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REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO JUDGE-ALONE TRIALS UNDER SECTION 132 OF THE CRIMINAL PROCEDURE ACT 1986

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At Sydney on Thursday 12 August 2010

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The Committee met at 10.45 a.m.

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PRESENT

The Hon. C. M. Robertson (Chair)

The Hon. J. G. Ajaka
The Hon. D. J. Clarke
The Hon. G. J. Donnelly
The Hon. L. J. Voltz
Ms S. P. Hale

CHAIR: Welcome to the second public hearing of the Standing Committee on Law and Justice's inquiry into judge-alone trials under section 132 of the Criminal Procedure Act 1986. The inquiry's terms of reference outline the proposed model that is under consideration.

Today's public hearing the Committee will hear from the Law Society of New South Wales, Young Lawyers New South Wales, and Victims of Crime Assistance League. Before we commence I will make some comments about procedural matters. The Committee has previously resolved to authorise media to broadcast sound and video excerpts of its public proceedings. A copy of the guidelines governing the broadcast of the proceedings are available at the table. In accordance with the guidelines, a member of the Committee and witnesses may be filed or recorded. However, people in the public gallery should not be the primary focus of filming. In reporting the proceedings of this Committee the media must take responsibility for what they publish or what interpretation is placed on anything that is said before the Committee.

Witnesses, members and their staff are advised that any messages should be delivered through the Committee clerks. Committee hearings are not intended to provide a forum for people to make adverse reflections about others. I ask everyone to turn off their mobile phones for the duration of the hearing, including mobile phones on silent, as they interfere with Hansard's recording of the proceedings. I welcome Ms Mary Macken and Mr Andrew Wilson from the Law Society of New South Wales.

MARY JOSEPHINE ESTHER MACKEN, President, Law Society of New South Wales, sworn and examined: and

ANDREW JACK WILSON, Manager, Practice Department, Law Society of New South Wales, affirmed and examined:

CHAIR: In what capacity do you appear before the Committee?

Ms MACKEN: As President of the Law Society of New South Wales.

Mr WILSON: As Manager of the Practice Department of the Law Society of New South Wales.

CHAIR: If you should consider at any stage certain evidence you wish to give, or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. If you take any questions on notice please provide replies within 21 days from when the Secretariat sends them to you. I recognise the impost that puts on your time but it is very useful to the Committee.

The Hon. JOHN AJAKA: I wish to make a disclosure; I am a member of the Law Society of New South Wales.

CHAIR: Do you wish to make an opening statement?

Ms MACKEN: Simply that we affirm our submission that we put which largely supports the model proposed save in two minor respects, the amendment of the 28 days to 14 days and where there is a risk of jury tampering that the word "identifiable" be placed before that so that it is not akin to the position of England and Wales.

CHAIR: Yesterday the Committee addressed with some witnesses the issue of the word "identifiable" but not information in relation to the 14 days. Would you please expand on that proposal?

Ms MACKEN: It is largely just for those unusual situations where a solicitor might get a brief late. It allows him to make an election for judge alone when he gets the brief late. I will ask Andrew who is closer to that issue than me to answer the question.

Mr WILSON: That is the situation. Whilst it is quite unusual it does happen commonly to have those two in the same sentences; that a solicitor and barrister are briefed late in a hearing. So whilst the 28 days is there to prevent justice shopping and forum shopping, the submission from the Law Society is that if its dropped to 14 days there is still plenty of time to prevent justice shopping and there is time to allow for those late briefings of solicitors without having to go to the court and seek leave because there is the option to seek leave. If you get a brief so late you have got to prepare, and to then go to court and seek leave to the judge alone just adds.

The Hon. JOHN AJAKA: Is that more common, for example, that the Public Defenders Office may at the last minute receive a brief than say counsel at the private bar?

Mr WILSON: I am not aware of that but I know it does happen. Private bar do change at the end as well, conflicts arise and things happen.

Ms SYLVIA HALE: When this was raised yesterday it was suggested that time would be needed to organise juries and the 14 days may make that very difficult to do. The logistics seemed to be the problem.

The Hon. LYNDA VOLTZ: Notification of jury service.

Ms MACKEN: It would be putting your election within 14 days that you want a judge alone so it is the reverse.

Ms SYLVIA HALE: So the assumption would be that it would be a jury trial. Therefore you might have the needless notification of jurors. Is that the problem?

The Hon. LYNDA VOLTZ: I think they were saying they needed to notify jurors out further than 14 days.

Ms MACKEN: That they were not needed?

The Hon. LYNDA VOLTZ: Whether they were needed to be called up for duty. So if they had notified people of the requirement to attend for jury service, and then they were allowed to go judge alone, a jury would be called up that was not required.

CHAIR: And their perception was that court procedures in general taking longer than the 14 days.

Ms SYLVIA HALE: But then again, anyone who is notified of juror duty is not necessarily called up so you always have that uncertainty surrounding the process.

Mr WILSON: In relation to the comment about court procedures going longer, if there is a judge-alone trial, I think everyone accepts, that they are not because they do not have the admission of evidence where the jury is removed and then the explaining of that so it is a quicker time.

CHAIR: If the judge actually makes a decision that it should be a jury trial rather than a judge-alone trial which is what he or she is required to do then there was a perception there would be difficulties with the court if the judge made that decision.

The Hon. JOHN AJAKA: The only exception to that would be that one would have to assume that the jury has already been notified, that is, one anticipates the jury to be there. Fourteen days prior to the trial when everything has been put in place, new counsel comes along, which is your point, and suddenly says, "This should be a trial by judge alone". It is not a matter of then trying to find a jury but is simply a matter of cancelling a jury.

CHAIR: But it was not just about the jury, was it?

The Hon. JOHN AJAKA: No, it was not. It was about other aspects of it as well.

Ms SYLVIA HALE: Point three says that applications may be made later than 28 days before the trial but only with the leave of the court. You are suggesting that if you got a brief at very short notice, and you have to spend time seeking that leave, it would be a further impediment.

Mr WILSON: Yes.

Ms SYLVIA HALE: Could one amend it to say that where a brief is received in a period shorter than 28 days before the trial that then application be accepted without having to seek leave?

The Hon. JOHN AJAKA: That would open up a Pandora's box if people will start to either look at that as the excuse or, worse still, there might even be a better reason but they are bound by that excuse. That is the uncomfortable part about putting in conditions. I am sorry, I have answered the question.

Mr WILSON: I endorse the answer. It could also be the fact that people might brief someone else to try to circumvent the 28 days.

The Hon. JOHN AJAKA: From a lawyer's perspective seeking amendments how hard do you press this? Is it absolutely vital and consideration should be and must be implemented or is it simply something you say, "Have a look at it"?

Mr WILSON: I think the 28 days to 14 days is not a vital one but it will make better legislation and make the administration of justice for the State better, and the rights of the accused better fulfilled. The identifiable risk is a much more important one; that is a fundamental issue.

The Hon. JOHN AJAKA: If you had to choose between the two, you would press the identifiable one?

Ms MACKEN: Yes.

The Hon. JOHN AJAKA: In relation to the identifiable risk, why is it so vital to you?

Ms MACKEN: If you look at item six in the model provision if one of the parties applies in court that there is a risk of jury tampering, without any sort of demonstrable risk or identifiable reasonable risk, there will always be a risk of jury tampering per se. So it takes away the element of discretion from the court. They could always just say that the matter should be sent to a judge sitting alone because there will always be a risk of jury tampering.

The Hon. JOHN AJAKA: The starting point is that one could argue that in every jury there is risk of tampering?

Ms MACKEN: Yes.

The Hon. JOHN AJAKA: So it needs to be more than simply a risk or a perception of tampering. It needs to be clear and concise?

Ms MACKEN: Yes.

CHAIR: Is there a problem with defining "identifiable"? I am not arguing against identifying but is there an issue with defining it?

Ms MACKEN: I suppose otherwise you could go to the United Kingdom definition which is real and present risk.

Mr WILSON: The United Kingdom is that there is evidence of a real and present danger that jury tampering would take place, but that is much harder than identifiable. I think the words stating "identifiable risk" defines it enough and gives the court the discretion when hearing the application to see whether the risk is identifiable or not, although we do believe it should be beyond reasonable doubt, the equivalent standard for that decision to be made.

The Hon. JOHN AJAKA: Are you aware of evidence given to the Committee by Nicholas Cowdery and Dan Howard?

Ms MACKEN: I am not because I have not had a chance. I journeyed overseas until this morning. I have read the *Daily Telegraph* today.

The Hon. JOHN AJAKA: I would not go by that.

Ms SYLVIA HALE: I thought they were very perceptive questions.

The Hon. JOHN AJAKA: They misquoted him, but I will leave it there. To summarise, from what I have perceived so far, the Director of Public Prosecutions [DPP] and Dan Howard take the view that the current guidelines of the DPP are the correct way to approach it. The Public Defender, Mr Ierace, took the view that the former DPP, the current Chief Judge, Reg Blanch, had the better approach. The difference between the two is that basically, as per the current model, when Reg Blanch was the DPP he took that view that if a defendant wants trial by judge alone invariably that is what he was allowed to have, and there would have to be very exceptional reasons not to; whereas the current DPP seems to take the view that if the defendant wants a trial by judge alone that that should sit under very strict criteria before the DPP gives consent. If the criteria are not met he would veto it. Is that your understanding of the differences between the two at the moment?

Ms MACKEN: Yes.

The Hon. JOHN AJAKA: The most compelling argument that both the DPP and Mr Howard raise was the aspect that the DPP—the Crown— represents the community. It is almost an argument that the community has a right—as a defendant does—to see a trial by jury. When the Crown looks at what is in the best interests of the community, because they represent the community, and believe it can be a trial by jury, that is the way it should be. Do either of you have a view on that aspect?

Ms MACKEN: It is an interesting philosophy. We did not put the DPP into that position necessarily. We thought that they were one of the parties and, therefore, the prosecution should not have the right of veto. If you go back to Magna Carta and Sir Thomas Moore, the whole point of juries is so that the accused is tried by his peers, so the onus, arguably, has usually been on fairness for the accused and also community participation in the jury process. Our main point is if there is a right of veto it should be with the accused.

The Hon. JOHN AJAKA: The defendant only.

Ms MACKEN: Yes.

The Hon. DAVID CLARKE: In fact, it would be a greater tack on the right of a person to have a jury trial to give the DPP a veto in that situation, as proposed, would it not?

Ms MACKEN: Yes.

The Hon. DAVID CLARKE: That really is an attack on the jury system?

Ms MACKEN: Yes.

Mr WILSON: Yes.

The Hon. DAVID CLARKE: Your submission states that the Law Society is of the view that there is not a strong justification for vesting the decision of whether a trial will be held before a judge alone on the prosecution. In fact, you say it is not a strong justification. Is there any justification for that to be the situation?

Ms MACKEN: We see them as just one of the parties.

The Hon. DAVID CLARKE: Yes.

Ms MACKEN: And having equal rights and that the true arbiter, the true decider, of that position should be the court in determining everything in the interests of justice, because that would be appealable anyway. It is a fairer process.

The Hon. DAVID CLARKE: There is no justification for the DPP having a veto in that situation, is there?

Ms MACKEN: No.

The Hon. DAVID CLARKE: Because that would be an attack on the jury system.

Ms MACKEN: They are talking about vetoing the judge alone application, so no.

The Hon. DAVID CLARKE: Yes, that is right, but the DPP also favours that under the proposed model the DPP should be able to apply for a judge only trial with no power to the defendant to object.

Ms MACKEN: Oh, I see.

The Hon. DAVID CLARKE: Would that not be an outrageous situation?

Ms MACKEN: Absolutely.

The Hon. DAVID CLARKE: So, the DPP should have not only a veto over whether a defendant seeks to have a judge only trial, but also they certainly should have no veto over the defendant being able to choose to have a jury?

Ms MACKEN: Absolutely, and the more latter proposition that you have just put is absolutely fundamental. Yes.

The Hon. DAVID CLARKE: Can you think of a single reason for any justification for vesting that decision in the prosecution—that the defendant not have a judge-alone trial? You say there is not a strong justification, but can you think of any justification?

Mr WILSON: No.

The Hon. JOHN AJAKA: Other than jury tampering, which is one of the requirements.

Mr WILSON: But even jury tampering involves the decision of the court, so it is not one of the prosecutions, no.

The Hon. DAVID CLARKE: If there were jury tampering, it should not be left up to the prosecution to decide. It would be left to the court.

Mr WILSON: That is right.

The Hon. DAVID CLARKE: According to your society there is absolutely no justification for this, is there?

Mr WILSON: To leave the veto with the prosecution?

The Hon. DAVID CLARKE: Yes.

Mr WILSON: No.

The Hon. JOHN AJAKA: If I could summarise this way: as I put to Mr Cowdery and Mr Howard and others, as I see it there are two absolute golden threads in our criminal justice system. The first and foremost is that the defendant is innocent until proven guilty; and the second is that the defendant has the right to be tried by his or her peers, which we call "the jury system". If a defendant wants to, for whatever valid reason, waive that inherent right, if the Crown objects it should not be an automatic right of veto for the Crown. There should be an additional step of letting a judge, as the referee, decide the issue. Would that be a fair summary of your position?

Ms MACKEN: That is indeed it exactly.

The Hon. JOHN AJAKA: That is it in a nutshell.

Ms SYLVIA HALE: I hope I am not verballing, but I get the impression that both Mr Cowdery and Mr Howard saw the Crown's right to veto a judge-alone trial as representing a bulwark against the erosion of trial by jury and in its interests say that it is saving money, efficiency, administrative ease, and that lay at the base of its contentions, which, particularly in the case of Mr Cowdery, was an attempt to substantiate or back up assertions that the Crown had a broader interest—it represented community interest. Also, Mr Cowdery said that if the defence wanted a judge-alone trial and the Crown did not, if it went to a judge to determine some of the information, for example about alibi evidence, that might be significant in the Crown wanting a trial by jury, that would not be able to be put before the judge because it would compromise the subsequent conduct of the case. Do you have any comment on those propositions?

Mr WILSON: Could I clarify that? The proposition is that the judge-alone trial if the judge had to decide what evidence was admissible would compromise that judge's later decision?

Ms SYLVIA HALE: It could compromise.

CHAIR: No, it was about disclosure. It was about the prosecution having to disclose evidence at that part of the process when they were trying to get the trial that they would have preferred to utilise during the trial. Is that right, Ms Hale?

Ms SYLVIA HALE: Yes, that is my understanding.

Mr WILSON: My response would be that the defence would have exactly the same problems and difficulties of having to disclose its case when arguing for the trial be not by jury when the judge is hearing it. A judge is well equipped and chosen by society to represent and make those decisions. If the defendant or the

accused chooses to have a trial by jury that is one of the things that the Crown has to live by, because it is a fundamental right. Those rights have already been dealt with in the summary and indictable matters and matters being dealt with in local courts. So the rights have been eroded. I do not think that having to disclose the case, sorry, whether they have to disclose evidence to insist that the trial be by jury would not hurt their case at all, because if the evidence was not allowed the jury would not hear it anyway. If I go to the next step, if they are arguing to have the case by jury any evidence put to the judge that is countered or later refused would not be given to the jury in the first place. I am talking around in a circle.

Ms MACKEN: They are saying they cannot put certain evidence to the determining judge who is determining the threshold issue of whether it goes to a jury or not, and therefore there is a certain lack of ventilation of a community interest.

CHAIR: You are notifying the other side. The example was the use of information about alibis and, therefore, the prosecution is notifying the defence about their proof against or for an alibi.

The Hon. LYNDA VOLTZ: No, it was not. It was actually in regard to not the defendant but a witness who was being an alibi witness for the defendant, and that it was obviously an untrue statement. Obviously any information they have in regard to the defendant they have to declare, but it was about other witnesses who may appear that they have other information on. It was a step-aside scenario.

