The AIJA Conference, Sydney 9 September 2011

Criminal Justice in Australia and New Zealand

Issues and Challenges for Judicial Administration

Trials in NSW by Judge Alone: Recent Legislative Changes

Mark Ierace SC

NSW Senior Public Defender

History of Judge Alone Trials in NSW

In 1990, following a recommendation of the NSW Law Reform Commission,[1] the Criminal Procedure Act, 1986 (NSW) ("the Act") was amended to permit an accused to elect to be tried by a judge sitting alone, that is, without a jury ("Judge-alone"), provided the DPP consented.[2] The option is not available for Commonwealth offences, which must be tried by a jury.[3]

The DPP implemented a policy, agreed by the NSW Attorney General, that the sole basis for declining consent would be to thwart so-called "judge-shopping".[4] For some years thereafter a defence request was normally agreed by the DPP, but over time the policy changed. On 23 March 1995 the then DPP, Nick Cowdery QC, formalised the new policy, writing:

> There has been a practice in the past of the Crown consenting almost as a matter of course to elections by accused to be tried by a judge alone under section [1]32 of the Criminal Procedure Act 1986.
>
> That practice has changed. I take the view that the requirement for consent under section [1]32(3) requires the question to be considered case by case and therefore it must be given or withheld on a basis that is informed, rational and directed towards the doing of justice. To assist in preventing such decisions from becoming arbitrary I have furnished guidelines as to the giving of such consent.

The DPP delegated the power to Crown Prosecutors and (solicitor) trial advocates, with no "appeal" to a Deputy Senior or the Senior Crown Prosecutor, or to his office.[5] Over the ensuing years the experience of defence counsel was that consent was rarely forthcoming, so that there became little point in seeking agreement, unless the case was exceptional.

In October 2009 the Chief Judge of the District Court, Hon Justice RO Blanch AM, who had been the DPP at the time the legislation was first introduced, wrote to the NSW Attorney General, requesting a review of the legislation. This followed the setting down of a trial which had been expected to take five days as Judge-alone; however, the DPP denied consent, and the estimate escalated to four to six weeks. The Attorney General sought the views of various agencies, including the NSW DPP, Public Defenders and victims groups. There was a significant difference of opinion between those who sought change, and those who did not.

Accordingly, the Attorney General referred the issue to the NSW Legislative Council Standing Committee on Law and Justice ("the Standing Committee"), proposing a model for

---

1 NSW LRC Report (1986) *Criminal Procedure: the Jury in a Criminal Trial.*

2 *The Criminal Procedure Legislation (Amendment) Act 1990* No 74. The amendments to section 132 of the Act commenced on 17 March 1991.

3 *Brown v R* (1986) 160 CLR 171.

4 The guideline issued by the DPP at the time was in the following terms:
Section 132 of the Criminal Procedure Act 1986 allows trial by judge alone if the accused so elects and the prosecutor consents. Normally the Crown will give consent if the accused elects. However the Act states in section 132(4) "An election must be made before the date fixed for the person's trial in the Supreme or District Court." The intention of the legislation is to prevent an accused from choosing a particular judge. That intention is one the Crown should ensure is put into effect. Accordingly the Crown should refuse consent where it is clear the election is made as part of a "judge selecting" exercise. That is particularly so in Sydney where an election is made only after it is clear the case will be heard before a particular judge.
Reproduced in the submission to the NSW Legislative Council Standing Committee on Law and Justice from the Hon Justice RO Blanch, Chief Judge of the District Court (and DPP at the time of the legislation's introduction), dated 17 May 2010.

5 Correspondence from N.R. Cowdery QC to the NSW Bar Association, Law Society and Public Defenders.

adoption that would enable the defence to apply to the court for an order for a Judge-alone trial where the DPP had declined consent, and obliging such a trial where the court found there to be a risk of jury-tampering, regardless of the opposing party's consent. The Standing Committee sought submissions and heard oral evidence from the relevant parties and interested persons, including the DPP, representatives of victims groups and Public Defenders. The Committee's report, published in November 2010,[6] recommended that the model, with modifications, be adopted, which was reflected in subsequent legislative amendments[7] that commenced on 14 January 2011, meaning they apply to trials where the accused has been indicted on or after that date.[8]

The Amended Legislation (see Appendix I)

The amendments require the court to order a trial by judge alone if both parties agree; s 132(2). Such an order is precluded if the accused declines to agree; s 132(3). The court may override a DPP refusal to consent to a defence application for trial by judge alone if it considers it to be in the interests of justice to do so; s 132(4). Section 132(5) sets out certain factors that bear upon the interests of justice test.

