutor, without which it is impossible to appreciate the real dangers inherent in the proposal contained in the terms of reference.

3. Although the independence of prosecutors in New South Wales has been weakened by recent amendments to the Crown Prosecutors Act, 1986 by the removal of tenure for newly appointed Crown Prosecutors, they maintain the independence of members of the New South Wales Bar, whose motto 'Servants of All yet of None' captures something of the professional ethical obligations that, as barristers, they are bound by. These obligations have evolved over hundreds of years. The NSW Barristers' Rules contain very strict provisions (Rules 62 -72) about the duties and obligations of prosecutors to prosecute fairly and with integrity; members of the Committee are urged to read these. Breach of these rules can expose a prosecutor to professional sanctions including striking off. A prosecutor also has all the profound duties and obligations of an Officer of the Court, by reason of admission to the legal profession.

4. In addition, the NSW Office of the DPP subscribes fully to the ethical obligations and standards contained in the *'Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors'* of the International Association of Prosecutors. The NSW ODPP has the highest reputation of all the prosecution services in Australia, for its professionalism and probity, and for the quality of its work on behalf of the people of New South Wales. The NSW ODPP Prosecution Guidelines are regularly revised and updated and are regarded as a model by other prosecution services setting the highest standards for the correct approach to prosecuting in the public interest.

5. Our law has long recognised the vital importance of the unique role of prosecutors within the criminal justice system. Prosecutorial independence in the choice of who is to be prosecuted for what, is a critical component of arm's length justice in the context of our adversary system, and it is vital also that the Judiciary does not entangle itself in the prosecutor's

function; the judiciary must remain aloof from the adversarial 'arena' or it will lose all credibility and respect.

6. 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.

7. The 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. The prosecutor works up a case, often over many months, and acquires an intimate and detailed knowledge of its details, not all of which can or should necessarily be disclosed to the court or to the defence. Examples of circumstances where the prosecutor is in a unique position to best determine the appropriate mode of trial include:

   a. In some cases (this is not unusual) a prosecutor may perceive or sense a degree of reluctance on the part of a prosecution witness to give evidence, the meaning of which the prosecutor cannot fathom or pre-judge, but which prompts a prosecutor to form the view that a jury trial would be the most suitable mode of trial, in fairness to all concerned. Juries, with their collective common sense, are particularly good at determining issues of credit and reliability.
   b. In sexual assault prosecutions, the prosecutor will often have a hesitant or reluctant complainant whose reliability/credibility may be very difficult to assess. Or the complainant may be uncorroborated but credible – the public interest often requires that these cases be run, and juries are particularly good at assessing them. Moreover, if a verdict of 'not guilty' is returned by a jury in such a case, it commands far more respect and acceptance, from both the complainant and the accused, than the verdict of a single judge. Prosecutors need to be aware of, and take into account, the sensibilities of complainants and victims in such cases, in ways that a judge should not have anything to do with, lest the quality of even-handedness toward the accused is lost.
   c. 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.
   d. Many cases these days involve conflicts between expert witnesses. Juries are particularly good at uncovering a 'hired gun' espousing 'junk science' and a prosecutor will often correctly prefer to have

issues of the credibility of experts determined by a jury. Such decisions by a prosecutor may require intimate knowledge of complex expert material and opinion. For a judge to assess this properly would more often than not be very time consuming.

8. When Judge Alone trials were first introduced in New South Wales, 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.

9. The proposed changes would further empower accused persons by giving them a greater say in the mode of trial, than that given to the community, represented by the prosecutor. This procedural imbalance will be seen as unfair by members of the community, particularly victims and their families. No doubt these proposals will be very popular with accused persons and the defence bar.

10. Lord Devlin, in his classic treatise *"Trial by Jury"* (Sweet & Maxwell 1956) wrote (at 164):

> *"Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution; it is the lamp that shows that freedom lives."*

11. Trial by Jury, in which the Prosecution on the one hand, and the Accused, on the other, define the issues to be determined in an adversarial process, is a cornerstone of our system of criminal justice, and its nature has been aptly described by then Chief Justice Sir Garfield Barwick in *Ratten v The Queen* (1974) 131 CLR 510 at 517:

> *As Smith J. rightly said in expressing the reasons of the Full Court in this case, "Under our law a criminal trial is not, and does not purport to be, an examination and assessment of all the information and evidence that exists, bearing on the question of guilt or innocence". It is a trial, not an inquisition: a trial in which the protagonists are the Crown on the one hand and the accused on the other. Each is free to decide the ground on which it or he will contest the issue, the evidence which it or he will call, and what questions whether in chief or in cross-examination shall be asked; always, of course, subject to the rules of evidence, fairness and admissibility. The judge is to take no*

part in that contest, having his own role to perform in ensuring the propriety and fairness of the trial and in instructing the jury in the relevant law. Upon the evidence and under the judge's directions, the jury is to decide whether the accused is guilty or not.