The Hon. JOHN AJAKA: Inherently the Crown has an obligation to disclose all to the defendant well before a trial date is even set. There would be fairly exceptional circumstances where a Crown could suddenly bring in some form of evidence that it did not want to previously to a defendant.

CHAIR: Is that the case?

Ms SYLVIA HALE: For whatever reason, if the Crown or the defence felt unable when that decision as to whether it would be judge alone or trial by jury were to proceed, the argument was that they would not necessarily be able to present the full reasons for them wanting a trial by jury. If that were the case, do you think that objection could be overcome by some requirement that the judge who determined whether the trial should be by jury or by judge alone, if the person who made that determination, were not the judge who actually heard the case?

Ms MACKEN: Yes, that would be the case.

Ms SYLVIA HALE: If that were the case, how would you overcome that difficulty in places such as Tamworth, where there is only one judge, or in Wollongong, where one judge sits permanently?

Mr WILSON: That might be a question we could take on notice, because the lead in information is a bit complex. I would like to consult on that.

The Hon. LYNDA VOLTZ: It was a fairly long bow.

Mr WILSON: I am sure we could provide a short arrow to fix it.

Ms SYLVIA HALE: Do you see the agreement or the extension of judge-alone trials will lead to the undermining of the jury system? Do you think it has that potential? This is one of the overriding concerns of some of the submissions.

Ms MACKEN: We do not, as long as the proposed model follows the points that are set out here, in the sense that the accused will still have the right of veto.

The Hon. DAVID CLARKE: That is the pivotal point, is it not, that the accused has the right of veto?

Ms MACKEN: Yes.

The Hon. DAVID CLARKE: If the accused has the right of veto there is no attack at all on the jury system?

Ms MACKEN: That is as we see it.

Ms SYLVIA HALE: One of the concerns raised about a judge-alone trial related to the potential repercussions against the judge, in terms of the judge being held individually responsible for the verdict. Also, the issue was raised that victims would have a belief that they had been more properly and adequately dealt with if the verdict were handed down by a jury of 12, presumably of their own peers as well as of the accused, rather than by a single judge. Do have any comment on those aspects?

Mr WILSON: Regarding the judge being held responsible, judges are eminent people of our society who are appointed to these positions to do that job. They make the decisions and during the course of a trial they will make decisions favourable to the accused and some favourable to the prosecution. I feel that is part of their role. The judge will make those decisions with a jury. Someone could hold a judge responsible for not allowing the evidence to go to the jury anyway.

Ms MACKEN: It is a risk that exists already, the safety of our judiciary.

Ms SYLVIA HALE: In view of the elitist background of many judges—they are drawn from a fairly non-representative example of the community in terms of their education, cultural background and so on—do you think a judge-alone trial will allow that breadth of consideration or would a judge be able to take into account the attitudes of the community which are not necessarily within the judge's life experience?

Ms MACKEN: Presumably if the accused does not think that a judge is sufficiently representative of the community and not able to take those sorts of things into account, then the accused would exercise his right of veto and would stick with the jury system.

The Hon. DAVID CLARKE: I think the concern was with the victims rather than the accused.

Ms SYLVIA HALE: With everyone who is involved in the process.

Ms MACKEN: Perhaps that is something we could take on notice. That is something we have not canvassed, how the victim would perceive it.

Ms SYLVIA HALE: It is my understanding that when judge-alone trials were first introduced the notion was that the judges would be dealing with fairly obtuse points of law, rather than heated, emotional circumstances where there is enormous community interest in both the process and outcome of the trial. Since there has been that transfer of focus, as it were, from the rarefied aspects of the law to something that is much more in the public consciousness and spotlight, anything that tends to increase the prevalence of judge-alone trials may not be desirable. Do you have any comment on that?

Ms MACKEN: So long as the accused has the right of veto we do not think that there would be a problem with an increased prevalence of judge-alone trials.

Ms SYLVIA HALE: Do you think there would be an increase in resorting to them?

Ms MACKEN: If you look at the figures it does not seem so particularly.

Ms SYLVIA HALE: We were told yesterday there were 48 trials.

CHAIR: In 2007.

Ms SYLVIA HALE: In 2007 there had been 48 judge-alone trials in the District Court. People were surprised there had been so many.

CHAIR: And there were four in the Supreme Court.

The Hon. DAVID CLARKE: Does the Law Society have any figures? We are given this figure but the important point is what percentage of the applications was agreed to? Do you have any figures on the total number of applications for a judge-alone trial?

Mr WILSON: No, we would not. We do not get our information from the court itself.

Ms MACKEN: Or from our members.

The Hon. DAVID CLARKE: You have no anecdotal information from the members of the Law Society?

Ms MACKEN: No.

The Hon. LYNDA VOLTZ: I want to go back to the notion of diversity amongst juries and the judicial system and possibly the prosecution as well. What you read in yesterday's *Daily Telegraph* about Nicholas Cowdery, even though it was tongue in cheek, was true. He did make the comment, "If I were guilty I would prefer a jury and if I were innocent I would prefer a judge alone." He also made an interesting comment that if you go to Campbelltown juries always let you off. Another barrister later in the day, a prosecutor named Howard, said that changed when the Sutherland shire was included in juries in Campbelltown and now not as many people got off in Campbelltown as they did in the past. I am interested in the idea of the right to be tried by your peers and the community. Given the diversity among the prison population and that some people have a much higher representation in prison numbers than others, what are your views about juries representing communities? There is obviously a perception within the DPP that some juries which represent their communities, such as Campbelltown, may have different findings to those that would be expected in other places?

Ms MACKEN: We would have to take that on notice. I do know there was some media issue about a month ago that there had been an increased tendency for juries not to convict in the country. When we analysed it our figures did not show that to be the case. It is a topical issue of debate.

The Hon. LYNDA VOLTZ: Do you think there may be a view within the DPP that there are differences among different communities around New South Wales?

Ms MACKEN: I did not know that. There is a whole body of law in the United States about representation on juries and underrepresentation. So they have diversity pretty well canvassed.

The Hon. LYNDA VOLTZ: Issues have been raised about a judge's life experience. Obviously a judge hearing the judge-alone trial has sat on the court for some time and has been working in the legal system for some time. They do not get their overnight. They would have heard a number of cases before they are in the position of conducting a judge-alone trial. How would the makeup of the DPP, which currently has the veto, and its experiences differ from that of the judiciary in relation to ethnicity, background, experience?

CHAIR: The sociodemographics.

Mr WILSON: I will answer that. I cannot comment on the background and the ethnicity of the DPP. However, they are in different roles. The person sitting as a judge, regardless of background, sits there as an independent arbiter of fact. The DPP is sitting there as the prosecutor of the case. Regardless of the background, they have different roles to play. Our belief is that the system is solid and just and that the judge will do his or her job according to being a judge and the DPP will do the job as the prosecutor, regardless of their background. They will put that aside.

The Hon. LYNDA VOLTZ: There should not be any demonstrable difference in life experience that means one is more qualified than the other?

Mr WILSON: I think that their jobs make that an irrelevant consideration.

Ms MACKEN: I do not think we can even comment on that. We would need to take it on notice.

The Hon. LYNDA VOLTZ: The life experience of judges has been raised by a couple of people as an issue in relation to judge-alone trials, whether they are qualified to make the decision that they should hear a case and whether they have the necessary life experience to do so. At the moment that is being exercised by the DPP. The obvious change that has been suggested is that the DPP does not have that veto and it will be the judge making that decision. That is why I asked the question. If you want to take it on notice, you can answer it later.

Ms MACKEN: Yes.

The Hon. LYNDA VOLTZ: In relation to the victims, we received a submission from VOCAL, one of the victims support groups. They raised a concern about the tendency for victims to accept pleas of guilty to a lesser charge in the hope that if the plea is accepted they will not have to go before a jury. Their objection to a judge-alone trial is along the same lines that defendants can make a plea of guilty to a lesser charge. Do you have a view on that? Does a judge-alone trial play into that same mentality that allows offenders to plead to lesser charges when they possibly could have been convicted on more serious charges?

Ms MACKEN: I am not sure how that is going to play out in the model that is proposed. I will have to read how they think that is going to play out.

The Hon. LYNDA VOLTZ: I did not quite understand how the link was being made. I was not sure if there was a link.

The Hon. JOHN AJAKA: Perhaps it is a question we should ask them. I cannot see how it connects either.

Mr WILSON: The judge would be hearing the original charge and it would not be a plea bargain there. That is the problem I am trying to follow.

The Hon. GREG DONNELLY: Most of the areas I was going to cover have been dealt with. In relation to the questions on notice that we provided to you, I take you to question no. 3. It was addressed by some of the witnesses yesterday and I would like your comments on it. What would be the impact, if any, of the proposed model on the community's perception of the fairness of the judiciary system, particularly if there is an increase in the number of judge-alone trials?

Ms MACKEN: Because it is either going to be the accused having his or her right of veto or the interests of justice being determined by a court, we did not think that there was going to be any negative perception in the community. Whilst it is difficult to predict how the community is going to perceive that without current circumstances, we cannot see that there would be a negative perception.

The Hon. GREG DONNELLY: Another area that some of the witnesses covered yesterday was that certain matters that may come before courts are of such a nature that they may be very confronting for a jury to deal with. I recall in the DPP's evidence a case was specifically referred to which had some terrible aspects and it would be very confronting for a jury to be taken through the whole matter chapter and verse. Does the Law Society subscribe to that view, that is, in certain matters, by their very nature, there should be consideration given to a judge alone dealing with them? The flipside is that perhaps a jury should not be exposed to the nature of such matters or even that a jury may not be able to comprehend the complexity of a matter?

Ms MACKEN: No, we do not think it is appropriate to distinguish between offences that are more or less distressing. The complexity of the issue is one that we think comes down to the skill of both the prosecution and defence in dealing with the issues in a sufficiently clear and concise way that the jury can understand the issues of fact put before them. There might be other things that can be done to educate the jury prior to the trial. It really does come down to the skill of the prosecution and the defence. We do not accept that either complexity or distressing material should change the process.

The Hon. GREG DONNELLY: Are there any instances at the moment where a matter would be dealt with by a judge alone because of the nature of the matter or that its complexity is such that it would be handled in a particular way?

The Hon. JOHN AJAKA: Without the defendant's permission?

Ms MACKEN: Not that I am aware of, but perhaps I can take that on notice. In the United States juries deal with securities fraud. That is incredibly complex.

The Hon. GREG DONNELLY: Yes, forensic accounting and those sorts of matters?

Ms MACKEN: That is right. We really do not believe the argument that complex issues should not be put to a jury. We do not subscribe to that argument.

CHAIR: The issue of right of veto currently is with the prosecutors. The proposal turns that around completely and removes any right of veto from the prosecutors and gives all right of veto to the accused. Am I right?

Ms MACKEN: That is our understanding, yes.

CHAIR: The proposal is a total reversal of the current situation in relation to consent?

The Hon. JOHN AJAKA: Only in relation to the Crown; not in relation to the defendant.

The Hon. LYNDA VOLTZ: The defendant always has had the right of veto.

The Hon. JOHN AJAKA: Yes. The defendant's position is not changing at all from current model to new model. Only the Crown's position is changing under the new model.

CHAIR: So the Crown does not get any right of veto?

The Hon. LYNDA VOLTZ: The Crown does; not the DPP.

The Hon. JOHN AJAKA: His right of veto basically is now going to be given to a judge to determine.

CHAIR: Yes. I understand that.

Mr WILSON: But he gets to prosecute that. Perhaps that is the wrong word: he gets to put his case to the judge to make that decision. So, he does not step out of the decision altogether.

The Hon. JOHN AJAKA: As an interlocutory matter.

CHAIR: Yes, the actual veto is changed to a judgement for the prosecutor?

Mr WILSON: Yes.

The Hon. DAVID CLARKE: Would you agree there is not much dispute that judge-alone trials see savings in time and costs?

Ms MACKEN: Yes, we agree. There is no dispute.

The Hon. DAVID CLARKE: That should not be a major reason for us pursuing judge-alone trials, should it?

Ms MACKEN: No.

The Hon. DAVID CLARKE: The question of fair justice and other issues should be paramount, not the questions of savings of time and cost, would you agree?

Ms MACKEN: Yes.

Mr WILSON: Definitely.

The Hon. DAVID CLARKE: The submission from Mr Peter Breen suggests that a judge-alone trial "may encourage people to focus blame for the verdict on the judge and cause the judge to be vilified or, worse, to be threatened, intimidated or even physically harmed". Do you have a view on Mr Breen's suggestion?

Ms MACKEN: There is ample scope already for people to vent to blame on the system. It is an issue currently and will remain an issue whether it is judge alone or judge with jury.

The Hon. DAVID CLARKE: Mr Wilson, I believe you pointed out that even in jury trials situations arise where the judge will make determinations, for instance in the summing up, that could cause resentment and so forth from interested parties?

Mr WILSON: Yes.

The Hon. DAVID CLARKE: That can arise in the present situation with jury trials?

Mr WILSON: Yes, and to clarify, by the judge allowing to go to the jury evidence that the accused thought should not go to the jury.

The Hon. DAVID CLARKE: The suggestion from the Office of the DPP was that the prosecution has a special interest, and exalted interest in a way, because it represents the community. The truth of the matter is that the jury actually really represents the community. The prosecution might represent the community in a way, but in all ways the jury represents the community, does it not?

Ms MACKEN: Absolutely. The whole basis of the jury system is that you are not going to be tried by peers of the realm or people in established power; you will be tried by representatives of your community and, therefore, you will receive a fair hearing.

The Hon. JOHN AJAKA: I would ask you to take this question on notice because you might want to put it to your criminal law committee. Following on from my colleague, the Crown was arguing in its simplest form that the community had a right to see trial by jury and that to take that away from the community and allow a defendant to seek trial by judge alone was creating inequality. That then raises this question to which I would love the answer. Is the right for trial by your peers, that is, trial by jury, an inherent right of the defendant only or is it an inherent right of the community to actually see all defendants dealt with as trial by jury?

The Hon. DAVID CLARKE: Or is it both?

The Hon. JOHN AJAKA: Or if it is both? If the view clearly is that the right of trial by jury is inherent from a defendant's point of view only, then the argument by the DPP falls away completely. If it is that the community has the inherent right to see defendants dealt with by jury, whether or not a defendant wants it, it becomes a different situation. I would like your view and that is why I ask you to take the question on notice. What does the Law Society consider is the right of trial by jury? Have I made the question clear?

Ms MACKEN: Thank you, you have summed up a lot of the direction of the earlier questions. We will take that on notice. We just hark back to the Magna Carta, which said, paraphrasing, no citizen shall be deprived of life or liberty or lose his property unless tried by his own peers or in accordance with the law of the land. The focus in that document was on the actual citizen. Our focus, coming before this Committee, has been as though it were that the accused had that particular right. That it is more a societal right is an interesting argument. We will take that on notice.

The Hon. JOHN AJAKA: I have my views and I would like to hear the society's views in relation to it.

Ms SYLVIA HALE: One of the points made yesterday by Mr Howard, who had experience as a prosecutor, was that the Crown is bound by a very strict set of ethics and prosecutors were obliged to ensure that trials were conducted fairly and evenly in the interests of justice, and that because these two obligations were upon them they therefore were in a position to act appropriately when deciding whether there should be judge-alone trials. Do you have any comment on that? Do you think that is a legitimate view or are all members of the legal profession bound by ethical considerations? What right or moral standing the Crown might claim to itself could the defence equally claim?

The Hon. JOHN AJAKA: They are all officers of the court.

Ms MACKEN: Yes.

