

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

Organisation: Australian Human Rights Commission

Name: The Hon Catherine Branson QC

Position: President

Date received: 30/09/2010



**Australian
Human Rights
Commission**

everyone, everywhere, everyday

President

The Hon Catherine Branson QC

1 October 2010

Also by facsimile: 9230 2981

NSW Legislative Council
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Robertson MLC,

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

I refer to your letter dated 3 September 2010 inviting the Australian Human Rights Commission to provide a human rights perspective on the issues raised in its inquiry into judge alone trials under s.132 of the *Criminal Procedure Act 1986*.

Please find attached our submission.

Yours sincerely,

Catherine Branson
President



Australian
Human Rights
Commission

everyone, everywhere, everyday

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

.....
Australian Human Rights Commission Submission
to the NSW Legislative Council Standing
Committee on Law and Justice

September 2010

Table of Contents

1	Introduction	3
2	Summary	3
3	Discussion.....	5
3.1	<i>Possible problems inherent in the jury tampering exception</i>	5
(a)	<i>Is the exception needed?.....</i>	<i>5</i>
(b)	<i>Ought the referral to judge-alone be mandatory or discretionary?.....</i>	<i>5</i>
(c)	<i>Is the requisite threshold high enough?.....</i>	<i>6</i>
3.2	<i>Should the consent of the accused be required for a trial to be judge-alone?.....</i>	7
3.3	<i>Informed application by the accused for a judge-alone trial and informed consent by the accused</i>	8

1 Introduction

1. On 3 September 2010 the Australian Human Rights Commission (the Commission) was invited, by the NSW Legislative Council Standing Committee on Law and Justice, to provide a human rights perspective on the issues raised in its inquiry into judge-alone trials under s 132 of the *Criminal Procedure Act 1986* (NSW).
2. The Commission was referred to the submissions received by the Committee and has considered those submissions in making the following observations and recommendations.

2 Summary

3. Section 132 of the *Criminal Procedure Act 1986* (NSW) currently permits a defendant to elect to be tried by a judge-alone rather than by a jury and provides that an election may be made only with the consent of the Director of Public Prosecutions.
4. The Standing Committee on Law and Justice is considering whether s 132 should be amended to allow either party in criminal proceedings to apply to the court for trial by a judge alone, without a requirement that the prosecution consents, with the decision to be made by the court based on the interests of justice. The terms of reference for this inquiry set out the following model for the Standing Committee to consider:
 - a) Either party may apply for a judge only trial.
 - b) Applications to be made not less than 28 days before the commencement of the trial.
 - c) Applications may be made later than 28 days before the trial, but only with the leave of the court.
 - d) If the parties are in agreement, the court must order that the trial proceeds before a judge sitting alone.
 - e) If the prosecution applies and the accused does not consent, then the matter must proceed to trial with a jury, subject to the jury tampering exception as set out at 6.
 - f) If one of the parties applies and the court finds there is a risk of jury tampering, then the court must order that the matter proceed before a judge sitting alone.
 - g) If the accused applies and the prosecution does not consent, then the court must determine whether or not the matter should proceed without a jury based on an 'interests of justice' test.
 - h) When considering the 'interests of justice', the court may refuse to make an order where the trial will involve a factual issue that requires the

application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness.

- i) If there are multiple accused and not all agree to a trial by judge-alone, the trial must proceed before a jury, again subject to the jury tampering exception as set out at 6.
 - j) Once consent to a judge only trial is given, it may not be withdrawn without leave of the court.
5. The Commission makes no submission as to whether the status quo should be maintained or the proposed model adopted.¹ However, if the proposed model is adopted there are three issues raised by the proposed amendments which the Commission believes need to be addressed:
- a) The jury tampering exemption applies if 'the court finds there is a risk of jury tampering'. This is a low threshold test, particularly as it is then mandatory that the court order the matter proceed before a judge alone.
 - b) The requirement for the consent of the accused for a trial to be judge-alone (but for the jury tampering exception) must be maintained.
 - c) Additional safeguards should be included in the proposed amendments to ensure that the accused has made an informed application for a judge-alone trial or has given informed consent to any application by the prosecution to have a judge-alone trial.
6. The Commission recommends:

Recommendation no. 1

If the Committee decides to make an amendment in relation to jury tampering, the Commission recommends adopting s 44 of the *Criminal Justice Act 2003* (UK) as a model subject to the inclusion of a provision enabling either the prosecution or defence to apply to the judge where an allegation of jury tampering is raised.

Recommendation no. 2

The requirement that the accused must consent for a trial to be by judge-alone (but for the jury tampering exception) must be maintained in any model for amendments to s 132 of the *Criminal Procedure Act 1986*. This requirement provides essential and appropriate protection to the accused's right to have a trial by jury and it would not be appropriate for a trial to be judge-alone without the accused's consent.

Recommendation no. 3

An additional safeguard should be included in the proposed amendments to ensure that the accused has made an informed application for a judge-alone trial or has given informed consent to any application by the prosecution to have a judge-alone trial. If the accused is legally represented, they must be required to produce a certificate

signed by a legal practitioner stating that the legal practitioner has advised the accused in relation to the application or consent and that the accused person has made the application or election freely. If the accused person is not legally represented, the court must be satisfied that the accused person properly understands the nature of the application or election.