The amendments also permit (rather than require) the court to impose a trial by judge alone if there is "a substantial risk" of jury or witness tampering which may not reasonably be neutralised by other means; s 132(7).

The application must be made not less than 28 days before the date fixed for trial, except with leave of the court; s 132A, which is presumably an anti-judge shopping provision. Where there are multiple accused, an application will only be entertained if all accused so apply; s 132A(2).

There are two key aspects to the amendments; the test to be applied by the court in determining whether to override the prosecution's objection to a defence request for trial by judge alone, and the special provisions that apply in relation to jury or witness tampering.

The Test

When introducing the amendments in his second reading speech, the Attorney General noted that: "Judge-alone trials are appropriate in a limited number of circumstances. For example, they may be appropriate where there are concerns that cannot be overcome regarding pre-trial publicity, or where the evidence of the trial is likely to be highly technical."[9]

The legislative "test" was first considered, not surprisingly, in the first application brought under the amendments, which was in the case of *R v GSR* (1)[2011] NSWDC 14. The accused, a gynaecologist by the name of Graeme Reeves, at the relevant times practising in the NSW

---

6 *Inquiry into Judge Alone Trials under s. 132 of the Criminal Procedure Act 1986,* Legislative Council Standing Committee on Law and Justice, Report 44, November 2010. Downloadable from the NSW Parliament website at: http://www.parliament.nsw.gov.au/

7 *The Courts and Crimes Legislation Further Amendment Act* 2010 (NSW).

8 As to the commencement of trial being arraignment, see *GG v R* [2010] NSWCCA 230, applied in *R v GSR (2)* [2011] NSWDC 16 *per* Woods QC DCJ to determine the commencement of "criminal proceedings" as stipulated in the transitional provision.

9 2nd Reading Speech, *Courts and Crimes Legislation Further Amendment Bill 2010* 24.11.10 page 28065.

country town of Bega, faced a series of criminal charges culminating in three trials in the District Court, the first being late 2010 and the other two in the first half of 2011. All were heard before Judge Woods QC. The accused was represented by John Stratton SC, Deputy Senior Public Defender. In late 2010 Mr Reeves went to trial ultimately on one count of excising the clitoris of a person, it not being necessary for the health of that person.

The Defence had sought a trial by judge alone, primarily because of adverse and prejudicial publicity, but this was declined. That trial resulted in a hung jury.

The second trial involved a count of obtaining money by deception, by falsely representing that he was entitled to practice in the field of obstetrics, thereby obtaining a financial advantage. The Defence again sought a trial by judge alone and was rebuffed by the prosecution. However, Mr Reeves was indicted on this matter after 14 January 2011, so the Defence was able to apply to the court for such an order.

The defence submitted that there had been overwhelming adverse and unfair pre-trial publicity, to the extent that in the interests of justice there should be a judge-alone trial, tendering an internet print-out which his Honour noted was: "highly inflammatory and includes epithets which are very nasty indeed. The material suggests widespread antagonism against the accused."[10] Indeed, Mr Reeves was sometimes referred to in the media in the lead-up to his arrest and trial as "the Butcher of Bega". Further, the defence submitted that "the Crown case will by its very nature necessarily reveal to the jury strongly prejudicial material in the form of the fact of the accused medico having, by orders made in 1997 by a disciplinary tribunal, been inhibited and limited in his practice."[11]

The Crown submitted that what was involved was "essentially a jury matter, ... of disputed credit ... whether the jury will draw a reasonable doubt from the version expected to be advanced by the accused".[12] As to the publicity, the Crown submitted it was unlikely the jury would know of or be influenced by, the publicity about the accused, that the jury would have little interest in this fraud case compared to other matters involving the accused.[13]

His Honour determined there was no presumption for or against either mode of trial, and likened the kind of decision involved as being "broadly akin to that which might be made in connection with an application for a separate trial, although the two matters are not precisely equivalent."[14] His Honour ordered a trial by judge alone, noting that his decision was not entirely based on the question of prejudicial publicity,[15] but nevertheless said [26]:

> ... I find it hard to envisage more malignant pre-trial publicity than that which has operated in this case. If this case does not qualify as one in which trial by judge alone is justified in the interests of justice, it is difficult to see that there ever would be one.