Ms SYLVIA HALE: Over the past couple of days we have had assertions and counter-assertions: whether it is the complexity of issues that juries are called upon to deal with, whether they can withstand confronting evidence and whether only judges can do that, whether they are capable of comprehending DNA evidence, whether indeed they are competent to even understand what is going on in the court. New South Wales seems to have a considerable absence of research would allow one to give credibility to one assertion as opposed to another. I imagine that sponsoring that research would be the responsibility of the Department of the Attorney General and Justice. Do you believe the Law Society or the Bar Association also should have a

responsibility to undertake this broader research into how juries actually function and analyse the results of judge-alone trials as compared to jury trials? There is a range of issues and we rely on some sort of conventional wisdom approach rather than actual fact.

Mr WILSON: We could provide a briefing or submission, for want of a better term, whether we have a responsibility to act in there because we are a representative of both, but we definitely could provide that information to assist the Committee.

The Hon. DAVID CLARKE: Are you aware of this information being readily accessible and available?

Mr WILSON: No, I am not.

Ms MACKEN: There are recent studies we have seen on the CSI factor and the supposed difficulty juries have in dealing with incredibly complex issues. We have seen recent research. We also probably are not in a position to resource detailed research, but we certainly can do whatever we can.

Ms SYLVIA HALE: Yesterday Peter Breen posited an interesting scenario. He said that there was this increasing tendency on the part of the Crown to rely upon indemnified witnesses and that the jury is quite adept at seeing as self-serving that an indemnified witness may want to give evidence that puts him in a particularly good light. He said that opposed to that, indemnified witnesses in a judge-alone trial are produced by the prosecution and because the judge may be inclined to confer the prestige attached to the prosecution on to the prosecution witnesses there might be a tendency in judge-alone trials for the evidence of indemnified witnesses to be accepted in a way that would not be accepted in a jury trial. There is no evidence to demonstrate that this evidence has been accepted in judge-alone trials as opposed to jury trials. Do you have any view on that? Would it be a worthwhile subject of research?

Ms MACKEN: I do not think we can really comment. We just hark back to the fact that juries are supposed to find the facts.

Ms SYLVIA HALE: Credibility is an important issue?

Ms MACKEN: By virtue of the fact that they are determining the facts, we believe 12 people chosen to be representatives of society are very good at determining credibility and facts.

CHAIR: Yesterday the suggestion was to add the word "dishonesty" into item 8 in the proposed model. Is there any difficulty in defining such a word or does it accidentally turn it into an all encompassing matter? Have you any thoughts on using the word "dishonesty"?

Ms MACKEN: I think that is readily understood by the community.

CHAIR: Should it be included in item 8 because that includes everything, does it not?

Ms MACKEN: I do not think we will have a problem with it, but we will take that on notice.

CHAIR: If it were to state, "... may refuse to make an order where the trial will involve a factual issue or in relation to dishonesty", what dishonesty?

Ms MACKEN: That requires the application of objective community standards such as an issue of reasonableness, dishonesty. I do not think the Law Society would have a problem, but perhaps we can take it on notice and question our committee. A jury should readily be able to try dishonesty. I would think we agree with that.

Mr WILSON: I think it is something we should take on notice.

CHAIR: Yes, to mull over, because in the current document that is being used by the DPP for assessment the word "dishonesty" is in there, item No. 24, but when we are considering how to deal with it we need some feedback from different groups about the use of it. I am very grateful to you for coming here today. You have some questions on notice and the secretariat will be sending them to you. I am sure the Committee will add to your questions on notice. Thank you very much for giving us your time.

Ms MACKEN: It is a pleasure. Thank you for having us, Committee, and thank you, Chair.

CHAIR: Thank you also for your submission. I might add that the complexity of this issue has made for a very interesting couple of days and everyone has contributed. Thank you very much.

(The witnesses withdrew)

CHAIR: Welcome and thank you for attending the second day of the Law and Justice Committee's inquiry into judge-alone trials under section 132 of the Criminal Procedure Act 1986. The terms of reference outline the proposed model that we are considering. Thank you very much for coming today. There are routine broadcasting guidelines that are available if required. If you have anything you want to deliver to the Committee, attract the attention of the secretariat and they will make sure that we get it. The Committee hearing is not intended to provide a forum to make adverse reflections about others. We request that witnesses avoid the mention of other individuals unless it is absolutely essential to address the terms of reference. I ask that you turn off mobile phones so that it does not interfere with the hearing. I welcome the three witnesses from the Young Lawyers organisation.

EMMANUEL STEPAN KERKYASHARIAN, Committee Member, New South Wales Young Lawyers Criminal Law Committee, sworn and examined, and

THOMAS SPOHR, Chair and Executive Councillor, New South Wales Young Lawyers Criminal Law Committee and

POUYAN AFSHAR, President, New South Wales Young Lawyers Criminal Law Committee, affirmed and examined:

CHAIR: If you should consider at any stage certain evidence you wish to give or documents you may wish to tender should be seen or heard only by the Committee please indicate that fact and the Committee will consider your request. If you do take any questions on notice, which is quite possible, we would appreciate if you would return the answers to those questions within 21 days from the time you receive those questions from the secretariat. Would any of you like to make a short opening statement?

Mr AFSHAR: I would, if that is okay. Madam Chair, members of the Committee, thank you very much for giving us the opportunity to speak to the questions that you have in respect of our submissions to this inquiry. I want to make a few small points but before I do, just for background, let me introduce to you New South Wales Young Lawyers. It is an organisation that represents members of the Law Society of New South Wales up to the age of 36 and all law students in this State. Our membership comprises somewhere in the vicinity of 14,000 to 15,000 individuals in this State and we comprise a number of committees of which the Criminal Law Committee is one.

I have Mr Spohr and Mr Kerkyasharian here with me because they are specialists in criminal law matters so they will be assisting in answering the questions that the Committee may have. The three points that I wanted to briefly make in the opening statements will probably be addressed by you and by the two gentlemen here in the course of answering specific questions that the Committee has. The first point is the wider point that the Committee is being asked to consider, that is, the questions about the right to a jury trial for an accused. There has been an indication or at least a question raised by the Director of Public Prosecutions about the question of efficiencies in his submission and that is the point that I wanted to make at the beginning here.

The question of efficiencies is one that obviously needs to be borne in mind when you are talking about trials and how long they are going to run and what resources are going to be expended in their running. We are of the view that those efficiencies and the quest to get to those efficiencies should be balanced with the rights of the accused to be heard by his or her peers as in being decided by his or her peers. There are many advantages that jury trials bring to a trial in a criminal matter, including obviously the fact that community values are represented and there are certain efficiencies later on in the process, such as the fact that an appeal from a jury trial happens only in limited circumstances whereas obviously in a judge-alone trial there may be more scope for an appeal later on. So when we are talking about efficiencies, efficiencies that are recognised in the initial part might not actually end up being more efficient for the system later on, especially in the appeal process.

The second thing is with respect to jury tampering. There is obviously always a risk that juries are tampered with and we think that a threshold that has been put in the proposal at the moment is quite low and we have set that out in our submission. There are instruments and procedures that the courts can effectively instrumentalise, use, to nullify the effects of jury tampering to try to mitigate the risk that there would be jury tampering. We think that the first instance, depending on how this would be worded, there would be a finding that there is a substantial risk—not on the item 5, although it has been suggested in some of the submissions, but actually a substantial risk that there would be jury tampering and that risk needs to be so substantial that the

normal procedures of the court to mitigate that risk cannot surmount that—I suppose, an insurmountable risk of jury tampering is what we think is appropriate in that circumstance of the threshold.

CHAIR: Sorry to interrupt but is there a problem of definition for the word "insurmountable"?

Mr AFSHAR: I think there probably is and I am sure there are other synonyms that could be used that would be much clearer or it could be in two segments that there would be substantial risk and that the court would determine that substantial risk could not be rectified by putting the instruments at the court's disposal. As a matter of drafting, that may work but the fact that the threshold is set so low and there is an effective automatic move to the judge alone—

CHAIR: By removing the word "identifiable", is there a chance that there could be—and I will make this up—some media campaign that gives some perception of the possibility of a jury tampering issue without any real identifiable information about it occurring, if you just leave in the word "substantial" and "insurmountable"? Should you really remove the word "identifiable"? What may happen is that perception becomes the leading—I am sorry to be vague; it is just that it is a very difficult question?

Mr SPOHR: With Mr Afshar's grace, I might take that question. Before I do, there are two things I need to say.

CHAIR: I did not mean to cut you off.

Mr SPOHR: We can still come back to them. I need to say two preliminary things. One is that it is a matter of public record that I am a member of the Law Society Criminal Law Committee and I had input into their submission but I am not here talking on behalf of the Law Society today. The second thing is that I am also an employee of the Office of the Director of Public Prosecutions and again the views that I am about to express are my own and nothing to do in any way, shape or form with my employment.

In terms of the question as to identifiable risk and so forth, the starting point is whether or not any risk can be identified on the basis of some form of evidence. It needs to be a risk that is based on some kind of evidence that is available to the court. There is always a risk. If I can put it broadly, it is the fact, though, that there needs to be some identifiable risk. To take an example, which is perhaps a slightly inflammatory example, it might be that the evidence exposes telephone intercepts in which an accused person talks to somebody about attempting to interfere with the jury. That would be a fairly obvious example of where there is real evidence but the real question, in our view, is: can the court takes steps to mitigate that risk if it exists.

One of the questions posed to us is: What are some examples of those steps? Examples include sequestration of the jury, so keeping them in a room so they cannot go out. Mr Ierace, on behalf of the Senior Public Defender, made some suggestions about a case in which he was aware of the sheriff driving jurors to and from court. There are a range of steps and indeed in a similar context if something prejudicial is said during a trial, the first step before a judge determines whether or not to discharge a jury is: Can I cure this by some direction or by some other means? In our view it is important that in relation to this jury tampering question the first step would be: Is there something else we can do rather than simply taking the view that, Well, we are going to go with the judge-alone trial because there is an identifiable risk?

The truth of it is you do not need to get to that step unless there is some evidence and whether one then defines the standard as substantial risk or identifiable risk becomes less important because it is the subsequent question that determines whether or not you take that action. It does not matter how big the risk is if you can overcome it by some means. It can be an incredibly huge risk but if you can overcome it by some means, then that mitigates the issue about how you set the standard. Our problem with the tampering test at this stage—and a lot of our input in terms of the actual standard questions came from Mr Kerkyasharian—is largely that it seems to be that there is a risk, therefore the right to jury trial goes out the window. It is quite a low threshold. I appreciate that this is not legislation, it is merely a model, but it does not seem to take into account the way in which that evidence would come to the judge's attention or the things that could be done to mitigate against that risk.

The Hon. JOHN AJAKA: On that specific point, is the answer that instead of defining "risk", in other words leaving it as it is, something needs to be added to point 6, such as "the risk is not rectifiable". You are saying let a judge determine there is a risk and it is not rectifiable. If it is rectifiable, whether it is a major risk, a minor risk or an identifiable risk is irrelevant. If it is not rectifiable under any circumstances, does it really

matter if it is identifiable? A judge would need to be satisfied on the evidence before him. I get the impression that that is what you are putting to us.

Mr SPOHR: More or less, and I will throw that question in part to Mr Kerkyasharian apart from one point. It is true, as you put it, that it is not as clear how we define "identifiable" or "real", but there should be something higher than "a risk", whether one then characterises it as a real risk or a substantial risk. Mr Kerkyasharian has been the source of a lot of our input in respect of tampering questions.

Mr KERKYASHARIAN: It comes back to the question you asked in the first instance, Madam Chair: Is "insurmountable" difficult to define? It is not the word you would use in legislation perhaps but that is the reality of what the test should be, in our view. There should be a risk that cannot be surmounted or taken care of by the court in some way. There may be a really exceptional example where there is some tiny risk that cannot be addressed that should not be enough to lose the right to a jury, so there has to be some word—real, substantial, exceptional, or whatever—but that is the threshold. Once that threshold is passed—

CHAIR: That can take in the multitude of possibilities.

Mr KERKYASHARIAN: Yes, so once that threshold is passed the next question is: Is that risk insurmountable?

Ms SYLVIA HALE: I assume the difficulty with the phrasing of item 6 is that it is mandatory—the court must order. If that wording were changed to "the court may order" would it be a sufficient loosening of the requirement to meet your concerns or do you think it needs to be spelled out in greater detail? Alternatively, "may as a last resort".

Mr KERKYASHARIAN: I think it goes some way to addressing it in that it leaves it to the discretion of the court but one does not know how the use of that discretion will develop. It may well be that the courts will take some sort of cue from the Parliament and think, "Unless there is some reason why we should not do it, in every case we must do it."

CHAIR: Second reading speech stuff.

Mr KERKYASHARIAN: Something like that. It is not clear how that would be interpreted, and for something as important as jury trials I think it is worth expanding it more in the legislation.

Ms SYLVIA HALE: I was particularly intrigued by your submission under the heading "Primacy of Jury Verdicts" where you say the committee is concerned that the proposal has the unintended effect of undermining the committee's perception of the legitimacy of a jury verdict compared to a judge alone verdict. I assume what you are suggesting there is that a verdict from a judge has behind it the suggestion that the judge is better qualified than the common people to reach a decision and therefore it may subtly undermine the notion that trial by jury is really fundamental to our system of law.

Mr SPOHR: I think that is right. The genesis of that submission came in part out of a discussion by the benchbook committee, which deals with the directions that judges give. There is a standard benchbook that judges use during trials. The benchbook committee is made up of judges and members of the Judicial Commission. When majority verdicts were brought in in 2006 there was a discussion about whether or not—this is a slightly different context but it informs the debate—juries should be asked whether their verdict was by majority or unanimous. The benchbook committee said, in effect, that Parliament has determined that a verdict either by majority or unanimous is of exactly the same force, so asking it leaves the implication that somehow a majority verdict is of less value or is not as legitimate. The answer to the question is yes, it subtly undermines it.

It terms of how one addresses that, the concern would be that a person may say, "Yes, I was found guilty, but I was only found guilty by a jury. I wasn't found guilty by a judge." It is not a suggestion that there is any problem with judge-alone trials, but it is a problem of the perceived legitimacy of jury trials in circumstances where we are not abolishing them by this proposal but are simply setting the conditions around which one might not be in front of a jury. There is a fundamental proposition in the Criminal Procedure Act that there are what are called table offences, where an accused person can elect to be dealt with by way of jury. In our view we need to buttress the legitimacy of the jury verdict as long as we are going to keep them. We either trust juries or we do not. If we do not trust them, this is not the debate we would be having. It would be a very

different and much more fundamental debate. Without wanting to get into that debate, our view is it ought to be buttressed.

Ms SYLVIA HALE: Would you say that if it comes to the court determining whether a matter should proceed or not without a jury, based on the interests of justice test, words should be included to the effect that there will be a presumption against judge-alone trials, or is that too strong a presumption?

Mr SPOHR: I can disclose that there is a debate amongst those at the table as to whether or not it should be described as a presumption. Perhaps it could be best put this way: The balancing act that we see taking place is between the rights of the community to participate in the criminal justice process and the rights of the individual generally to be tried by the means that they think is fairest to them. If the test recognises those competing interests—and the interests of justice test might need to be clarified in some respects—that may alleviate the need for a presumption. It is absolutely important that the legislation does not under any circumstances leave the impression that a judge alone verdict is better in some way.

The Hon. JOHN AJAKA: Or worse.

Mr SPOHR: I suppose "or worse" is the corollary, but particularly in circumstances where sometimes juries are under attack by the public anyway and we need to be a little vigilant about undermining their legitimacy by accident, as it were.

The Hon. DAVID CLARKE: You are not suggesting there is some inference it is going to do that, are you?

Mr SPOHR: No, this is why I said I think it does that unintentionally. It does that unintentionally only if the test does not recognise the relevant factors to be taken into account. The Director's Guideline 24 does take into account the rights of the community to participate and so in some ways does the proposal, but perhaps it ought to be a little bit stronger. That is the effect of it.