3 Discussion

3.1 Possible problems inherent in the jury tampering exception

7. The amendments propose 'if one of the parties applies and the court finds there is a **risk** of jury tampering, then the court **must** order that the matter proceed before a judge sitting alone' (emphasis added).
8. The issues raised in the submissions to the inquiry which are of interest to the Commission are whether the exception is in fact needed, whether the referral ought to be mandatory or discretionary, and whether the proposed threshold is high enough. The Commission is of the view that s 44 of the *Criminal Justice Act 2003* (UK) provides a model which addresses these issues and is more appropriate than the amendment currently proposed.

(a) Is the exception needed?

9. The Director of Public Prosecutions in his submission dated 18 June 2010 noted that:

In relation to the issue of jury tampering I would, with respect, disagree that evidence of attempted contact with jurors should automatically dispense with a jury trial. There must be confidence in the protocols in place to protect juror identification and with the police to deal with any serious intrusions into the judicial process. That problem is not frequently encountered in NSW.

10. Similarly, the Legal Aid New South Wales submission dated 2 July 2010 notes that:

Issues of potential jury tampering can be sufficiently dealt with under the existing bias and conflict of interest provisions of the *Jury Act 1977*.

11. The Public Defenders Submission dated 28 June 2010 also raised the issue of whether the amendment was necessary:

I am unaware of any solid data as to whether the incidence of jury tampering has increased in recent years, and if so, whether there is any reasonable basis for concern that court orders have been unable to overcome the anticipated threat.

(b) Ought the referral to judge-alone be mandatory or discretionary?

12. The Legal Aid New South Wales submission dated 2 July 2010 notes that:

A mere risk of jury tampering is a relatively low bar to set as the precondition for a mandatory judge-only trial.

13. Similarly, the Queensland Law Society submission dated 7 July 2010 notes that:

for an accused to lose their right to a jury trial, there must be more than a 'mere risk' of jury tampering... such an order should not be made...unless the court was satisfied that jury tampering had occurred, or was a real likelihood.

14. In this respect, the Commission notes that s 118 of the *Criminal Procedure Act 2004* (WA), which provides for judge-alone trials in Western Australia, states that the court 'may make the order if it considers...that it is likely that acts which may constitute an offence...would be committed in respect of a member of a jury' (emphasis added). Similarly s 615 in chapter 62 division 9A of the *Criminal Code 1899* (Qld), provides that the court 'may make a no jury order if there is a real possibility that acts that may constitute an offence...would be committed in relation to a member of a jury' (emphasis added).

(c) *Is the requisite threshold high enough?*

15. Submissions have been placed before the Committee that the proposal be amended to require an 'identifiable risk' (Law Society submission dated 1 July 2010 and NSW Young Lawyers Submission dated 29 June 2010).

16. In the Commission's view, consideration ought to be given to the threshold test used in s 44 of the *Criminal Justice Act 2003* (UK) which provides for the option of judge-only trials if there is a 'real and present danger' of jury tampering:

44. Application by prosecution for trial to be conducted without a jury where danger of jury tampering

(1) This section applies where one or more defendants are to be tried on indictment for one or more offences.

(2) The prosecution may apply to a judge of the Crown Court for the trial to be conducted without a jury.

(3) If an application under subsection (2) is made and the judge is satisfied that both of the following two conditions are fulfilled, he must make an order that the trial is to be conducted without a jury; but if he is not so satisfied he must refuse the application.

(4) The first condition is that there is evidence of a real and present danger that jury tampering would take place.

(5) The second condition is that, notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.

(6) The following are examples of cases where there may be evidence of a real and present danger that jury tampering would take place—

(a) a case where the trial is a retrial and the jury in the previous trial was discharged because jury tampering had taken place,

(b) a case where jury tampering has taken place in previous criminal proceedings involving the defendant or any of the defendants,

(c) a case where there has been intimidation, or attempted intimidation, of any person who is likely to be a witness in the trial.

17. Although the order for the judge-alone trial is mandatory in s 44(3) the order can only be made after the judge is satisfied both that there is evidence of a real and present danger that jury tampering would take place and that notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury. This threshold is considerably higher than the threshold proposed in the amendments being considered in this inquiry and also ensures that the exception is only utilised when the usual jury protection measures and protocols have been exhausted.
18. Section 44 of the *Criminal Justice Act 2003* (UK) has been tested and considered in recent cases² and provides, in the Commission's view, an appropriate balance between the right of the accused to have a jury trial and the need to ensure that the trial is unaffected by tampering with jurors.
19. The Commission notes however that pursuant to s 44(2) only the prosecution may apply to a judge of the Crown Court for the trial to be conducted without a jury. The Commission submits that the application ought properly to be available to either party (as per the current proposed amendment).