His Honour made observations in relation to the recent development of the internet that, I think, make a strong case as to why, more than ever before, it is in the interests of justice for

---

[10] *R v GSR (1)* [2011] NSWDC 14 at Para 11.
[11] *ibid* para 12.
[12] *ibid* para 13.
[13] *ibid* para 14.
[14] *ibid* para 18.
[15] His Honour rejected the second defence submission, namely that the evidence of the earlier orders limiting the doctor's area of practice would warrant a trial by judge alone; *ibid* para 17.

the Defence to be able to request the court to override a prosecution objection to a trial by judge alone. His Honour said (para 22):

> I am careful to distinguish the decision I make on this point from a decision which might be made by a court dealing with an application for a permanent stay of a prosecution on the ground of inflammatory publicity. Orders of that kind are rare and are usually dealt with by way of adjournment for a cooling off period. However, although jurors might forget things (as we all do over time) the internet does not. It does not have a "cooling off period", so that for years, where there has been substantial publicity about a particular matter, it may remain dormant in the search engine, ready to spring out at any particular point in time.

The accused ultimately pleaded guilty to this count. The next trial then came before the court for an application for an order for trial by judge alone, again following the prosecution's refusal to consent, in mid-March 2011; *R v GSR (3)* [2011] NSWDC 17.

The accused now faced an indictment containing five counts, each alleging an assault and act of indecency, against five different women, in each case being under GSR's authority, namely, his patients. Judge Woods again considered s 132(4) and (5). His Honour again determined that the court should make no presumption either way, but instead "engage in the exercise of judicially weighing factors relevant to the interests of justice overall."[16]

His Hour noted that this time the counts concerned indecency, which is one of the matters identified in s 132(5) as: "a factual issue that requires the application of objective community standards" that may prompt the court to refuse to make an order. However, his Honour found that if the acts relied upon to constitute indecency were proved, namely the sexual manipulation of the female genitals during a gynaecological examination, a tribunal of fact, however constituted, would not have the "slightest difficulty" in concluding that these acts constituted indecency.[17]

Again the poisonous pre-trial publicity was the determining factor. His Honour ordered a trial by judge alone, ultimately convicting the accused of two counts and acquitting him of the remaining three.

Three days after Judge Woods QC considered the accused's last application for a Judge-alone trial, Judge Berman SC of the District Court entertained a Judge-alone application by an accused facing trial on a count of assault occasioning grievous bodily harm; *R v Markou* [2011] NSWDC 25.[18] His Honour appeared to express positive enthusiasm for trials by judge alone, noting in his judgement that since trials by judge alone were first introduced twenty-one years ago:

> [6] ... judges have built up some experience and are able to compare trials with a jury with trials by judge alone. It has to be said that most judges do not like the idea of trials by judge alone, but they are - and have proved to be - an efficient way of determining guilt or innocence. I do not understand there to be any challenge to the proposition that a judge alone trial is quicker and more efficient and

---

16 *R v GSR (3)* [2011] NSWDC 17 para 15.

17 *ibid* para 19.

18 The judge noted that there was no dispute that the accused punched the victim, and that the victim suffered grievous bodily harm. The only dispute was whether it was the accused's punch that caused the grievous bodily harm, or an assault by another person who was captured by CCTV punching him. His Honour ordered a trial by judge alone.

more flexible than a trial before a jury. To give one example, if a witness or an accused became ill for a long time, in a jury trial it would almost inevitably be the case that the jury would be discharged, and court time would be wasted. In a judge alone trial, the same occurrence would almost inevitably mean that the trial would be adjourned for whatever time was required, and it would recommence before the same judge at a later date.

[7] Even in trials that run without interruption, judge alone trials are more efficient. Advocates naturally assume that the clever points they are making regarding evidence have to be emphasised and repeated in order to ensure that the least perceptive member of the jury understands it. Not only do judges tend to understand points the first time they hear them, they have the ability to say to an advocate " *I understood that the first time.*" I use that as a simple example of how a judge alone trial tends to be quicker.