CHAIR: A stronger statement of endorsement.

Mr SPOHR: Yes.

Ms SYLVIA HALE: One of the problems we have confronted is that whilst the Director of Public Prosecutions' guidelines are underwritten by a notion that trial by jury is the preferable way to go, the guidelines prior to that, when Mr Blanch was the Director, clearly suggested that it was a matter that under normal circumstances would be by judge alone. Here we have an exercise of discretion by two people both holding the same office and yet reaching radically different conclusions. Do you think that despite having two bob each way as it were and saying there is the right of the accused to choose the forum they would like and the rights of the community and the fundamental importance of trial by jury, it needs to be shored up? This possibly goes back to my presumption against judge-alone trials. How can we shore that up?

Mr SPOHR: Your example of the difference in guidelines under now Justice Blanch—

CHAIR: Formerly Mr Blanch and now Mr Cowdery.

Mr SPOHR:—yes—is apposite because the fact is that from March 2011 we will have a different Director of Public Prosecutions, or perhaps from April, assuming he steps down as he has publicly said he will. I have absolutely no reason to distrust the decision-maker in this context—I think I made a similar point in this forum earlier this year in relation to the use of victims' DNA—but I do not necessarily think we ought to pin our hopes on the fact that the following decision-maker will be just as reasonable and take into account the same conditions. This changed guideline is a perfect example of that. The presumption was turned entirely on its head. With regard to shoring it up, I think considerations of the right of the community to participate do that implicitly without necessarily saying in the legislation there is a presumption against judge-alone trials.

There is a real implication in the right of the community to participate perhaps through a jury—that may be another way of phrasing it, or the interests of the community. We have mentioned obliquely in our submission a case in which it was decided in the High Court that the Australian Constitution obliges indictable matters to be dealt with in front of a jury of 12 in the Commonwealth domain. One comment that has been made a couple of times by the High Court is that the community has the right to participate and it is one of the few

ways in which they can participate. It is one of the main things that judges say to jurors when they are either called for jury duty or discharged from their obligations: "This is one of your few opportunities to participate in the criminal justice process."

The Hon. LYNDA VOLTZ: Going back to the question of unintentionally undermining the jury system, the right to apply for judge-alone trials dates back to 1989 so the reality is that that right exists and is not changing in any way.

Mr SPOHR: With respect, I am not sure that that is completely so because the abolition of the Director's veto, I think it is fair to say, will inevitably lead to an increase.

The Hon. LYNDA VOLTZ: We are moving the right to veto away from the Director for Public Prosecutions to a judge making the decision. The DPP still has the right to object.

Mr KERKYASHARIAN: One of the things that does for the first time is put a judge is in a position where the judge is saying, "In this case a jury is not going to do it as well as me," or vice versa. Even if that is not the criteria that they are considering, that is the perception that will flow from that decision. That is a pretty significant change. Assuming that change is to be made, the basis upon which that decision is made, being in the interests of justice, creates the risk that either the judge is going to end up looking like he cannot do the job as well or the jury will end up looking like they cannot do the job as well—that issue that was raised earlier about trying to maintain the sanctity of the verdicts of both the judges and the juries. That is why I think this idea of imputing the community's right to be present and involved in trials is the way to underpin that.

The Hon. LYNDA VOLTZ: But at the moment the right for whether they can or cannot participate sits with the Director of Public Prosecutions?

Mr KERKYASHARIAN: Yes.

The Hon. LYNDA VOLTZ: How is it different shifting that right from the DPP to the judge?

Mr KERKYASHARIAN: In a sense because we are opening up the judges to criticism for making that decision. The Director of Public Prosecutions is already open to criticism for that decision, fair enough, but now we are asking the judges to make a decision in particular cases as to whether they are going to do the job right or the jury is going to do the job right. Once they start doing their job—

The Hon. LYNDA VOLTZ: Hang on, they are not making a decision based on whether they are doing the job right or the jury is doing the job right. They are making the decision on judge-alone trials, whether there is a reason to have a judge-alone trial, which may be based on the type of the case, the nature of the case, where the case is heard, a whole range of issues that would imply to the judge that the interests of the community are best served by a judge-alone trial.

Mr KERKYASHARIAN: Yes, and one way of characterising that is that the judges making the decision that in this particular case for these particular reasons a fairer or more accurate or righter decision will be made by a judge that a jury. I accept I am simplifying it is perhaps too much, but the danger is that that will be cast as the judge saying, "I can do it better."

The Hon. LYNDA VOLTZ: Given the comments by Nicholas Cowdery reported in the *Daily Telegraph* this morning, which do you think undermines it more?

Mr KERKYASHARIAN: I do not know, I am not aware of what they are. I have not read them

The Hon. LYNDA VOLTZ: Yesterday he flippantly suggested: If I were guilty I would want a trial by jury; if I were innocent I would want a trial by judge alone.

Mr SPOHR: It is funny you should say that; I had that written down in my notes too.

The Hon. LYNDA VOLTZ: You do not think that undermines the idea of juries?

Mr SPOHR: With respect, that is a slightly different debate. I accept there are real criticisms about the validity or there are problems with juries. There are clear problems with juries. It happens to be that our view is

that many of the criticisms levelled at juries are failures of the administration but it is a slightly different debate dealing with the narrow issue of whether or not the right to elect for a judge-alone trial undermines the community's perception of a jury verdict—if it adds to that perception, I should say, or adds to the undermining of that perception.

The Hon. LYNDA VOLTZ: We already have that because since 1989 we have had that, and there are different guidelines under Blanch and Cowdery whether there is a presumption in favour or a presumption against based on what is put before the Director of Public Prosecutions. That has existed since 1989.

Mr SPOHR: With one very important distinction and that is this. None of that was ever aired in the open. The decision whether or not to proceed to consent to a judge-alone trial is entirely the Director's decision—

CHAIR: Which is why we cannot get any data.

Mr SPOHR: That is right, and it is entirely within the domain of, effectively, a statutory appointee who is accountable to Parliament, fine—

The Hon. LYNDA VOLTZ: Sorry, who is accountable to Parliament?

Mr SPOHR: The Director is technically accountable. The fact that is it we are now going to be airing our dirty laundry about juries in the open. One other important point has been made, and I thank Mr Kerkyasharian for pointing this out to me. The fact is that the accused currently has a veto. It has been raised. One of the questions put to us at question 1: The Director of Public Prosecutions suggests it may be an inappropriate power to provide the accused person with a veto. The fact is that the accused has a veto power now, because if they do not concede then it does not proceed with a judge only trial. The Director cannot make an application on his own at the moment.

The Hon. DAVID CLARKE: The Director of Public Prosecutions wants to take that power away from an accused.

The Hon. LYNDA VOLTZ: No, hang on a second, that goes back to the Magna Carta, does it not? That goes back to what the Magna Carta says about the accused having a right to trial by his peers?

Mr SPOHR: That is right.

The Hon. LYNDA VOLTZ: So, in law that is something that has been handed down for centuries?

Mr SPOHR: Yes. I suppose the concern is in the absence of a proposal to abolish jury trials—a debate I do not think this jurisdiction is ready to have—but in the absence of a proposal to abolish jury trials we need, in our view, to buttress their legitimacy. They are the people who are finding accused people guilty or innocent. They are the community's voice in determining that person's guilt or innocence. The fact that one could have attempted to make an application or could have asked the Director to consent previously is changed by the fact that we are now turning up at court and saying, as Mr Kerkyasharian has rightly said, for all of these reasons, the jury is not going to get the decision right.

The Hon. LYNDA VOLTZ: But are they the community's voice or are they 12 people who make a decision that the evidence has been proved by the prosecution within the law? In fact, is it not the case that if a jury found someone guilty and the evidence had not been proved—you mentioned earlier figures of appeals for judge alone as opposed to judge and jury trials, and I would be interested to see those figures—but is it not the case that it is the jury's job to determine whether the proof of the offence had been presented by the prosecution?

Mr AFSHAR: I think in doing so what they are doing is bringing an objective standard of community values to their decision. That is across other uses of juries, for example, in defamation matters where you have that community input and it brings that objective standard to the analysis. So, they get their facts, they listen to the arguments and then make their decision. Because of where those 12 members of the community come from that community standard comes into their analysis.

The Hon. LYNDA VOLTZ: And it is based on the proofs of the offence?

Mr KERKYASHARIAN: Not so much. For example, "obscene" has to be tested by somebody. Is X obscene? A jury represents the community in deciding that X is obscene. A judge, in a sense, does not.

The Hon. LYNDA VOLTZ: Obscenity is a particular point because we have had it before us where peeing somewhere is not necessarily. There is indecency and obscenity and there are clear definitions between the two.

Mr KERKYASHARIAN: Yes, but that is something the jury is clearly qualified to decide. There are other things. Is it a reasonable thing for a person to do or is it not?

Mr SPOHR: The standards of ordinary people—we refer to these things as having definitions but the truth is they are extraordinarily ephemeral; and they should be because they are moveable feasts. What was indecent in the 1920s may not be indecent now. Without wanting to unduly criticise anybody, but in this case judges, there is a very good argument to say that judges, not least because they are individual but also because of their particular background and because they have by their very nature been involved in the criminal justice process for many years and maybe jaded by that, may not necessarily be as representative. Maybe they are, one cannot cast aspersions over the whole lot, but I think this debate is about whether or not juries are getting it right and the basis on which they are making their decisions. That is a valid and very important debate, with respect, but I am not sure it is the same debate as to whether or not an accused person should be able to make an application for a judge-alone trial without an individual's consent.

The Hon. GREG DONNELLY: We provided some questions on notice to you. Can I specifically take you to question 4? I am keen to hear your reflections on that. In your submission you suggest that before making an order based on the risk of jury tampering the court must consider all options available in order to overcome the risk of jury tampering, especially where there are multiple accused. Could you elaborate on that please?

Mr SPOHR: The options that are available were alluded to in Mr Afshar's opening. One of those options, for example, is sequestration of the jury. This is that point we were speaking about before in response to some questions from the Chair, the questions about how the test is framed. In our view the options are available—for example, sequestration. If the risk happens to be coming from the accused on the basis of evidence, one of those options is to bail refuse the accused. The accused will not be able personally to go and do things from in jail.

But, in our view that ought to form an integral part of the test. So, all of those options—most of which are available under the Jury Act, some of which are described in helpful detail by Mr Ierace SC in relation to the Public Defender's submission—are available to the court and we ought not lose sight of those in terms of the question of jury tampering. I am not aware of how common jury tampering is, so it is difficult to formulate a response insofar as it is hard to say whether something is more prevalent. The more prevalent it is it may be easier to make a case that the test ought to be lower, but our view is that those options ought to be an integral part of the overall test as it relates to jury tampering.

The Hon. GREG DONNELLY: Can you give me a response to question No. 5? What is your view about this aspect?

Mr SPOHR: We had some difficulties—and in a moment I will ask Mr Kerkyasharian to respond more fully—because there does not seem to be another useful model. Otherwise, what one is doing is weighing the right of one individual to a jury trial as against the rights of another person to have a jury trial. That is incredibly difficult. How does one reconcile those two sets of rights? I do not know there is a way to resolve it other than in what has been proposed and there is a background issue which is if there are multiple accused and there is some issue as to one wanting a judge-alone trial and one not, one person can make an application for a separate trial, separate to the trial of the other person, but I think Mr Kerkyasharian has a comment on that.

Mr KERKYASHARIAN: It is always available for one co-accused or a number of co-accused to make an application for a separate trial. The basis of that application may well be that they do not want a jury in that matter and if they can present the cogent and compelling reasons necessary to not have a jury, that may well ground the application for a separate trial, and that is a solution to the problem. But as a presumptive matter an accused should not lose their right to trial simply because they have a co-accused who wants to do it another way.

The Hon. DAVID CLARKE: The Director of Public Prosecutions favours that under the proposed model it should be able to apply for a judge only trial with no power to the defendant to veto that. You would not agree with that or would you?

Mr KERKYASHARIAN: No.

The Hon. DAVID CLARKE: That is an outrageous thing, is it not? That is taking away the right of someone to trial by jury.

Mr KERKYASHARIAN: I am not going to adopt the first part of that but the second part is true. It is, in effect, taking a way the absolute right to a jury, which is a bold step.

The Hon. DAVID CLARKE: Yes, it is undermining that right. And as my friend said yesterday, it is one of the two golden threads of our legal system, the right to trial by jury as well as the right to be presumed innocent?

Mr KERKYASHARIAN: Yes, it ceases to be a right. Once you give a court the discretion to take away a person's jury trial it ceases to be a right.

The Hon. DAVID CLARKE: As another member of the panel has said, we need to buttress the jury system and this would, in fact, be undermining it, would it not?

Mr KERKYASHARIAN: Yes.

The Hon. DAVID CLARKE: It would be starting to boil the pot very slowly, piece by piece.

Mr KERKYASHARIAN: The thin end of the wedge.

The Hon. DAVID CLARKE: The DPP should not have a final veto on the accused choosing a judge only trial under the new model?

Mr KERKYASHARIAN: Well, I think that is the new model; that is the change that the model is proposing?

The Hon. DAVID CLARKE: Yes, that is right. It should not have a veto? You agree with that?

Mr KERKYASHARIAN: Yes.

Mr SPOHR: I should make one other point, and I note my precarious position but nevertheless. The fact of it is as long as one does, and I think it is correct to characterise it as having a right to jury trial—the Magna Carta was mentioned earlier—then it is very difficult to make a case that it ought to be taken away. If one ceases to characterise it as a right then it becomes more difficult. I think it is more appropriately characterised and Young Lawyers think it is more appropriately characterised as a right, and on that basis it is very difficult to argue that that should ever be taken away from an accused person.

The Hon. DAVID CLARKE: An argument that is raised in favour of judge-alone trials is the savings in costs and time. While that may be the case, that certainly should not be a major consideration in going down that pathway, should it?

Mr SPOHR: No, that is right. We put very plainly the case that efficiency is a very low order priority in the criminal justice system, except insofar as an inefficient trial may adversely affect fairness, efficiency ought almost not feature at all, in our view, in considerations of jury trials. The fact that something is inefficient makes no difference at all to whether or not in our view it ought to be heard by judge alone or otherwise. The fact of it is that in order to be fair, one often by necessity needs to be inefficient and that in our view is the correct balance.

The Hon. DAVID CLARKE: I direct your attention to question nine of which you received notice. The submission from the DPP suggests that when a case is required for consideration of truly abhorrent facts such as sexual assaults against children, the consent of the accused to a judge-alone trial should not be

necessary. However, the New South Wales Public Defender suggests that where cases involve distressing evidence the right to trial by jury is the more deserving of retention. Do you have a view on that issue?

Mr SPOHR: In essence the anonymity of the jury protects everybody involved in the process. I think we would adopt the Public Defender's position that it is a better to have a jury in those cases. If you can imagine in those cases which have abhorrent facts the pressure is on everybody. Perhaps there is a lot of media around and a lot of externalised pressure that will potentially put the entire criminal justice system in disrepute if a finding of acquittal is made. The beauty of having the jury there is that you have anonymous people representing, in effect, the people, making the decision. And so they are less open to criticism and assuming they have been led well through the whole process can ground the decision that has been made, whereas a judge will, in the same way, get presently subjected to criticism in relation to sentence.

CHAIR: The country does not have anonymity of jurors. Everybody knows who the jurors are. We do not have anonymous juries.

Mr KERKYASHARIAN: Their names are not read onto the record.

CHAIR: No, that is right. The newspaper is not allowed to print their names, it is just that everybody knows who they are.

Mr KERKYASHARIAN: That is right. Everybody knows who they are but they are not criticised by name.

