**Submission No 2**

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

**Name**: The Hon Justice R O Blanch AM

**Position**: Chief Judge, NSW District Court

**Date received**: 19/05/2010

*The Chief Judge*
*District Court of NSW*



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

17 May, 2010

Dear Sir/Madam,

I have received notification of the Inquiry into Judge Alone Trials under section 132 of the *Criminal Procedure Act, 1986*. The Committee conducting this Inquiry may be assisted by an understanding of the history of the section.

The section was introduced in 1989 at which time I was the Director of Public Prosecutions and The Hon John Dowd was the Attorney General. 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. I attach to this letter a copy of the guideline No. 8 which was issued. I note this copy of the guideline wrongly refers to section 32 and not section 132.

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. I see it is now guideline 24 and 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.

Because of the change in personnel in the Office of the Director, the change to the guideline was almost certainly done without there being any corporate memory of the original reason for the guideline.

Yours faithfully,

The Hon Justice R O Blanch
**CHIEF JUDGE**

(5) A number of decisions have highlighted the need for restraint in laying conspiracy charges. Whenever possible substantive charges should be laid. However, there are occasions when a conspiracy charge is the only one which is adequate and appropriate on the available evidence. Where it is proposed to lay or proceed with conspiracy charges against a number of accused jointly, those responsible for making the necessary decision must guard against the risk of the joint trial being unduly complex or lengthy, or otherwise causing unfairness to the accused.

(6) The Crown has a responsibility to ensure trials proceed and once a case has been listed for trial it is, generally speaking, not appropriate for the Crown to force an adjournment by refusing to present an indictment to the Court. Where such action is taken a report should be made to the Director of Public Prosecutions explaining the reasons for so doing.

The Crown should also assist the efficient organization of the business of the courts by opposing unnecessary applications for adjournments of trials on the day of trial and, in particular, where such applications are for the purpose of seeking to review judgments of the trial judge as to preliminary matters such as staying the indictment.

(7) In exercising the right of challenge of the Crown no attempt should be made to select a jury which is not representative as to age, sex, or ethnic origin.

(8) Section 32 of the Criminal Procedure Act 1986 allows trial by judge alone if the accused so elects and the prosecutor consents. Normally the Crown will give consent if the accused elects.

However the Act states in section 32(4) "An election must be made before the date fixed for the person's trial in the Supreme Court or District Court."

The intention of the legislation is to prevent an accused from choosing a particular judge. That intention is one the Crown should ensure is put into effect. Accordingly the Crown should refuse consent where it is clear the election is made as part of a "judge selecting" exercise. That is particularly so in Sydney where an election is made only after it is clear the case will be heard before a particular judge.

(9) When advised by defence counsel before a trial that there is a particular reason certain evidence should not be referred to in the Crown's opening and the relevant evidence will be challenged, care should be taken to ensure nothing is said in the opening which may lead to the subsequent discharge of the jury.

(10) Where Crown witnesses are known to prosecuting counsel to have prior convictions and/or are indemnified in respect of the matter before the court and that fact could be of any material significance in the trial, it is appropriate to reveal the conviction or the indemnity to the defence.

(11) Attention should be given to the decision of the High Court in The Queen v. Apostilides