[8] For my part, in deciding whether the interests of justice suggests a trial by judge alone rather than a jury trial, I would take into account those efficiencies I have mentioned and other efficiencies that I have not mentioned. Another matter I take into account ... is that a judge who determines guilt or innocence without a jury gives reasons for that decision. Juries, of course, simply come back with either guilty or not guilty verdicts and their decisions are to that extent inscrutable.

Judge Berman took a different view to Judge Woods as to the issue of a presumption in favour or against trial by jury, stating:

[11] Of course I accept at once the Crown's proposition that the default position is that the trial should be held before a jury. By participating as jurors in the criminal justice system, the community, through the jury, plays an important part in the administration of criminal justice. That role is not lightly to be cast aside. But where the issues are as narrow as I have identified them, ... and where the trial will be quicker, more flexible, and the trial judge will be able to give reasons, I am satisfied the interests of justice do require that I make the order that the trial be held before a judge alone, and that is the order I make.

I note Judge Woods's prescience in stating in *GSR (1)*: "I anticipate with some confidence that this issue will be much agitated in the courts."[19]

Jury-Tampering Provisions

S 132 (7)

(7) The court may make a trial by judge order despite any other provision of this section or section 132A if the court is of the opinion that:

(a) there is a substantial risk that acts that may constitute an offence under Division 3 of Part 7 of the *Crimes Act 1900* are likely to be committed in respect of any jury or juror, and

(b) the risk of those acts occurring may not reasonably be mitigated by other means.

Division 3 of Part 7 of the NSW *Crimes Act* 1900 (sections 320 to 326) comprises offences concerning various forms of threatening, corrupting or intimidating judicial officers, jurors or witnesses. I note that the real thrust of the section is likely to be in respect of anticipated criminal interference with jurors, rather than with witnesses or judicial officers, since the nature of the threats to the integrity of the criminal justice system in these latter categories are not necessarily alleviated by a Judge-alone trial. For this reason, I refer to the subsection as a "jury-tampering" provision.

---

[19] *R v GSR (1)* [2011] NSWDC 14 para 16.

An order made under this subsection does not require the accused's consent. "Jury tampering" constitutes a direct challenge to the impartiality that lies at the heart of the jury system. It is trite to observe that the reason that the right to trial by jury for a serious offence is a fundamental cornerstone of our justice system is that it is a demonstrable guarantee that the verdict has been arrived at impartially, and that it is based on a broad and common-sense evaluation of the evidence by persons with a range of life experiences. Where there are well-founded concerns of jury tampering by or at the accused's direction, he or she may reasonably be considered to have forfeited their right to trial by jury by their own attack on the jury's independence, although the community retains its strong interest in the benefit of a jury trial, even in these circumstances. Usually, however, the risk (or fact) of jury tampering cannot be attributed to the accused, although the effect of it may often be thought to be in his or her tactical interest. It is not inconceivable, however, that on occasion jury-tampering is undertaken by persons desirous of securing a successful prosecution.

I am unaware of any solid data as to whether the incidence of jury-tampering has increased in recent years, and if so, whether there is any reasonable basis for concern that court orders have been unable to overcome the anticipated threat. Nevertheless, in my opinion it is appropriate for there to be a legislative provision for trial by judge alone in circumstances where, for whatever reason, court orders are thought to be unable to meet the threat.

Some foreign common law jurisdictions have also enacted such provisions.

The New Zealand *Crimes Act 1961* provides that the Court may proceed by judge alone where it is satisfied that: "*there are reasonable grounds to believe (a) that intimidation of any person or persons who may be selected as a juror or jurors has occurred, is occurring, or may occur, and (b) that the effects of intimidation can be avoided effectively only be making (such) an order ...*" (s.361E).

In the United Kingdom, the *Criminal Justice Act 2003* provides that the prosecution may make an application for a trial without a jury where: *"there is evidence of a real and present danger that jury tampering would take place"* and also: *"notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury."*(s.44) A provision in the same Act also permits a trial judge who is at a point of discharging a jury because he or she is satisfied that jury tampering has occurred, to continue the trial without the jury; ie, as a trial by judge alone, subject to certain considerations of fairness to the accused (s.46).