Mr SPOHR: The question of regional trials featured in our debates in relation to this issue amongst ourselves. It is true that there are slightly different considerations in all of this when one talks about regional areas because, for example, as one of the submissions quite rightly points out, we know in advance who will be the judge and we may know who the jurors will be. The perfect example then of our suggestion about jury tampering is I have been involved in several trials that needed to be removed from a regional or rural area into the city in order to be able to guarantee an appropriate jury. It is absolutely vital that that occurs.

Whilst I am talking about knowing the judge there is one other issue that perhaps did not come out in our submission and I would like to take this opportunity to mention it. Our view is that the judge who hears the application for a judge-alone trial under the model, if there is to be one, ought not be the judge that hears the matter if it goes by judge alone. It is, in our view, inappropriate that a judge hears evidence that a particular accused person, for example, is going to tamper with the jury and then, having determined that a person is going to tamper with the jury, then put in the position where they need to make a determination as to the guilt or innocence of that person in a different context. So that subject to practicalities, and those are particularly evident in regional areas, in our view in all circumstances where it is practicable, a different judge ought to hear the application for a judge-alone trial if a judge is going to be making that decision.

The Hon. JOHN AJAKA: In relation to tampering issues?

Mr SPOHR: In relation to anything really.

The Hon. DAVID CLARKE: I think there has been a consensus from other witnesses who have appeared in this inquiry along the same lines.

CHAIR: But you have helpfully added the word "practicable".

Mr SPOHR: Another background issue is that the determination by the judge will require the prosecutor to turn up and say, "Here is the trial." They have to literally produce the entire trial as they propose to present it and put it in front of a judge and say, "Looking at this evidence, this is what should or should not go before a jury". That is another issue because if that judge then determines that it is to be by a judge-alone trial, they may have seen evidence that is highly prejudicial. There are all sorts of issues. There are also questions of efficiency in that and costs and all sorts of background issues, but the fact of it is that the prosecutor will be required to present the trial in presumably a summary concise form to the judge in order to make this determination. There is no other way for it to take place. There is no other way for the judge to make that determination.

The Hon. JOHN AJAKA: I am happy if my questions are taken on notice. 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? 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? What is the effect of that? What is your experience in judge-alone trials that have happened to date? Will that require more work by the judge, bearing in mind that a lot of trials will be shortened and technically a judge will have more time available?

Thirdly, and going to heart of this inquiry, leaving aside debate on juries and so on, there are two golden threads as I have put it to other witnesses. The first is the defendant is innocent until proven guilty. The second is clearly that he or she has a right to be tried by his or her peers which we call the jury system. If anyone were to take away that right from a defendant we would all strenuously object to it. 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?

The DPP and others who have spoken on behalf of the Crown have put to the Committee that in a sense the community has a right to that determination of a trial by jury. 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? I am sorry that my questions are a little deep.

CHAIR: I thought it was an attempt at summing up.

The Hon. JOHN AJAKA: It is not a summing up.

Mr SPOHR: It is a perfectly good question by which I mean to say that it is inherent in our submission that the community does have a right. In fact, in our submission we have cited a couple of examples of the High Court explicitly identifying that right at the Commonwealth level. So that it is true, in our view, that the community has a right to participate in the criminal justice process through juries. The question hides an underlying complexity though because in one sense there is no difference between the current process and the proposed process if all one is looking at is whether or not the community is represented because the Director is bound to represent the community. The question is the process by which that decision is made, and the balancing that one carries out as against the individual's right to determine the means by which they are found guilty or innocent.

I could just take one small point though, it is not, perhaps with respect, completely true to say that it is a golden thread that the accused can have their guilt or innocence determined by a jury. We have an entire swathe of areas, summary offences, where they actually have no right to elect to be dealt with by a jury. Then there is a small category of offences where they could elect to be dealt with by a jury rather than by a magistrate. So that the question of a person's right to a jury trial is one that in a sense has been eroding for a long time. The question is how one legitimately takes into account balancing the competing interests in this case?

The Hon. JOHN AJAKA: My final question raises the practical aspects of the same judge hearing an application for a judge-alone trial not being the same judge who ultimately hears the matter. There will be some substantial practical difficulties in the rural areas and even in a place such as Wollongong where we all know there is only one judge. We know who he is and when he sits, et cetera. Therefore, should we be looking at a system whereby, for example, the submission is not made to the judge at the court but a system where a notice of motion, submissions, et cetera, are lodged with, for example, the Chief Judge and the Chief Judge via himself or delegated authority determines it on the papers, on the submissions, makes a determination and then once that determination is made the matter continues with the judge at the particular court? Again, I am happy for you to take that on notice, because I have put it to someone else as well.

Mr SPOHR: We might take it partly on notice, but there are two issues raised. One, the Chief Judge already does callovers by video link or phone with all rural matters. It is not insurmountable for them being adversarial. Really, what is proposed is an adversarial setting, not simply something dealt with in chambers. This is not an appropriate means by which to deal with this, but I will raise it anyway: at the Local Court committal stage the magistrate is required to form a view about many things. In fact, the committal process is: here is the brief; here is how we expect the trial to proceed; make a determination or a prediction about the

verdict of that trial. The problem with that is that it is not appropriate for a magistrate to be determining this question, but as a matter of practicality we have determined in respect of committal proceedings, for example, that an accused can waive their right to a committal and simply be dealt with on the basis of what is called a paper committal, where simply the brief is tendered and submissions are made, or that witnesses can be required to attend.

The Hon. JOHN AJAKA: I understand that, I have done enough myself, but the major difficulty is that the reality is that counsel appearing for a defendant at a committal hearing may not be the counsel appearing at the final hearing. That is why we argued whether 28 days or 14 days are sufficient. To suddenly put that onus on a Local Court magistrate who has never run a trial, never had a jury before him, I find to be a very difficult proposition.

Mr SPOHR: We are not advocating in favour of that. I am pointing to the model of how one approaches the prospect of having all this evidence before one, and the different means by which that can be achieved by a paper committal, by a waiver, by actually having witnesses attend. Although there are practical difficulties there are also ways of mitigating those things.

Mr KERKYASHARIAN: Last Monday I was counsel in a trial in Broken Hill. I received that brief seven days before that. I think the Crown had read it at about that time. I read it last week. The reality is that there is no lead-in time in the country, it is a big practical problem.

The Hon. JOHN AJAKA: That is where the 28 days is an issue.

Mr KERKYASHARIAN: Yes, and ultimately the Crown dropped that case because that was the right way to go. We would like to think that these things are done early, but in practice it is simply not possible.

CHAIR: Thank you for coming today. I have said to previous witnesses that the information received by the Committee during the past two days of hearings has been quite awe inspiring. You have certainly contributed to that. Questions on notice will be forwarded to you and you are requested to reply within 21 days, recognising that that is a lot of work. Do you have anything else to say?

Mr AFSHAR: No, just that on behalf of New South Wales Young Lawyers thank you Madam Chair and the Committee for giving us the opportunity to come and make our submissions.

(The witnesses withdrew)

(Luncheon adjournment)

HOWARD WILLIAM BROWN, Deputy President, Victims of Crime Assistance League, sworn and examined:

CHAIR: Welcome to the second public hearing of the Standing Committee on Law and Justice Committee inquiry into judge-alone trials under section 132 of the Criminal Procedure Act 1986. The inquiry's terms of reference outline the proposed model we are considering. I will not detail the formal procedures because I know that Mr Brown has heard it before and I have outlined them during this inquiry. I refer there to the broadcasting guidelines, the delivering of messages through the secretariat and the turning off of mobile phones. No adverse mention is to be made against other persons. I thank you, Mr Brown, for your time and your submission.

Mr BROWN: It is my pleasure.

CHAIR: In what capacity are you appearing here today?

Mr BROWN: I appear here as the Deputy President of the Victims of Crime Assistance League [VOCAL], which is a volunteer support organisation for victims of crime.

CHAIR: The Committee has read your submission and we have sent you questions. I indicate that the last two days have been incredibly interesting. This issue, which seems straightforward on the surface, is complex. We have received a great deal of good information and your evidence is important as well. I will start with the first of the questions. One of the arguments that is often raised in favour of judge-alone trials is that a judge-alone trial is likely to be completed more efficiently than a jury trial, resulting in time and cost savings for the judicial system. What do you think about that argument?

Mr BROWN: I certainly appreciate that is one of the arguments that have been put forward on a number of occasions when this matter has been discussed. Yet I think that the proponents of efficiencies of cost and efficiencies of time in relation to judge alone matters are somewhat mistaken in as much as that under normal circumstances the role of a jury within the criminal process is not one whereby they are given the opportunity, unlike the situation 400 years ago, of asking questions themselves. So they are merely sitting there and listening to the evidence that has been given. The only real effect that it has on the length of the trial is the period of time which it may take the jury to deliberate. That, in my view, is one of those situations where if a jury is taking a substantial period of time to deliberate and to come to some sort of agreement as to whether a person is innocent or guilty, that is the entire purpose of having a jury. They should be the sole arbiters of fact. This is not a function of a judge, if we are to keep judges completely independent of the process. The judge is merely there to ensure that the rules are followed and to give guidance and explain the law to those people who are the arbiters of fact.

It has been our experience when the reverse has occurred and a matter has been before a judge alone, we then see a process whereby particularly the defence insist on going into what we call voir dire where they will argue a particular point of law in order to exclude a particular piece of evidence. They go into voir dire for the purpose that if the decision of the sitting judge is unfavourable to their particular outcome they can appeal that and go to a higher authority to appeal the process. As a result the trial is then basically placed on hold until such time as the decision that the judge has handed down in relation to a point of law is argued in a court of appeal, a direction is given and then it comes back. In essence, and it is certainly our experience, judge-alone trials often can finish up being far longer in process than those with juries.

CHAIR: It is remiss of me but I neglected to ask you if you had an opening statement.

Mr BROWN: Hopefully I can encapsulate it in my responses to the Committee.

CHAIR: Thank you.

The Hon. DAVID CLARKE: Mr Brown, in relation to the series of questions that were sent to you I will read question two onto the record:

> Under the proposed model if the prosecution applies for a judge-alone trial the accused must consent to their trial proceeding under the judge alone model. Mr Daniel Howard noted in his submission that 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.

Would you comment on the suggestion that the proposed model further empowers accused persons, from a victim's perspective? Paragraph (b) states:

> If the proposed model were to be introduced, what would be the impact on the community's perception of the fairness of the judicial system?

Mr BROWN: Can I first say this was something I was going to address in my opening remarks, so I can interpose that now? There is a false belief that the role of the Office of the Director of Public Prosecutions [ODPP] is purely a role of prosecution. If that was the case, perhaps under these circumstances you could look at a situation where the accused had that right. The difficulty is that is a perception of the role of the ODPP. The ODPP is not just there for the purposes of prosecution. The ODPP performs a function whereby it obtains the entire brief of evidence. It will look at the factors that have been brought before them and, having done so, decide whether there is, in fact, further investigation required. If so, it will raise what we call tickets back to the Police for the purposes of additional inquiry and information. Once they have all that information before them then and only then do they decide what charges will finally be indicted against the accused and the manner in which that prosecution will actually run. Then from that point thereon they go into the prosecution process.

If we were in a situation where we were to provide basically a veto by the accused over the DPP what we are then doing is placing ourselves in a situation where a lot of the information which would not normally be used during the standard prosecution of an accused would then have to be made available to the judge sitting alone. In our view that has the potential, and we have certainly seen this in cases of judge-alone trials, where the decision of the judge in relation to how he has come to a view appears to have been tainted by something that he has received in the brief, which under normal circumstances if a jury was involved he would not have been presented with. What in fact occurs is that we have a situation where if we gave that power to the accused to veto that particular process we would then be placing the judge in a position where instead of being independent to the particular process and merely ensuring that the rules are followed, he is exposing himself—or herself, I should say to be completely non-sexist—the judges would expose themselves to a situation where they could be accused of bias in allowing certain pieces of the evidence into the particular trial and passing a direction in relation to that. Under normal circumstances that would never have been brought to the judge's attention if that authority was vested solely in the DPP. That is why we have a great concern.

One of the things that people tend to lose sight of is that the burden of proof on the Crown is to prove that the accused has committed this offence beyond reasonable doubt. That burden is most arduous. It is not something that we treat lightly. I am not saying that we should reduce the burden of proof. In fact, one of the great precepts of our criminal justice system is that it does fall to the Crown to prove beyond reasonable doubt. If I was to sue you civilly I would just have to prove on the balance of probabilities. That burden is far less. When we are talking about potentially placing a person in incarceration, especially for substantial periods of time, it is only fit and proper that the burden of proof be beyond reasonable doubt. So the constraints that are placed on the ODPP to satisfy that burden in itself are, in fact, particularly high. If we were then to obfuscate the entire process by removing the ability of the DPP to veto the process, I believe that we would be doing substantial harm. Because, in effect, what we would be doing is not serving the rights of the victim accordingly.

It is always a difficulty, however. Again, this is another thing that is perhaps misunderstood. It is certainly our experience from dealing with the victims of crime who come to us that they believe that the DPP are prosecuting for them. The DPP are not prosecuting for the victim. The DPP are prosecuting for all of us. They are prosecuting on behalf of the entire community. So, often, what a victim requires is not what the DPP believes that they require. Without having the right to be the sole arbiters of what goes forward to the court so that the court might make a decision in relation to a matter unbiased and unfettered by things which may confuse the entire process, I think we are starting to move into very dangerous territory.

The Hon. JOHN AJAKA: Mr Brown, I am trying to get a perspective from the victims' point of view because we have had everyone else's perspective. Would it not be an argument from the victim's point of view that if trials were shorter in front of a judge alone it possibly would be less stress on a victim, that a victim would not be forced to give evidence in front of the 12 strangers, if I can use that term, of the jury? In your experience would that be a situation more appropriate for the victim or do you say in reality that does not happen?

Mr BROWN: Can I say there is something else perhaps we need to take into consideration?

The Hon. JOHN AJAKA: Please.

Mr BROWN: That is, that the number of matters prosecuted by the ODPP are, in fact, quite small in relation to the number of matters that come through the office. In the majority of situations the ODPP engage in what is known as a process of charge negotiation. You and I would generally refer to that as plea bargaining.

CHAIR: Because we watch television.

Mr BROWN: Yes. Of course, if Mr Cowdery was to come before this Committee he would let you know in no uncertain terms that it is called charge negotiation. Charge negotiation is a process whereby the DPP utilises the situation where if they can convince the accused to plead to a slightly lesser charge and prevent the need for a trial that is the process by which they best protect the interests of victims in ensuring that they do not have to go through the trial process and reduce the trauma to which they are exposed. If we are faced with a situation, however, where that charge negotiation breaks down or the accused is just simply not willing to admit guilt to any charge, no matter how large or small, and we then come to the process of trial, I come back to my initial point: the most dramatic part of the process for the victim is the actual giving of the evidence.

The awaiting of an outcome of that is nowhere near as traumatic as the process of in fact giving their evidence. We find the demands that are placed on us as a court support organisation is that probably—this is perhaps a little rough in the figure-work department—around 70 per cent of our victims only require court support for that period of time up until they give evidence, at which point they would normally withdraw and ask us to remain and we will then follow the progress of the trial and keep them updated on a daily basis. The length of it is not the issue as far as the victim is concerned.

The Hon. JOHN AJAKA: As far as the first part of what you said is concerned, I do not know if that is correct but assuming it is, I do not see what difference it will make. If the DPP is going to charge negotiate, it is going to do that whether it is a judge-alone trial or a jury trial. I do not quite see a difference in that respect. The more important aspect for me is that if the most serious aspect of the victims stress comes from giving evidence, what difference would it make to the victim if he or she is giving evidence in front of a judge alone or in front of 12 people? How could there be a difference? How could it be better for the victim if it is done in front of a jury?

Mr BROWN: I will answer your question in the two stages. The first thing that it is vital for you to understand, and I am desperately trying not to be pedantic—

The Hon. JOHN AJAKA: No, I understand that. You are being most helpful.