Recommendation no. 1

If the Committee decides to make an amendment in relation to jury tampering, the Commission recommends adopting s 44 of the *Criminal Justice Act 2003* (UK) as a model subject to the inclusion of a provision enabling either the prosecution or defence to apply to the judge where an allegation of jury tampering is raised.³

3.2 *Should the consent of the accused be required for a trial to be judge-alone?*

20. Under the proposed amendments if the prosecution applies and the accused does not consent, then the matter must proceed to trial with a jury, subject to the jury tampering exception.
21. The Commission notes that MJ McCusker AO QC in his submission dated 3 June 2010 contends that the 'accused's failure to consent to the prosecution application should be no more than a factor to be taken into account by the court, when considering the prosecution's application'. The Director of Public

Prosecutions also raised his concern about the defence's ability to veto an application by the Crown for a judge-alone trial.

22. The Commission contends that in, accordance with the proposed amendment, it is essential and appropriate that the consent of the accused must be required for a judge-alone trial. This practice reflects the position in Western Australia, Queensland, South Australia and the ACT.⁴

Recommendation no. 2

The requirement that the accused must consent for a trial to be by judge-alone (but for the jury tampering exception) must be maintained in any model for amendments to s 132 of the *Criminal Procedure Act 1986*. This requirement provides essential and appropriate protection to the accused's right to have a trial by jury and it would not be appropriate for a trial to be judge-alone without the accused's consent.

3.3 *Informed application by the accused for a judge-alone trial and informed consent by the accused*

23. Section 132 of the *Criminal Procedure Act 1986* currently provides that a judge must 'be satisfied that the person, before making the election, sought and received advice in relation to the election from an Australian legal practitioner'. Such a provision provides an essential mechanism to ensure that any election by an accused for a judge-alone trial is an informed one. However, the proposed model does not retain this provision.
24. The Commission submits that appropriate mechanisms need to be included in any proposed amendments to ensure that the accused may make an informed application for a judge-alone trial and can also give informed consent to an application by the prosecution for a judge-alone trial.
25. The *Juries Act 1927* (SA), the *Criminal Code 1899* (Qld) and the *Supreme Court Act 1933* (ACT) all contain provisions aimed at ensuring that any application by the accused for a judge-alone trial is properly informed. Section 7(1) of the *Juries Act* provides that where an accused elects to be tried by the judge-alone the presiding judge is to be satisfied that the accused, before making the election, sought and received advice in relation to the election from a legal practitioner. Section 615(3) of the *Criminal Code* also provides that if the accused person is not represented by a lawyer, the court must be satisfied that the accused person properly understands the nature of the application. Lastly, s 68B of the *Supreme Court Act* provides that an accused person in criminal proceedings shall be tried by a judge-alone if the accused person elects in writing to undergo such a trial; and the accused person produces a certificate signed by a legal practitioner stating that he or she has advised the accused in relation to the election and the accused person has made the election freely.
26. A safeguard should be included in any proposed amendments to ensure that an accused person has made an informed application for a judge-only trial or

given informed consent to an application by the prosecution. The safeguard should protect both legally represented and non-legally represented persons.

Recommendation no. 3

An additional safeguard should be included in the proposed amendments to ensure that the accused has made an informed application for a judge-alone trial or has given informed consent to any application by the prosecution to have a judge-alone trial. If the accused is legally represented, they must be required to produce a certificate signed by a legal practitioner stating that the legal practitioner has advised the accused in relation to the application or consent and that the accused person has made the application or election freely. If the accused person is not legally represented, the court must be satisfied that the accused person properly understands the nature of the application or election.

¹ The Commission does, however, note the divergent views of the Director of Public Prosecutions: 'The suggested amendments ... adds unnecessary complexity to the system' (submission dated 18 June 2010) and the Public Defender: 'It has been the experience of counsel for the defence over many years that when consent is sought of the DPP for trial by judge alone, it has rarely been forthcoming...In my view, a legislative amendment that permitted the Court to override a DPP refusal of consent would lead to a significant increase in applications by the Defence' (submission dated 28 June 2010).

² *J, S, M v R* [2010] EWCA Crim 1755 involved three men who allegedly conspired to pervert the course of public justice. The judge had ruled that there was evidence of a 'real and present danger that jury tampering would take place' and that a trial without a jury was necessary in the interests of justice. The Lord Chief Justice rejected this stating that the arrangements for jury-less trials introduced by the 2003 Act 'remains and must remain the decision of last resort' and should only be used in 'extreme cases'.

In *KS v R* [2010] EWCA Crim 1756 (23 July 2010) there were also serious concerns over potential jury tampering. The case involved an allegation arising from a very substantial VAT fraud known as an MTIC (or 'carousel') fraud. Again, the Lord Chief Justice ruled that the concerns went nowhere near enough to allow for a jury-less trial. Rather, 'a fairly limited level of jury protection could reasonably be provided which would sufficiently outweigh the potential threat of jury tampering'.

³ Section 44(2) provides that only 'The prosecution may apply to a judge of the Crown Court for the trial to be conducted without a jury'.

⁴ Section 118 *Criminal Procedure Act 2004* (WA), sections 614 and 615 *Criminal Code 1899* (Qld), section 7 *Juries Act 1927* (SA) and section 68B *Supreme Court Act 1933* (ACT). Victoria, Tasmania and the Northern Territory do not have judge alone provisions.