Both of these provisions provide that resort to trial by judge alone in circumstances of suspected jury-tampering is only to apply where (1) there is more than an opportunity, motive or suspicion of jury tampering, and (2) where all other means available to the court of thwarting any such attempt are deemed to be incapable of removing that real risk. This is consistent with the NSW provision.

I have personal experience of prosecuting a trial in which the court found there were reasonable grounds to anticipate jury tampering, which was remedied by certain orders made by the trial judge, that were tested in the CCA; *R v Warren Richards and Roy Bijkerk* [1999] NSWCCA 114. Although it was an egregious instance of anticipated jury tampering, the

orders were adequate to overcome the concerns in that case. Shortly stated, the orders were made on a re-trial, where three earlier trials had aborted; the first in troubling circumstances, with hindsight, and the third following what the trial judge termed: "apparent tampering with the jury".[20] The jury had just retired after some six weeks of evidence to consider their verdict. As the jurors field out of the court complex for lunch, they were approached by a woman wearing a disguise. She handed each juror an envelope containing material highly prejudicial to one of the two co-accused, with the inevitable consequence of the jury being discharged.

Federal police had anticipated there would be such an attempt and had undertaken surveillance of the jury, but nevertheless were unable to prevent the tampering. On the re-trial, the trial judge ordered that the proceedings be held *in camera* with the exception of accredited members of the media and the legal profession, that during the trial the Sheriff provide transport for each juror to and from the court complex, and that the jury be sequestered while considering their verdict. There were no further incidents.

This case demonstrates that even where concerted attempts to tamper with a jury are anticipated, court orders can overcome that threat. In line with legislation in overseas common law jurisdictions, the recent NSW legislative amendments provide for a judge-alone trial to be a remedy of absolute last resort, which in my view is appropriate.

Has the Number of Judge-Alone Trials Increased Since the Amendments?

When introducing the amendments in the Legislative Council, the Attorney General said: "It is not intended that these amendments will significantly increase the number of judge-alone trials. The jury remains the most appropriate fact finder for serious criminal trials and these provisions do not seek to change that."[21]

There has been some suggestion in the media[22] that since the amendments commenced operation the incidence of Judge-alone trials has become alarmingly high, and that acquittal rates have risen.

The NSW Bureau of Crime Statistics and Research ("BOCSAR") have calculated that in 2010, 61 persons were tried Judge-alone in the NSW Supreme and District Courts.[23] According to informal figures from the NSW DPP (see Appendix II), so far in 2011 (as of 7 September 2011), there have been 53 Judge-alone trials. The BOCSAR and DPP figures are not directly comparable, since BOCSAR records "persons" whereas the NSW DPP records "trials". It is possible that there have been Judge-alone trials with multiple co-accused this year, although any such trials are likely to be few in number. With this proviso, the figures suggest a rate of about three Judge-alone trials per fortnight, yielding a projection for the court calendar year of 2011 of around 75 such trials,[24] being an increase of around 14 over last year. In my opinion this is a significant increase, but hardly of alarming proportions.

---

[20] *R v Richards & Bijkerk* [1999] NSWCCA 114 at para [7].

[21] 2nd reading speech.

[22] Sydney Daily Telegraph 1.8.11, front-page article: "Jury Out on Judge Trials".

[23] I express my gratitude to BOCSAR for tallying these figures for the purposes of this paper.

[24] I am grateful to the office of NSW DPP for providing me with statistics as to the incidence of Judge-alone trials since the amendments commenced. There is a further proviso attached, which is that they were first

The ratio of Judge-alone to Jury trials so far this year is 53 of a total of 365 trials, or 14%. One cannot sensibly compare this percentage with BOCSAR's 2010 figures, because jury trials with multiple accused are relatively common, so any comparison of *trials* in 2011 (DPP figures) to *persons* tried in 2010 (BOCSAR figures) would cause the comparative percentage for Judge-alone trials in 2011 to be inaccurately high.