Mr BROWN: In a situation of charge negotiation there is no trial. So, the discussion about trial with or without a jury is completely moot. We do not even get to that process of deciding whether we will have a judge alone or a jury matter because if the accused pleads, we then go straight to sentencing.

The Hon. JOHN AJAKA: Correct. That is why I did not think it was a relevant issue.

Mr BROWN: So that comes out of it. The confrontation in relation to the victim presenting the evidence is not the fact that they are giving their evidence before a jury or not; it is the fact that they are facing the person whom they are accusing of committing the atrocity upon them. The conflict for that person is not so much the fact that they have to give their evidence before a jury; it is the fact that they have to give their evidence. A matter being heard by judge alone or with the jury is of little consequence as far as the trauma to which the victim is subjected.

The Hon. JOHN AJAKA: I am trying to understand from a victim's perspective why you are pressing for a jury as opposed to judge alone?

Mr BROWN: One of the real difficulties is that whenever a victim comes to us—the material is available through the New South Wales and Victims Services when they talk about "your day in court" and about the process of trial by jury and an accused being decided upon by a panel of his peers—and observes a judge in full flight, because the judge has to be completely separated from the process and, for want of a better expression, devoid of emotion, the majority of our victims feel that the judges have no real concern for them. The fact there is a jury, people just like themselves, gives them comfort that the decision that is being made in

relation to the person's guilt or innocence is in fact being made by a group of people who are similar to them, the victim, and not someone who is aloof, begowned and bewigged.

The Hon. DAVID CLARKE: But there is a suggestion that accused do better before a jury. The viewpoint out there is that those who are more likely to be guilty want to go before a jury rather than before a judge because it is more likely they will be convicted before a judge. What is your response to that viewpoint?

Mr BROWN: It is actually a viewpoint with which I agree. It is my belief that more people are successful in being acquitted, or should I say being found not guilty, by a jury than by a judge alone.

The Hon. DAVID CLARKE: Are you not arguing against yourself to some extent?

Mr BROWN: I suppose if we work on the basis that any person who is accused is therefore guilty, and that is always a very dangerous precedent. I imagine Mr Cowdery, with whom I sit on the New South Wales Sentencing Council and the New South Wales DNA Review Panel and for whom I have a certain amount of time, would be very disappointed if I pointed out here that of all the matters that actually go to trial prosecuted by the ODPP, 51 per cent of them are lost. The ODPP's greatest success rate comes about as a result of charge negotiations. I know we are actually arguing against ourselves and I have had plenty of situations where we have been supporting victims, especially in sexual assault matters, where we have discovered after the event why a jury returned a verdict of not guilty.

The Hon. JOHN AJAKA: Your proposition is that victims feel the system has dealt with them better when they actually see the jury than just a judge alone?

Mr BROWN: Exactly.

The Hon. JOHN AJAKA: Also because victims had been led to believe or had a perception or were advised that they would be giving evidence before a jury and then at the last minute suddenly there is no jury—because they were not involved in that process—that could place them under more stress. Is that a fair summation?

Mr BROWN: It is a fair summation and can I say from my own personal experience, specifically related to judges of the District Court, there are a substantial percentage of judges of District Court who, by their various comments, have affronted victims purely and simply because of the legal and technical manner in which they have dealt with the case and the victims have felt that there has been absolutely no empathy whatsoever.

The Hon. JOHN AJAKA: But that can happen whether or not there is a jury?

Mr BROWN: Quite so, but if you are convinced that it is the judge who is making that decision and has already formed an opinion about you, then the perception is that the decision has been handed down and that is why, even though as you rightly pointed out, there is that view out there that you are better off to be before a jury if you are the accused, we still believe and all our counselling models are all developed around the prospect and the process that you are far better off to be adjudged by a jury of your peers. Let us be brutally honest about this, because we have an adversarial system, when you are a victim of crime you too are being adjudged by the jury.

The Hon. GREG DONNELLY: We provided some questions on notice to you. I take you to question 3:

> Your submission suggests that the proposed model 'puts into question the integrity of the Office of the Director of Public Prosecutions as "gatekeepers" for the process of judge-alone trials'.
>
> a. Why do you consider this to be the case?

Mr BROWN: I suppose the general principle that comes about from this particular process is that as it currently stands under the current provisions of section 132 that is the role of the office of the Director of Public Prosecutions. That is why I said earlier that there is this perception that all the ODPP does is prosecute. If it were as simple as that, the question would be completely irrelevant, but that is not the function of the ODPP. The function of the ODPP is that when it obtains all the evidence, it then decides which evidence it will lead, which witnesses it will call and how it actually structures the prosecution throughout the entire process. It may well be, and it is often the case, you may have five or six witnesses in relation to a particular matter and you

decide quite specifically not to present two of those witnesses, potentially because one may be unable to express themselves quite clearly or when they do so during the interview process you have found out that no matter what you ask them—if you asked them "What is two plus two", instead of looking at you and saying "The answer is four"—they would give you a convoluted reason as to why you should not be asking that question and actually confuse the entire process.

It then becomes the responsibility of the DPP not just to prosecute but to actually mould the case in such a manner so that the court is presented with the best possible viewpoint as to why are we are actually prosecuting and how we are prosecuting. If we take that role away from the DPP, someone is going to have to fill that role. Unfortunately, the only people who can fill that role if we take it away from the gatekeeper is a judge. I agree with Mr Dan Howard in his submission that we actually threaten the independence of the judiciary if we start to engage them in the process of deciding what is and is not relevant for a prosecution. I should point out also that Mr Ierace, who has also made a submission on behalf of the Public Defender's Office—who also sits with me on the New South Wales Sentencing Council and for whom I have a great deal of time—is not enamoured of the operations of the DPP as perhaps we are. Unfortunately, there are none of us who do not come to this Committee with some form of vested interest. I guess it is obvious and plain that I should actually state that.

The Hon. GREG DONNELLY: Have you effectively covered the second part of that question?

Mr BROWN: The second part asks:

> Is the prosecution better placed to weigh the competing interests than the judiciary in determining the merits of a trial proceeding ... ?

Yes, I think it is. The reason I say that is that on numerous occasions we have been on a judge alone matter where evidence that has been put to the judge at first instance to decide how he is going to proceed are matters that would not normally have been given to the judge had there been a jury because they would have been matters that would have been discussed perhaps in voir dire, in a completely different environment. So, there are matters of which a judge can become aware that could be seen by the accused and the accused's legal team to be adversely influencing the judge's decision in relation to what evidence he will and will not allow. This then complicates the matter by giving rise to appellable situations. One of the things we need to give very serious consideration to is that when we talk about judge-alone trials we cannot just look at that in isolation. We have to look at the net result.

If the net result is an increase in the number of appeals which then go on to the Court of Criminal Appeal, any transitional cost savings which might be perceived as coming about from judge-alone trials will be lost through the appeal process and that is one of the real problems. If we give that position to the judges to determine, it lays open a greater ground for appeal by the accused. We are opposed to that purely and simply because the trauma of an appeal is a situation which retards a victim's ability to rehabilitate following the matter.

The Hon. GREG DONNELLY: I put this to you because it was raised yesterday with some witnesses and I am a little bit bemused. It has been put to us by different witnesses in the context of the court proceedings that an argument can be advanced that the judge, prosecutor and the jury are all, in some sense, representing the community at large; in other words, the only person not representing the community is the defendant. That was put by a range of witnesses. Surely that is not the case. I would like to know your opinion about whether the position put forward by different interest groups is something you agree with or that you have a very clear mind in terms of the court dynamics, the court process, that there is just one group representing the interests of the community and if so, which one is it?

Mr BROWN: Well it is certainly none of the people who appear at the bar table and it is certainly not the bench. The only people who represent the views of the community are in fact juries. That is why I say that the actual role of the ODPP is one which is most misunderstood. Of the questions that are put to us by victims, the most vexing and most constant question is: What is the role of the DPP when it comes to me? We have had Gordon Samuels, for instance, conduct a very substantial inquiry into charge negotiations because victims were complaining about the lack of inclusion in that process of charge negotiation.

One of the functions of the ODPP—and I will not name the prosecutor but he was involved in a matter which has become quite seriously the debate of a great deal of attention in the press in a most recent case where a young child has been killed at the hand of a person who was on parole at the time of committing the offence. If I had had any say in that matter and if the victim of that particular crime, the mother of the deceased, had had

any say in that situation that matter would never have been negotiated to a manslaughter matter; it would have been run as a murder trial. But the Crown prosecutor in that particular case insisted that emotion was too involved in this particular matter and that we were confused by emotion and that his role was not to look after our best interests but the interests of the community—and he made that perfectly clear, as do the majority of Crown prosecutors.

The Hon. GREG DONNELLY: "Our best interests" being the victims?

Mr BROWN: The victim's best interests. His interest was purely for the entire community.

The Hon. JOHN AJAKA: The community as a whole as opposed to the victim as one?

Mr BROWN: Yes. I actually disagree with that. I do not believe that they do represent the views of the community. I believe they represent the views of a legal precept. Certainly the defence has no real interest in looking after the community, although having said that I must be fair, especially to the Public Defender's Office, that wherever they determine that a person is guilty, they will always encourage that person to enter a plea of guilty even if it is to a lesser charge to avoid that particular process. And the judge is there purely and simply to arbitrate. The judge's function is to ensure that the rules of evidence are followed and the rule of law is followed and to provide advice, sometimes to both Crown and defence, as to the fact that they may be overstepping the mark, so the judge himself is not really a representative of the community either, although obviously when it comes to imposing a sentence he is supposed to take into account the views of the community and the abhorrence that the community has for particular types of crime.

The Hon. GREG DONNELLY: Is it your view that there could possibly be some types of matters where the facts are so repellent or appalling that it would be in the interest of a judge alone to deal with that matter as opposed to exposing the matter to a jury; or a matter is so complicated that it might be too complex for a jury to understand?

Mr BROWN: Certainly there are issues where matters of evidence can become quite complicated and particularly technical. I have seen plenty of cases where those people, both prosecuting and defending in matters of such nature, have become quite confused themselves and have actually been confused by the people they have called to support their particular case. Technical arguments can be quite difficult. One of the biggest problems that I believe we have—and this is something we do not often talk about and it is something in an ideal world would be completely different—generally speaking, anyone who provides court support to our organisation is required, if they want to be a volunteer with our organisation, to submit to counselling.

I, myself, receive psychiatric counselling once a month as a formal debrief so that I deal with the things and the abhorrent crimes that I have dealt with in a month. I go and have a professional debrief, normally between two and three hours, to ensure that I am not carrying too much garbage myself. We do not provide that to our jurors and some of our jurors endure some of the most horrific of circumstances. We basically say, "Thank you for all the assistance you have provided to this court. Go away and heal thyself."

Ms SYLVIA HALE: Presumably it is not provided to judges either, is it?

Mr BROWN: And that was my point. That is the follow-on. It is very similar to police. We are of the view that any police officer involved in a critical incident should be required at law under the Law Enforcement (Powers and Responsibilities) Act relating to police to attend counselling as a matter of fact. In fact, all that happens in critical incidents is that they are offered counselling if they have been the victim of a critical incident.

The Hon. LYNDA VOLTZ: What about the Office of Public Prosecutions?

Mr BROWN: Exactly the same. In an ideal world the officers of the ODPP, the judges and the jurors should all be entitled and given free access to counselling to deal with the trauma to which they are exposed and that is one of the major failings of coming to grips with how we actually choose when to go judge alone or not.

The Hon. LYNDA VOLTZ: Judge-alone trials are actually a lot more work for judges, are they not?

Mr BROWN: They certainly are.

The Hon. LYNDA VOLTZ: So why do you think that if judges are actually the advocates at the end of the day over whether it should be judge alone or not that they will suddenly be rushing to have an increase in the number of judge-alone trials?

Mr BROWN: I do not quite follow the question.

The Hon. LYNDA VOLTZ: In 2007 there were 46 judge-alone trials and I think four in the Supreme Court. You raised issues of an increase in appeals and an increase in a whole range of things. Why would there be any increase if judges are the advocates of this?

Mr BROWN: What it basically comes down to is where a judge is sitting alone, that person then has to make decisions in relation to what evidence will or will not be led. Most of those decisions currently are made by the DPP.

The Hon. LYNDA VOLTZ: I know that, but if the judge is the person who makes the decision about whether to have judge-alone trials, given that it is significantly more work for judges, why would judges suddenly be making the decision to proceed with more trials by judge alone than is currently being taken by the ODPP?

Mr BROWN: When you put it in that light, I would imagine that most judges would do whatever they possibly could to avoid that particular process, but having said that, I think you would find that the situation would escalate quite substantially if we were to change the current rules in relation to judge-alone trials—and I think that is almost inferred in Mr Ierace's submission.

The Hon. LYNDA VOLTZ: But that is an "if" is it not?

Mr BROWN: It certainly is an "if".

The Hon. LYNDA VOLTZ: In 51 per cent of cases that the ODPP has brought before a jury the person has been found not guilty, the case has been lost. Do you know the breakdown between judge-alone trials and jury trials in terms of prosecution rates?

Mr BROWN: It is really interesting. When the first terms of reference came out I tried to endeavour to determine exactly that because I was aware of when Mr Clarke first raised the issue. Most people think you are far better off as an accused to go before a jury because you have a greater chance of getting off, so I wanted to try and have a look at the figures. I tried to access it through the Judicial Commission but unfortunately I was unable to determine those figures and I do not know whether the Committee has been successful in obtaining them either.

The Hon. LYNDA VOLTZ: No, we have not.

Mr BROWN: Perhaps I should not say this on oath but I actually tried to use some of the access that I had through the Sentencing Council to obtain that information but I was unsuccessful.

The Hon. LYNDA VOLTZ: What kind of cases does the ODPP currently recommend for trial before a jury?

Mr BROWN: I drew attention to this in my submission in a way and to put it in a general class is the easiest thing. When we are talking about determining the difference between aggravated dangerous driving occasioning grievous bodily harm as opposed to dangerous driving occasioning grievous bodily harm, even though the law is reasonably clear on what the terms of aggravation are, especially under section 21A of the Sentencing Act, it is reasonably clear what aggravating and what mitigating features are, but where there is a dispute as to whether a case is aggravated or not, that is generally a matter which the DPP would put to a jury, so that a jury could decide whether the circumstances of the crime were such that they had sufficient aggravating features to meet that higher burden.

The Hon. LYNDA VOLTZ: Which cases at the moment are the ODPP requesting for judge-alone trials because they did 46 in 2007? What kind of cases were they?

Mr BROWN: The majority of those matters were ones that involve deeply intrinsic DNA evaluations, so a conflict of expert witnesses relating to DNA, whether we were using YSTR or using standard X technology in relation to DNA; some of the major fraud matters were ones put forward. We do not normally deal with the fraud matters because we normally only deal with crimes of violence. There was a third category. There were at least a couple, as far as I am aware and they were matters of sexual assault involving sexual assault of children.

The Hon. LYNDA VOLTZ: That is the one that kind of interests me. I understood what you said about being able to express before 12 jurors what someone had done to me because they would understand it but also some crimes, particularly sexual assaults, were about humiliation of the witness. To have a judge and a couple of lawyers know my most intimate details of humiliation I may be able to live with but to have 12 people I do not know wandering the streets know those details I may not be able to live with. I asked this question of Nicholas Cowdery but I got the impression that in some instances it was the welfare of the victim that they were talking about, what their state of mind would be, and that a judge-alone trial may actually be more suitable in sexual assault cases?

Mr BROWN: Our view, especially in sexual assault matters involving children under the age of 14, is that a judge-alone trial is by far and away the best way to proceed purely and simply because of the matters where we have been involved in those cases where young girls have been the victims. I do not know whether this was just luck but the judges involved in that particular process—bearing in mind that these particular children were giving their evidence in a CCTV room so they were not actually directly confronting the perpetrator—but the sensitive manner and the dignity in which they treated those children was absolutely exceptional and those kids have come out of that process far less damaged than we anticipated and we believe that was because they did not have to go through that process of that humiliation to which you referred with a jury.