12. The vital and very special role of the Prosecutor in the criminal process has been the subject of much judicial consideration. In *Maxwell v The Queen* (1996) 70 ALJR 324 at 534, Gaudron and Gummow JJ emphasised the significance of the Prosecutor's role to the integrity of the trial process:

> *It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute*[1] *, to enter a nolle prosequi* [2] *, to proceed ex officio* [3] *, whether or not to present evidence*[4] *and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted* [5] *. The integrity of the judicial process -- particularly, its independence and impartiality and the public perception thereof -- would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what* [6] *.*

13. In *Richardson v The Queen* (1974) 131 CLR 116 at 119, the High Court (Barwick CJ, McTiernan & Mason JJ) said this of the prosecutor's role in calling witnesses in a trial:

> *Any discussion of the role of the Crown prosecutor in presenting the Crown case must begin with the fundamental proposition that it is for him to determine what witnesses will be called for the prosecution. He has the responsibility of ensuring that the Crown case is properly presented and in the course of discharging that responsibility it is for him to decide what evidence, in particular what oral testimony, will be adduced. He also has the responsibility of ensuring that the Crown case is presented with fairness to the accused. In making his decision as to the witnesses who will be called he may be required in a*

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[1] See *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1277; *R v Humphrys* [1977] AC 1 at 46; *Barton v The Queen* (1980) 147 CLR 75 at 94-95, 110.
[2] See *R v Allen* (1862) 1 B & S 850 [121 ER 929]; *Barton v The Queen* (1980) 147 CLR 75 at 90-91.
[3] See *Barton v The Queen* (1980) 147 CLR 75 at 92-93, 104, 107, 109.
[4] See, eg, *R v Apostilides* (1984) 154 CLR 563 at 575.
[5] See *R v McCready* (1985) 20 A Crim R 32 at 39; *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 at 604-605.
[6] *Barton v The Queen* (1980) 147 CLR 75 at 94-95; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 38-39, 54, per Brennan J; at 77-78, per Gaudron J; *Williams v Spautz* (1992) 174 CLR 509 at 548, per Deane J; *Ridgeway v The Queen* (1995) 184 CLR 19 at 74-75, per Gaudron J.

particular case to take into account many factors, for example, whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible and truthful, whether in the interests of justice it should be subject to cross-examination by the Crown, to mention but a few.
What is important is that it is for the prosecutor to decide in the particular case what are the relevant factors and, in the light of those factors, to determine the course which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused. It is in this sense that it has been said that the prosecutor has a discretion as to what witnesses will be called for the prosecution. But to say this is not to give the prosecutor's decision the same character as the exercise of a judicial discretion or the exercise of a discretionary power or to make his decision reviewable in the same manner as those discretions are reviewable. In the context the word "discretion" signifies no more than that the prosecutor is called upon to make a personal judgment, bearing in mind the responsibilities which we have already mentioned.

This passage was referred to with approval by the High Court (Gibbs CJ, Mason, Murphy, Wilson & Dawson JJ) in *The Queen v Apotilides* (1984) 154 CLR 563 at 573-4.

These passages demonstrate the critical and singular role of the Prosecutor, who represents the community and whose function is to prosecute independently and fearlessly in the public interest and in scrupulous fairness to the accused.

The proposal to remove the prosecutor's right to refuse trial by judge alone severely diminishes the prosecutor's discretion and decision-making role. It is the prosecutor who chooses what charges to proceed with, what witnesses to call and how to present the case in the best public interest. The choice of mode of trial is an integral and equally important component of this. It is not for the judge to meddle into these matters. To do so will invite the very criticism referred to in the passage from *Maxwell v The Queen* above.

14. 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[7], 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). The vital components behind this idea include:

[7] The Jury Act has been amended numerous times to keep it relevant and efficient.

- That the common people, not those holding power, determine guilt or innocence. This is not a trite idea – it is an essential and indispensable safeguard to our idea of a free society. History and the modern era are replete with corrupt or 'agenda driven' regimes installing compliant judges to do their bidding[8]. The rule of law breaks down when this happens. The New South Wales judiciary is not immune from this[9], especially as long as the executive is solely responsible for choosing the judiciary, as is currently the case.

- 'Experts' do not decide the outcome of serious criminal cases – the jury does. It would be a bleak world that was ruled by 'experts' (be they judges or scientific experts) whose theories may be (and often are) proven to be misguided or utterly wrong. Juries, in their collective wisdom, have a matchless ability to sense a biased or 'theory bound' expert or a 'hired gun'; despite the expert codes of conduct, there are still plenty of these people about, and more and more expert evidence is called in trials these days. There have been innumerable miscarriages of justice wrought by poor expert evidence. To lessen the occasions when juries could screen this kind of evidence would be a retrograde step and further increase the risk of miscarriages. The NSW Court of Criminal Appeal in *R v Lissoff* [1999] NSWCCA 364 (per Sully J with whom Spigelman CJ & Newman J agreed) made this point firmly at [49]:

  ...it is, in our opinion, necessary to be clear about certain fundamental propositions which we would express as follows:

  1. The status in our system of criminal justice of a jury at trial is of absolutely fundamental constitutional legitimacy and importance. The empanelling of a lay jury, chosen at random from the general body of citizens, to be the sole tribunal of fact is not some irksome survival from a feudal past, whether real or imagined. The contribution of lay juries to our system of