There Should be an Increase in Judge-Alone Trials

I submitted to the Standing Committee that a legislative amendment permitting the Court to override a DPP refusal of consent would lead to an increase in Judge-alone trials. The orders made by Judges Woods and Berman, overriding DPP objections, reflect this new reality. In evidence before the Standing Committee, I, the DPP and the Director of the NSW Criminal Law Review Division of the Attorney General's Department, expressed the opinion that a judge's order would be appealable under s 5F of the NSW Criminal Appeal Act. It is noteworthy that none of the orders made so far pursuant to the amendments has been appealed by either the Defence or the DPP.

Are Judge Alone Trials yielding a Higher Rate of Acquittals?

The ratio of Judge-alone acquittals to Jury acquittals so far this year is harder to calculate, because there is no allowance within the DPP figures for co-accused.

It is also important to allow for indictments with multiple counts, where the accused are acquitted on some counts and convicted on others; there are figures reproduced in Appendix II that provide this break-down.

The DPP statistics, with the above proviso, suggest the following: the percentage of Judge-alone acquittals (Not Guilty all counts) to straight convictions (Guilty, all counts) is 75%. The comparative figure for Jury trials (combining verdicts by direction with Not Guilty verdicts) is 63.6%.

The percentage of Judge-alone acquittals (Not Guilty verdicts) to all other outcomes (ie, including mixed convictions and acquittals on multiple counts, and aborted trials) is 56.6%. The comparative figure for Jury trials (combining verdicts by direction with Not Guilty verdicts) is 42.6%.

These figures suggest that the trials by Judge-alone are yielding a higher rate of acquittals by around 12-14 percentage points. I am not aware of any statistics for past years, so I am unable to offer any comparison with pre-amendment ratios.

Arguments that the Court Order a Judge-Alone Trial over Defence Objections

The NSW DPP (and some representatives of victims groups) submitted to the Standing Committee that the Office should not only retain the exclusive power to ensure a Judge-alone trial, but it should also be significantly expanded at the expense of the Defence's right to a

---

collected some weeks after the amendments commenced, and relied upon the recollections of the prosecutors involved, rather than contemporaneously-made records.

jury trial. They maintained that there are some circumstances in which the DPP should be able to unilaterally override an accused's objection to a Judge-alone trial, without appeal.

Distressing Evidence

One such circumstance that was advanced by the DPP is where jurors of ordinary fortitude could be "traumatised".

I disagree with this argument. Some of the evidence in many, if not most, murder trials causes distress to jurors and other participants in the trial process, such as witnesses; probably more than in any other category of case.

For those trials with highly distressing evidence where the accused wishes to exercise his or her right to trial by jury, the Courts have at their disposal a range of measures to assist. There are sometimes objective signs of extreme distress or trauma (such as jurors becoming teary or agitated) observable to others in the courtroom. Often during such testing evidence, the trial judge directs the jury that they may take a break when they feel the need to, or simply requires the jury to take short breaks. When such evidence is anticipated in advance of the empanelling of the jury, the trial judge may inform the panel of this, and advise that an application to be excused will be sympathetically considered, if a member does not feel up to the task. Similar observations may be made about the current practice of judges in manslaughter and serious assault trials in the District Court, and trials of charges involving sexual assault, particularly of children.

Common between these categories of cases that typically involve distressing evidence is that they concern charges with maximum penalties at or towards the top of the range; life, or 25 years imprisonment. Where the interests of the accused in this sense are most at stake, the *right* to trial by jury is the more deserving of retention.

Where the Trial is Lengthy or Concerns Evidence of a Complex Nature

It has been suggested that the right of the accused to trial by jury should be overridden where the anticipated evidence is of such a lengthy and complex technical nature that it is suggested a lay jury could not be expected to comprehend it adequately for their task.

Although lengthy trials of complex technical evidence can be challenging to jurors (and also judges and trial counsel), the jury system has demonstrated a capacity to overcome such obstacles. The recent Commonwealth so-called "terrorism" prosecution at Parramatta involved lengthy and complex evidence, on a scale that might reasonably be regarded as extreme; there is not likely to be a state trial that would be as complex or technically challenging as that trial. It was completed successfully, partly because counsel deployed appropriate technology and aids such as charts to present evidence, and because additional jurors were sworn in at the outset, so that by the trial's completion, there remained a full complement of 12 jurors, although three had been discharged for various reasons along the way.