The Hon. LYNDA VOLTZ: And my understanding is that the Government has undertaken a lot of training of judges in relation to sexual assault?

Mr BROWN: Especially relating to children.

Ms SYLVIA HALE: As I understand it, you are saying that victims want to have their day in court and they want to do it in the context in which they expect it to be done, namely trial by jury. When you are talking to victims do you tell them that if they go before a judge alone they will at least have the benefit of being able to read the reasons for a judge making a decision or do you not really discuss those options with the victims because it is not up to the victim to determine the particular forum?

Mr BROWN: No. Our role in the prosecution process is actually quite minimal. We are dealt with under sufferance to a degree by the ODPP when we are providing court support. The process that we live by is that our organisation gives the victim as much information as possible. We talk about the possibility of trial by judge alone and trial by jury. We talk about the process upon conviction and the process of delivering the victim impact statement, who is going to do that and who is best equipped to do that. We give them every possible scenario so that nothing comes as a surprise to them because unfortunately that can happen in the process and if you do not adequately equip your victims for any quick change in the process you are putting them behind the ball to start with. We provide them with sufficient information.

One of the functions we perform is that the moment a judgement is handed down we obtain a copy of the judgement, with the cooperation of the DPP, at that time and we suggest to the victim that they do not read the judgement straightaway. We ask them to give themselves between seven and 10 days before we arrange to sit them down with a counsellor and work through the judgement of their case and explain to them why certain things have been said. Unfortunately, sometimes in decisions and judgements judges will use technical language that is beyond the scope of our victims. We try to be with them in that process to help explain it.

Ms SYLVIA HALE: So VOCAL plays absolutely no role and never attempts to play a role in influencing the ODPP as to whether it will be—

Mr BROWN: No.

Ms SYLVIA HALE: You come into things after the decision has been made.

Mr BROWN: Most definitely.

Ms SYLVIA HALE: There is also an assumption that a trial conducted before a jury as opposed to one before a judge alone will somehow be more available to the public. Does that work out in reality?

Mr BROWN: No. You are right; it is a perception, not a fact. Unfortunately, the attraction of media to cases has nothing to do with the construction of the trial. It has to do with either the circumstances of the accused or the nature of the crime, and sometimes both.

Ms SYLVIA HALE: If a judge is called upon to determine whether a trial will be by jury or by judge alone, and the evidence has to be made available in arguing both cases, would you agree that if it is a judge-alone trial, or perhaps even if it is a jury trial, that judge should not preside at the trial itself?

Mr BROWN: This becomes very problematic when we are talking about a matter where there has previously been a trial by jury and it has been aborted, for whatever reason, and there is an indication by both sides that they would like the same judge to deal with the matter so that there is a reduction in the time spent in the new trial, because this is not an appeal process but a trial that has been aborted. In circumstances like that we would not have a problem with it per se, but under normal circumstances our preference would be that a completely different judge deal with one aspect of it before we get to the trial so that there could be no risk and no additional avenue of appeal on the basis of contamination of the judge's view by prior knowledge of certain factors.

Ms SYLVIA HALE: Earlier in your evidence you suggested that occasionally you have had access to a jury's reasons for coming to a decision. I presume that is only by talking to one or two jurors rather than all 12 of them. Firstly, do you think that is appropriate given the jury's reasons are supposed to be kept within the confines of the jury room and, secondly, do you think there is a significant lack of research into the role and capacity of juries, and judges for that matter, in determining the outcomes of trials?

Mr BROWN: Yes. You may have picked up on my original written submission where I indicated to the Committee that whether the role of the jury has been given a great deal of consideration could well be the subject of a further inquiry by this Committee.

Ms SYLVIA HALE: I am talking about research rather than further inquiries because this Committee does not undertake independent research.

Mr BROWN: One of the problems we have as an organisation is that we are constantly being confronted by jurors who come to us because they have no avenue or venue for seeking assistance for counselling after they have been through a trial. They come to us because they see us as a victim support organisation and they identify themselves as a victim. We never approach jurors, apart from the fact that it is against the law, but we have had five cases where all 12 jurors have come to us en masse because of the trauma to which they have been exposed. I have to be perfectly frank with you. As an organisation we are not set up to be approached by 12 jurors because we have really strict rules about confidentiality and things of that nature and you cannot debrief an entire jury because it would be completely inappropriate.

The counselling models would be dead against a thing like that. It indicates to us that when jurors are physically tracking us down—we are not that hard to find; if you Google "victims of crime" you will find us straightaway—there is a major failure within the system when we are being approached constantly. Of course, there is no funding. If a victim comes to us and requires counselling we can get them free counselling through the accredited counselling scheme, but that system is not available to the jurors. I have to be honest with you. I know from people who have been my friends and who have been called upon to perform jury duty that they are ill-equipped to have any real understanding. Despite the small video they get to see prior to being sworn in, it does not really assist them a great deal in understanding the complexities of our legal system.

Ms SYLVIA HALE: You did say earlier that jurors were not able to ask questions.

Mr BROWN: Yes.

Ms SYLVIA HALE: It is my understanding that they can ask them but they have to be asked via the judge. Whether that is an unnecessarily cumbersome process that discourages people from asking questions—

Mr BROWN: They have a mechanism by which they can refer questions through the foreperson to the judge and the judge will then decide whether it is appropriate to answer those questions. If, for example, a juror asked, "Is it true that this person has been before court previously?" the judge would come back and say, "You are not allowed to ask that question."

Ms SYLVIA HALE: One of the suggestions was that in a judge-alone trial there is a much more relaxed atmosphere or process when it comes to asking questions and following up and elucidating information. It is a far easier process than might exist in a jury trial and that might be an advantage.

Mr BROWN: I would disagree with that. I have been involved in a large number of judge-alone trials. The dynamics of the defence and the Crown are such that if we were able to bottle it we would not have a problem with an emissions trading scheme, we could run it out of our court system! The animosity is palpable. They seem to be trying to score off each other. On a number of occasions I have seen judges respond. Judge Nicholson springs to mind straightaway and he was a former public defender. Judge Nicholson has this very nasty habit of saying to both advocates, "Who are you trying to impress? There is no jury here." He makes it perfectly clear they are not impressing him, but the dynamics can be quite poisonous. Some of our victims find it very difficult because they have already given their evidence and are sitting through the balance of the trial and they see what is literally a kindergarten fight going on in the courtroom. They say, "These are people who are deciding my fate and they're acting like kids."

CHAIR: Is there anything else you would like to say. I warn you that you will get a lot of questions on notice as well.

Mr BROWN: That is fine. I notice that one of your former fellow parliamentarians, Mr Peter Breen, whom I know very well and with whom I get on very well, has indicated that judge-alone trials may result in an increase in the conviction of innocent people. I would like to point out, as I have made clear, that I am a member of the New South Wales DNA Review Panel. Because of the rules of confidentiality in relation to my involvement in the DNA Review Panel I cannot detail the names of people who have made applications to the DNA Review Panel, but if the number of applications we have received is an indication of the number of people who have been incorrectly convicted we have nothing to worry about.

CHAIR: Thank you very much for giving us further information for this inquiry.

Mr BROWN: My pleasure. If you have further questions to direct to me I am more than happy to provide any assistance I can to the Committee.

CHAIR: Thank you. We would like responses to questions within 21 days if you can manage it.

(The witness withdrew)

STEPHEN JAMES ODGERS SC, Chair, Criminal Law Committee, New South Wales Bar Association, affirmed and examined:

CHAIR: Welcome to the second day's hearing of the Law and Justice Committee's inquiry into judge-alone trials under section 132 of the Criminal Procedure Act 1986. The inquiry's terms of reference outline the proposed model that is under consideration. I know this is an imposition on your time but we value everybody's input. It has been a very satisfying couple of days as far as information input is concerned. The people who have appeared before the Committee have given us very valuable information about a matter which, like many of the matters this Committee considers, is a very complex question.

If you should consider at any stage certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. If you take any questions on notice, we would like the answers back within 21 days of the secretariat sending them to you. If that is a problem for you, negotiation would be fine. Would you like to start by making a statement?

Mr ODGERS: I would, thank you. As I indicated, I am chair of the Criminal Law Committee of the Bar Association. That is a committee composed reasonably equally of Crown prosecutors and barristers who do mainly defence work. So, it is a balanced committee. The issue of the present power of the Director of Public Prosecutions to effectively veto trial by judge alone has been considered at length by the committee and it was unable to reach any consensus view. I can say to you there was a clear split between the views of prosecutors on my committee, who unanimously opposed the abolition of the veto, and the vast majority of those who primarily defend, who saw no difficulty with abolition and allowing the trial judge to have a broad discretion in the interest of justice to determine whether or not it should be trial by jury or by judge alone.

So, importantly, I am not here to express the views of the committee or the Bar Association, and I am not going to express for myself any strong personal view. I have come here, and I hope it will be useful—it may be that it will not be very useful—essentially to summarise what I understand to be the competing arguments. You have had the benefit of two days of people coming along and no doubt putting arguments for and against, so it may well be that what I am about to say will be just repeating what you have already heard, and feel free to cut me off and tell me to stop if I am not being helpful.

The Hon. LYNDA VOLTZ: Are you a prosecutor or a defender?

Mr ODGERS: I do mainly defence work. I should add too, to the extent that I am able to provide information, it will not be a lot of personal information. I am going to put arguments that were put in the committee on both sides.

CHAIR: I remind Committee members there was a lot of conversation about Mr Odgers coming to speak with us. He has come here representing an organisation and has put on the table how he will do that without putting his own values on the table.

Mr ODGERS: Just to finish the point I was trying to make, to the extent that you can ask me questions and I can provide information, you should bear in mind that I have primarily an appellate practice, so I do not do a lot of trials. I probably do one or two trials a year in the past 10 years. I have never in my life done a judge-alone trial, they have always been jury trials, and because I am not a Crown prosecutor I am not privy to the internal decision-making processes in the DPP in deciding whether or not to agree to trial by judge alone. So, I cannot talk knowledgeably about that either. There are a lot of qualifications to what I can usefully provide, but if there is some use in my attempting to summarise briefly what I understand to be the competing arguments, I will do that.

I will begin with the arguments advanced by those opposed to this possible change. In essence, what I am doing is passing on arguments essentially from Crown prosecutors who believe that they should retain the veto. As I go through each argument I will make some comments from the other side of the equation. The first argument advanced by those who oppose any change to the current situation is that they emphasise the advantages of jury trials. I am sure many people have come before you and said jury trials are fabulous things, and to summarise some of the arguments in favour of jury trials—they involve the community in the process of criminal justice; they reflect democratic principles; they bring the collective sense and common sense of ordinary people into the criminal justice system; and they infuse community values into that system. They are

also said to be a safeguard against arbitrary exercise of power by the state. So, there is a whole series of arguments which I am not going to detail about why the jury is a good thing in the criminal justice system.

Those who support the current system emphasise those good things, those advantages to jury trials, and it seems clear that most Crown prosecutors proceed on the presumption that a trial should be trial by jury. That is the general rule that they would adopt. When they come to deciding whether or not they would agree to judge-alone trials, unless it is an exceptional case they would not. They think generally juries should be the tribunal of fact and they would generally apply their veto unless they were persuaded there is something about the particular case which requires judge alone. So, those who advance this argument say that if you remove the Director of Public Prosecution's veto and left it to a trial judge, they would not be confident that the trial judge would apply that kind of approach, they would not be confident that a trial judge would presume that it should normally be trial by jury and only in exceptional circumstances judge alone. Therefore, that is the first argument, I understand, advanced against removal of the veto.

The converse position would be that there is no reason to assume that trial judges who are determining this question, if they had the power to decide it—and I am assuming, of course, in this whole debate that the judge would only get to consider the question if the accused wanted trial by judge alone, so that is a given—will adopt a different approach. There is a sense that most judges would prefer to have a jury determine questions of fact or ultimate factual issues. There is no reason to believe that judges are jumping over themselves to be the ones to make those decisions. On the public record there are judges who have often said that they are delighted they do not have to be the ones who have to make those decisions. So, there is no reason to assume that judges would approach it differently. But, if it is truly in the interest of justice that the tribunal be judge alone, so be it, is the argument of those who support a change to the current system. If it truly is in the interest of justice, however assessed, that it be trial by judge alone, it is wrong to approach it with any a priori presumption in favour of jury trial.

The second argument that supporters of the current veto advance is that determination of the mode of trial, including the nature of the tribunal, is an integral part of the prosecutorial function, such as whether or not to prosecute at all, which is part of the prosecutorial function, what witness and what evidence to lead. They argue it is integral and should be left to the Director of Public Prosecutions and should be unreviewable and judges should not be involved in that issue. The counter argument is that it is not integral at all to a prosecutorial function; that there is a big difference between determining whether or not to prosecute and how to prosecute from the question of who decides the ultimate question of fact or questions of fact in a trial. While one can see that the prosecutorial function is necessarily tied up with whether or not there should be prosecution and how it should be conducted, that has nothing to do with the question of who decides. So, the whole premise of that second argument is rejected by those who support a change to the current position.

The third argument that supporters of the current veto advance is that leaving it to the trial judge's discretion will compromise the independence of the judiciary or, at least, the appearance of the independence of the judiciary, which is an important matter in any event. Opponents, people who favour a change and disagree with the veto, challenge again that argument because they say letting the judge decide this question is no different from many other questions that judges are routinely required to determine, sometimes on the basis of what is in the interests of justice, and there is nothing inherently in this question where one would be concerned about the appearance of judicial independence.

The weakness, perhaps, of that argument—and again I am not expressing a view about it—is those questions do not really involve the issue of whether it is the judge who is going to decide the ultimate questions in the case. So, there is something, it is said, a little odd in the judge himself or herself deciding what he or she is going to be having to do. There might be, it is said, an appearance of lack of independence. That might be solved, I suppose, as I heard somebody mention earlier, if one judge decided it would be by judge alone and then another judge would do it. That might be an answer to this argument, but in the event, there is a tricky issue of the appearance of independence which perhaps there is no clear answer to.

The fourth argument in support of the current position against, and maintaining the veto, is that it is unfair that the accused can veto but the Crown cannot—an unfairness argument, basically. The opponents of that position, those who favour a change, say this is not an issue of fairness. The issue is what is in the interests of justice. It is not a game of cricket, it is not a situation in which we need to give equal opportunities to both sides. Ultimately, if it is in the interests of justice and we allow a judge to determine that question that there should be trial by judge alone, so be it, and to invoke considerations of fairness is quite misleading.

But, in any event, so it is said, an accused person has a number of procedural rights in our system of justice which the Crown does not have. It is not a completely balanced system in which the accused and prosecution are treated completely equally. As we all know, the accused has a right to silence and cannot be required to testify. That is a right the accused has which prosecution witnesses obviously do not have, and the prosecution just has to accept that there are certain procedural rights that the accused has in our system which means it is not a purely adversarial system in which both are treated equally. So, to the extent that this might give greater power to the accused, even on this analysis, there is nothing inherently wrong in that.

The fifth and last argument I am going to mention is that supporters of the current veto say that a trial judge may be poorly placed to decide the question of whether or not it should be trial by jury or trial by judge alone compared to the prosecutor. This is really a pragmatic argument. There will be circumstances, for example, where the prosecutor may not be able to disclose to the judge a particular reason why, in the view of the prosecutor, it should be trial by jury. Obviously enough, if there was a good reason and there were pragmatic or forensic reasons why it could not be disclosed, that would mean that the decision-making process of the judge would be impaired, and one might say in that situation that the prosecutor who is aware of the information would be in a better position to make the decision. The opponents of this argument, those who support a change to the current position, say, "Well, this is just not persuasive because it is hard to imagine any reasons for a jury trial which could not be disclosed to a trial judge." The difficulty is those who want to maintain the current system say "There is a practical problem" have to come up with examples.

