Submission No 16

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 St
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Dear Director

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

Thank you for the opportunity to make a submission to this Inquiry.

Jurisdictional comparison

The ability to elect to a trial by judge alone was inserted into the *Criminal Procedure Act 1986* in 1990 as a result of the recommendations of the Law Reform Commission's 1986 Report *Criminal Procedure: the Jury in a Criminal Trial*. The requirement that the Director of Public Prosecutions (DPP) consent to an election has always formed a part of the provision. After South Australia, which amended the *Juies Act 1927* (SA) in 1984, NSW was the next to adopt such a provision. Western Australia, which followed suit in 1994, initially based its provision on the NSW model, including the requirement to obtain the consent of the prosecution.

Since the introduction of the *Criminal Procedure Act 2004* (WA), the relevant provision in Western Australia has departed from the NSW approach. Section 118 of the *Criminal Procedure Act 2004* (WA) allows the court to order a trial by judge alone where it considers it would be in the interests of justice to do so, and the application is made (by either party) before the identity of the trial judge is known to the parties. Where the application is made by the prosecution, the consent of the accused must be obtained. Without limiting its broad "interests of justice" discretion, a court may make an order if the trial, due to its length or complexity, is likely to be overly burdensome to a jury, or an offence of 'corrupting or threatening jurors' is likely to be committed during the trial. A court may refuse to make an order if it considers that 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.

In 2008, QLD made amendments to its *Criminal Code 1899* inserting s.614 and 615, which differ slightly in form to the WA provisions, but are nearly identical in operation. In addition to the complexity and jury offence considerations, the QLD provisions allow a court to make a 'no jury order' where pre-trial publicity may affect jury deliberations, although there is nothing preventing a WA court from taking this issue into account.

In the District and Supreme Courts in South Australia (s.7 *Juries Act 1927*), and the Supreme Court in the Australian Capital Territory (s.68B *Supreme Court Act 1933*), the accused can opt for a judge alone trial without any consideration of the interests of justice if the court considers that the accused has been advised by a legal practitioner and has made the election freely. In South Australia, the proportion of trials that proceed before a judge sitting alone is comparable to NSW despite the existence of such a provision. Under s.352 of the *Criminal Law Consolidation Act 1935* (SA), the prosecution is restricted from appealing against an acquittal where the verdict resulted from a jury trial, making acquittal by a jury a more appealing outcome for accused persons than an acquittal by a judge sitting alone. It is not clear whether there are comparable provisions in the ACT.

Victoria, Tasmania and the Northern Territory do not have judge alone provisions.

The proposed model

The three points that are most commonly raised when considering the issue of judge alone trials are the rights of the accused to a trial by jury, the community's participation in the criminal justice system, and the possibility of 'judge shopping'.

The rights of the accused are not threatened under the proposed model. Under the model, where the prosecution applies for a trial by judge alone, it must only be ordered with the consent of the accused, with the only exception being circumstances where there is a real risk of jury tampering. In most cases, it will be the accused that applies for a trial by judge alone. By doing so, he or she willingly waives the right to a trial by jury, and provided that this is done after receiving advice from an Australian legal practitioner, such an action raises no concerns.

The Prosecution Guidelines issued by the Office of the Director of Prosecutions observe that the community has a role to play in the administration of justice, and trials in which judgment is required on issues raising community values, such as reasonableness and indecency, or in which cases are wholly circumstantial, should ordinarily be heard by a jury. Cases which may be better suited to trial by judge alone include where the evidence is of a technical nature, there are concerns that directions from the judge or other measures will be insufficient to overcome jury prejudice resulting from pre-trial publicity, where the witnesses or accused may conduct themselves so as to cause a jury trial to abort, or where the offence is of a trivial or technical nature.

While the proposed amendments include minor differences to the existing provisions under s.132, these are administrative in nature. The only significant change being proposed is a shift from the current position, where the prosecution effectively acts as the decision maker in applications for judge alone trials, to a new regime under which a judge makes the decision based on the interests of justice. Without any criticism of the prosecution's ability to make a fair and just decision on judge alone trials, there is no reason to believe that the prosecution is better placed to weigh the competing interests than the judiciary.

In relation to the possibility of 'judge shopping', I note that the time restriction under point 2 of the proposed model, and the limitations on the withdrawal of consent once

given, under point 10 of the model, should significantly mitigate against the risk of the accused basing his or her decision to opt for a judge alone trial or a jury trial on the known identity of the trial judge.

The Department of Justice and Attorney General supports amendments to s.132 in line with the proposed model. Thank you once again for the opportunity to comment on this matter.

Yours faithfully

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Acting Director General