[8] President Roosevelt notoriously attempted (unsuccessfully) to 'stack' the U.S. Supreme Court with compliant appointees in order to overcome the court's perceived resistance to his 'New Deal' legislation – for a lucid account see J. Shesol *'Supreme Power'* W.W. Norton & Co., 2010; the mass dismissals of members of the judiciary in Fiji, and those in Pakistan are very recent examples. The complete subjugation of the judiciary by the Third Reich is a story all too well known. See also T. Ginsburg (Ed.) *"Rule by Law: The Politics of Courts in Authoritarian Regimes"* Cambridge University Press, 2008

[9] The recent example of the Crimes (Criminal Organisation Control) Act, 2009 initially had introduced a system of *'eligible judges'* who could be appointed and unappointed by the Attorney General in his or her absolute discretion. This egregious and dangerous challenge to the separation of powers was open to serious abuse, and after much public outcry, was amended.

criminal justice is the lynch-pin of that system. The importance of the jury in our criminal justice system is such as to justify attributing to the jury a constitutional significance even where there is no express constitutional protection such as that provided by s.80 of the Commonwealth Constitution. Statutes will not be interpreted, therefore, as impinging on the right to trial by jury unless there is clear and unambiguous language to that effect.

2. It would be to close one's eyes to what is going on in contemporary society not to recognise that there is a body of articulate opinion which holds that a lay jury drawn at random in accordance with current principle and practice is, more or less as of course, unable to be entrusted safely with the decision of questions of fact which are said to be complex, or of a highly technical nature. There is, more often than not, more than just a touch of elitism and of intellectual condescension in the point of view. But the real flaw in the point of view is that it fails wholly to take account of the everyday practical experience of the courts in their dealings with juries empanelled in criminal trials.

3. That experience would, in our own observation and understanding of these matters, have to acknowledge, and to make allowance for, the case of the jury that fails, as a collegiate body, to do its sworn public duty. The same would have to be said about individual jurors in particular cases. But it seems to us that the fair position is that such departures from proper jury standards are very much the exception rather than the rule. It is, in our opinion, demonstrably true as a general proposition that the average jury, if properly assisted and directed, will do diligently and conscientiously what the law asks of it.

- 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, and retains the right, through the prosecutor, to choose the mode of trial. Judges have to give reasons for their decisions when sitting judge alone; juries do not have to give reasons. This inscrutability of a jury verdict is a strong safeguard for the important factors of closure and finality of outcome. A unanimous verdict of a jury is much stronger and commands more respect than a verdict of a single judge.

- 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.

15. These issues are too fundamental and important to be sacrificed in the name of 'cost efficiency', 'statistical outcomes' or the other measures of 'bean counters'. If the requirement of the prosecutor's consent to Judge Alone trial were to be removed, there can be no doubt that pressures of listing and time/cost efficiencies will be brought to bear (even if subtly) upon the Judges, who will, as a result, be inclined to find good reason not to have a jury trial even where no such reasons exist.

16. In regard to Paragraph 8 of the Terms of Reference, the Prosecutor, as the representative of the community, should be able to insist on a jury trial if any of the objective community standards referred to are in issue. The assessment of the need for a jury to determine such matters is very much tied in with an intimate knowledge of the evidence that the prosecutor will gain in preparation of the case, often over many months. A judge should not have to be involved in this and much time will be wasted in Notices of Motion requiring judges determine these matters, when the prosecutor does not consent. In some cases, to make an informed decision, the judge will need to acquire the same intimate knowledge of the case as the prosecutor has, resulting in further time wasting.

17. 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.

18. Paragraph 6 of the Terms of Reference makes it mandatory to hold a judge alone trial if the court finds that there is a 'risk of jury tampering'. This is completely unsound. Such a provision will encourage threats of jury tampering by or on behalf of accused persons who seek trial by judge alone. At present there is next to no jury tampering in New South Wales. And how does one assess 'risk' of this? This provision is entirely unworkable and unnecessary. Jury tamperers should be prosecuted with all the rigour of the law; the right to trial by jury (including the prosecution's right to this) should not be compromised by nebulous fears of this kind.

19. I have often observed how diligently juries work and, having been counsel in hundreds of trials, I have an immense respect for the capacity of juries to 'get it right'. Jury service is such an important part of citizenship and

enhances respect for the law. We must not lose sight of this important fact. It is puzzling that this proposal, which will certainly significantly reduce the number of jury trials, comes at a time when the parliament is about to pass amendments to the Jury Act that are designed to reduce the number of persons entitled to exemption from jury duty. We have reduced the incidence of jury duty enough in New South Wales and should not diminish it any more.

20. The fact that other jurisdictions may have adopted a similar proposal to the one being considered, is no answer to the issues of fundamental importance that I have endeavoured to set out above. Adoption of such a proposal can only be motivated by considerations of perceived 'efficiency' or 'cost' but the cost of introducing them is far too high. We do not need to reduce the quality of justice in New South Wales for such reasons.

Yours faithfully,

DAN HOWARD SC