One example that was mentioned in my committee—I will pass it on—is when the prosecutor is aware that the defence will run alibi and has evidence to show that it is a concocted alibi, that is, will be able to call evidence in the trial to demonstrate that it has been fabricated. According to this argument, if that were a reason for a jury trial then it cannot be disclosed in open court to the judge because that will then warn the defence that the prosecution has this information to show that the alibi is fabricated, and that will then mean that the defence will be warned about it and be able to respond to it forensically. The difficulty with that argument is, I suppose, that whether or not there is a fabricated alibi does not seem to bear on the question of whether there should be a jury trial. A judge will be in just as good a position to be able to take into account the significance, and assess the significance of such a fabrication of an alibi as it bears on the ultimate issues in the trial as would a jury.

But I guess it is tied up with the first point, which is the one I began with, which is whether we believe juries are better than judges because if you think juries are better than judges because they are better able to make assessments of credibility of witnesses, for example, or make judgements about the reliability of witnesses or that kind of activity, then this would feed in. The prosecutors would say, "Well, a jury would be better able to assess the significance of a fabricated alibi and therefore we want the jury to hear it and, therefore, we do not want to disclose it in an open court prior to a trial because that would then forewarn—it may not get before the jury at the end of the day because the defence will abandon any attempt to run alibi. Obviously the arguments feed into each other.

I conclude by saying that that is not seen as persuasive by those who favour a change of giving a discretion to the judge, and the basic point that is made is that the prosecution should be required to disclose its reasons for supporting a jury trial and let the issue be properly argued in open court before a judge. That makes justice more open. We can see the reasons that the DPP has. They can be contested by the defence and so everybody knows where they stand and the judge will be given the ultimate discretion to determine the question in accordance with legal principle and that, so it is said, cannot be a bad thing.

The Hon. GREG DONNELLY: I do not have any questions because the summary of the arguments has been very useful and has touched on a great deal that has been said by witnesses yesterday and today.

The Hon. LYNDA VOLTZ: Is it the job of the DPP to prosecute when it has the evidence? If it did not have the evidence it may not prosecute, but surely the DPP would always prosecute when it has the evidence to prove an offence?

Mr ODGERS: As I explained I am not a prosecutor but, no, it is accepted by our legal system that there are number of factors that are at play in determining whether there should be a prosecution. When you say "has the evidence", of course, a judgement firstly has to be made about the strength of the evidence. It may be that the evidence that is available is perceived to be extremely weak. There is no public interest in conducting a trial if it is doomed to result in an acquittal. That is just not in the public interest.

The Hon. LYNDA VOLTZ: Is "weak evidence" the same as saying it has not the evidence to succeed beyond reasonable doubt?

Mr ODGERS: If that is what you mean by that term then, firstly, a judgement has to be made by someone, and our system confers that judgement unreviewably on the prosecutor as to whether there is evidence in the term you use, or whether there are reasonable prospects of success, which is the more conventional term. But even then it is accepted that sometimes there will be conflicting public interests which should be taken into account. Notwithstanding a conclusion that there are reasonable prospects of getting a conviction it may be that the offence involved is a relatively minor one and that, therefore, notwithstanding the fact that there is some evidence of guilt.

The Hon. LYNDA VOLTZ: Does the DPP, on behalf of the community, sometimes make decisions not to prosecute even though it may have evidence to do so?

Mr ODGERS: Yes, there are published guidelines by the DPP which explain the way in which decisions to prosecute are made.

The Hon. LYNDA VOLTZ: One of your arguments referred to democracy and the abuse of power by the State in relation to having juries and that having the DPP decide was important to those people because of those reasons. Another argument against a change was that it interfered with the independence of the judiciary. There is a clear separation between the State and the judiciary, whereas between the Parliament and the DPP there is not a clear separation.

Mr ODGERS: Going to the first argument in favour of juries, one of the reasons for supporting juries is that, there is no doubt, individual members of the community are not part of the State. The State is perceived to be a combination of the Executive, the judiciary, the Legislature; the instruments of power in the State. Ordinary people are not part of that. There is a whole lot of jurisprudential literature, particularly coming out of the United States, that there are advantages in some situations for having people who are not part of the establishment, if I might use that general term, decide some questions in criminal justice to ensure that the State, the establishment, is not able to just simply get a rubber stamp of the laws that it creates.

The Hon. LYNDA VOLTZ: But who appoints the DDP? Who appoints the public prosecutor?

The Hon. JOHN AJAKA: The Director of Public Prosecutions? The Government?

The Hon. LYNDA VOLTZ: Yes, I know that.

Mr ODGERS: I think there has been confusion with the two arguments. The first argument, I just remind you, juries are good things; we should encourage them. The current policy of most Crown Prosecutors is to advance that proposition and therefore that should be maintained. If you allow judges to decide it they might be more willing to have judge-alone trials, that is the first argument. The argument about independence is a separate one which is that if the judge gets to determine it then the judge will be making a decision about something where the judge cannot be independent, or at least the appearance of independence is not present because it is a decision about what that judge will be doing, how the trial in which that judge is involved, will be proceeding and, therefore the appearance of independence may not be there. It is a separate argument.

The Hon. LYNDA VOLTZ: I am more concerned with the argument about democracy and abuse of power by the State.

Mr ODGERS: And that is why I think perhaps you misunderstood the argument I was advancing.

Ms SYLVIA HALE: An issue that was canvassed earlier today may be an elaboration on the first point you raised and that is that we may see an increased use of judge-alone trials which will in some way undermine the legitimacy and even call into question jury trials and there will be a public perception that determinations made by experts are far superior to those made by the common man. Do you have any comment on that? Is that beyond your brief?

Mr ODGERS: I think both. I know that you asked a question of Mr Brown earlier about research on juries and judge-alone trials. The short answer is it is almost impossible to measure because this is our system of determining the facts and how does one measure that to ensure that they have got it right. Occasionally there

will be cases where we concede that there have been miscarriages of justice but we cannot come to a view as to just how often that happens. My predecessor said well he does not have, he is on the DNA panel but that does not really provide a very good guide to the accuracy in terms of decision making of the particular tribunals. Certainly the populist media sometimes equates acquittal rates with accuracy and determination but that begs the question.

So the short answer is that we do not know really how accurate are these processes. It is a system designed to minimise the risk of convicting innocent people, there is no doubt about that, and if it errs on the side of acquitting guilty people then that is the price we pay. It is worth emphasising that, but that is true whether it is trial jury or a judge-alone trial. So the short answer is I do not think anybody really knows how good juries are at determining these questions but because there are so many good reasons to have them then, even if we have a gut feeling that they will not be as good at determining these questions as judges, we still think it is, on balance, better to have them.

Ms SYLVIA HALE: Clearly in relation to the Director of Public Prosecutions and his attitude to judge-alone trials there has been a complete reversal of positions. The position adopted by Judge Blanch when he was the Director was, I gather, that normally any request for a judge-alone trial would be accepted. The position adopted by the current Director of Public Prosecutions is that it would probably be the exception rather than the rule that judge-alone trials would be agreed to. Do you attribute that to the personal idiosyncrasies or beliefs of either gentleman? Or are you aware of anything that eventuated as a result of the first position adopted by Judge Blanch that would have caused Mr Cowdery to adopt a contra position?

Mr ODGERS: I am not going to be able to help you in my answer. There are a few points I would make. First, I was not aware of what the situation was under Judge Blanch. I do not say you are wrong but I just do not know.

Ms SYLVIA HALE: The Committee has evidence of that.

Mr ODGERS: Second, I am not sure to what extent the current DPP requires his prosecutors to adopt a common policy. The members of my committee did not convey to me that there was a position which they are required to follow.

Ms SYLVIA HALE: I think guidelines have been established.

Mr ODGERS: I cannot comment to know. If there are guidelines which say it should be a jury trial unless there are exceptional circumstances, I am not aware of that. As to whether there was an earlier policy, and you say there was and I do not dispute it, did that lead to problems which then led to a change in policy, I do not know. The short answer is I am not really able to help you with any of that.

The Hon. DAVID CLARKE: The Office of the Director of Public Prosecutions favours that under the proposed model it should be able to apply for a judge only trial with no power for the accused to veto that. Can you comment on that? In other words, it is seeking a power to veto the right of the accused to have a trial by jury?

The Hon. JOHN AJAKA: In very limited circumstances.

Mr ODGERS: I was unaware of that. Certainly I can say that I would be confident that members of my committee would oppose that. The general view would be that, to put it in simple terms, an accused person should have a so-called right to a jury trial for a serious criminal charge; certainly a charge on indictment. That right should be protected and there should be no exceptions for it. And, unless a powerful reason was advanced, and I do not know what reasons have been advanced by the DPP for that change, my expectation would be that members of my committee would generally be opposed to any qualifications to the general principle that an accused who wants a jury trial should be able to have a jury trial in cases where it currently is available.

The Hon. DAVID CLARKE: Would you be confident that that is the majority view of both sides of your committee, both prosecutors and defence lawyers?

Mr ODGERS: I am hesitant to say that. With my committee I have found over the seven or eight years that I have been Chair, that in the vast majority of cases we are able to agree on things. There is a high level of consensus. This was an exceptional situation, where there was a clear dichotomy and no consensus at all. For

that reason, while I normally would be confident about my expectations about different members of the committee I am not as confident as to what prosecutors would say. It may well be that they are aware of particular situations where they think that the accused should not have the right to a jury trial. I imagine one might be where there is a particular reason to believe that attempts will be made to get at the jury, so to speak.

The Hon. JOHN AJAKA: One of the main things he raised, as a perfect example, was that the facts of the case which are so horrific that it would have such a huge impact on a jury, that it was so bad—

Mr ODGERS: Traumatic.

The Hon. JOHN AJAKA: —that that was the type of example he gave.

Mr ODGERS: I would be reasonably confident that members of my committee would not regard that as sufficient reason.

The Hon. DAVID CLARKE: Your observation is that there would be a very strong view from one side at least that such a proposition as I have just put to you, favoured by the DPP, could be seen to be a very strong attack on the right to trial by jury?

Mr ODGERS: Absolutely. I can say confidently that within my committee and generally the Bar Association there is a strongly held view that the current right to jury trial should be protected and any diminution of that right is generally to be resisted. Indeed, as an example, recently consideration was given to increasing the jurisdiction of Local Court magistrates to impose higher sentences than they currently can. Certainly I am getting a sense within my committee and generally that that is to be resisted because that will indirectly lead to a reduction in jury trials because more matters will be dealt with in the Local Court without a jury than in the higher courts.

The Hon. JOHN AJAKA: Summarily as opposed to indictable?

Mr ODGERS: Yes. For example, a prosecutor will be much more willing for a matter to go to the Local Court if the penalty that can be imposed is significantly higher than two years.

The Hon. DAVID CLARKE: You mentioned that one of the arguments of those who support the current veto is that it is a prosecutorial function to choose tribunal.

Mr ODGERS: It is said to be integral to the prosecutorial function.

The Hon. DAVID CLARKE: Yes, that is correct. Have you observed that there is also a strong view that taking that particular view conflicts with the right to trial by jury?

Mr ODGERS: I imagine taking the position of those who advance that argument is that there is no conflict, they are saying that the prosecutor can determine whether or not there will be trial by judge alone or by jury because under the current system, if both have a veto power, the accused has a right to a jury trial if he or she wants it. The prosecutor can ensure that there is a jury trial if he or she thinks it appropriate.

The Hon. DAVID CLARKE: But not the reverse.

Mr ODGERS: But not the reverse. The answer to your question is that there is no right for an accused to have a trial by judge alone. That is the current system. No-one generally advances the proposition that there should be such a fundamental right to have trial by judge alone in an accused, and, therefore, there is no great philosophical problem with the current veto power of the DPP. It does not conflict with a right to trial by jury, it only means that there is no right to judge-alone trial. Am I making myself clear?

The Hon. DAVID CLARKE: Yes, thank you.

The Hon. JOHN AJAKA: Your summary was very helpful, it gave us both sides of the picture and I thank you for that.

Ms SYLVIA HALE: I will revert to an issue raised by the Hon. Lynda Voltz? As we know the position of the Director of Public Prosecutions is now to be made subject to a limited term. The appointment will be for a limited term.

Mr ODGERS: Yes.

Ms SYLVIA HALE: Presumably there is a suggestion that from the point of view of the State the administration of justice will be a lot more efficient and will save considerable money if judge-alone trials proceed. Of course, that may be subject to all sorts of appeal so it may not be as cheap as one might expect. If there is that perception, is there the possibility that pressure could be applied to the DPP to change its guidelines to encourage judge-alone trials in the interests of administrative efficiency and cost savings?

Mr ODGERS: I am reluctant to answer that, because the issue before this Committee, as I understand it, is—

CHAIR: The question was well outside the terms of reference.

Ms SYLVIA HALE: I withdraw the question.

CHAIR: What is the possible increase in appeals? I gather from what you said earlier that the proposed changes would increase the number of judge only trials. Is that what you said?

Mr ODGERS: I am trying to avoid giving personal opinions. It is argued that—

CHAIR: On one side of the argument, is that what is said?

Mr ODGERS: There is an argument that it will result in more judge-alone trials than currently is the position.

CHAIR: Is that coming from the no-change group or the change group?

Mr ODGERS: The no-change group. The no-change group say that a jury trial is a fabulous institution and want to maintain it. They are concerned that giving the power to judges is likely to result in more trials by judge alone.

CHAIR: I ask now about your personal thoughts. Do you perceive that there will be an increase of the appeal processes if there is an increase in judge only trials?

Mr ODGERS: It is not really apparent to me. A lot of appeals are brought from judges' directions to juries about how they are to proceed, that is in the summing up that a judge gives to a jury. While, of course, a judge acting alone is required to give reasons and the things that a judge would say to a jury is that he or she is supposed to factor into his or her own reasons, so I am not assuming that there would be a great reduction in appeals. But it is not apparent to me that there would be a significant increase in appeals if it was by judge alone. I suppose the difference is that because a judge is required to give reasons, whereas a jury does not give reasons, that may mean that it will be easier for an appeal court to assess the process of reasoning which lead the judge to the ultimate determination, because it will be expressed.

So that would perhaps make it easier for an appeal court to be willing to hold that a verdict was unreasonable, for example. The current position is that the court looks at the totality of the appeal, the evidence, and comes to a view about whether they think there was a reasonable doubt and then they try to imagine how the jury might have concluded beyond reasonable doubt that there was guilt. It is a somewhat amorphous process of the challenge to a jury's verdict as being unreasonable; whereas an argument that the judge's verdict was unreasonable would be more easily determined. That might, I suppose, result in more appeals, but I am not convinced that there will be a big difference in the number of appeals or successful appeals.

CHAIR: Recognising that was probably a small drop in the bucket of trials that occurred in 2007, the Committee has been told that there were 46 judge only trials in the District Court and four in the Supreme Court. Did you see the result of any of those in the appeals courts?

Mr ODGERS: No.

CHAIR: I know you are just giving your observation.

Mr ODGERS: I keep my finger on the pulse of appeals and I cannot recall at the moment—maybe I will be proven to be completely wrong—an appeal from a judge alone decision in the New South Wales Court of Criminal Appeal in the last two years. I do not remember any. The members of the Committee would be interested in knowing whether there have been appeals

CHAIR: Yes, to balance the case.

Mr ODGERS: I cannot recall seeing one. But that may be my own fault.

CHAIR: Do you have anything further to say to the Committee?

Mr ODGERS: No thank you.

CHAIR: Thank you for appearing before the Committee and further enlightening us on this evasive question.

(The witness withdrew)

(The Committee adjourned at 3.28 p.m.)