I do not think that in NSW we need to remove the option of trial by jury from the accused against his or her consent, in order to deal with lengthy trials of a complex nature. The amendments to the Jury Act 1977 (NSW) permitting the empanelling of additional jurors in long trials, the recent legislative amendments that pick up the recommendations of the NSW Law Reform Commission Report No 117 ("Jury Selection"), which will enhance the

education level of jury panels, and perhaps most importantly the "case management" amendments to the Criminal Procedure Act 1986 (NSW), will all have a positive impact on the ability of the jury system to even better deal with long, complex trials. There is also likely to be fewer occasions of technical forensic evidence being unnecessarily challenged by defence counsel, consequent to the current review of "briefing out" procedures by NSW Legal Aid.

No Judge Alone Order Where Trial Judge's Identity is Known in Advance

Section 132A(1) of the Act, introduced by the amendments, is intended to avoid "judge-shopping":

> (1) An application for an order under section 132 that an accused person be tried by a Judge alone must be made not less than 28 days before the date fixed for the trial in the Supreme Court or District Court, except with the leave of the court.

While this was a significant issue of public debate in the 1990's in relation to trial by judge alone, it seems to have faded away, which is perhaps reflected in the amendment, by inclusion of the words: "except with the leave of the court".

A provision that mandatorily excluded judge-alone trials where the trial judge's identity could be discovered in advance would have the effect of precluding applications for judge alone orders in regional and some metropolitan District Courts, since the identity of the rostered judge is usually publicly known well in advance. For many years now there have been trials by judge alone in these courts where the judge's identity is known in advance and both parties are in agreement, but this practice could not continue with such a legislative provision. The flexibility of the option of trial by judge alone is particularly effective in country sittings, since the judge may adjourn the trial from time to time to interpose short matters, and even adjourn the trial from one week to the next, to facilitate the availability of witnesses travelling from other towns, or elsewhere. I am unaware of any professional or public criticism of this practice.

The policy imperatives for including such courts are compelling. It is desirable that there be equality of options for the parties, regardless of whether they appear in a country or city court. Longer (jury) trials have a greater adverse impact on the resources of country courts that city multiple-court complexes, for example in the marshalling of jury panels and the inability to quickly "fill the list" if a long trial or special sitting collapses. Further, many busy sittings of the District Court, such as at Lismore (where there is a permanent judge), Gosford, and perhaps Newcastle, Wollongong and Penrith as well, may well have been precluded by such a prerequisite, had this flexibility not been incorporated in the amendments.

Further, there are proper concerns of the defence and prosecution that are peculiar to regional and country courts that may be remedied by the application of the amendments. If a serious offence attracts considerable local publicity that is adverse to the accused or a key prosecution witness, or either is otherwise well-known locally in an unfavourable light, so that at least some members of the jury panel drawn from that same area would inevitably have this adverse local knowledge, the availability of this option may be especially attractive to the relevant party, and more convenient to the court and witnesses for both sides than the current

alternative, of seeking a change in venue. The DPP guidelines recognise that such concerns may be a proper basis for trial by judge alone.[25]

Issues peculiar to country and metropolitan courts aside, there are some further policy concerns with a prohibition where the judge's identity is known in advance. Occasionally there are trials heard in the District and Supreme Courts where the jury has been discharged (because it cannot agree, or for other reasons at a stage when much of the evidence has been given), and the prosecution and defence jointly submit that the trial judge (who has already heard all the evidence) immediately proceed to a re-trial on the basis of judge alone. The transcript and exhibits from the earlier trial are then tendered, and with a minimum of additional court time the trial proceeds to finality with the judge rendering a verdict (see for example *R v Ham* [2009] NSWSC 296). This practice saves significant judicial and other resources, but would necessarily be prohibited if advance public knowledge of the judge's identity precluded an application.

It would also be incompatible with the practice in the Supreme Court of the arraignments judge indicating the name of the trial judge when fixing the trial date so as to facilitate pre-trial applications, unless the question was resolved at that early stage, which is unlikely in many instances.

Conclusion: Be Careful What You Wish For

Although defence counsel have advocated over many years for such amendments as these, I, and I suspect my fellow advocates, do so with a considerable degree of wariness. We identify with observations made by Judge Woods in *GSR (1)*, no doubt calling on his own research when writing his highly-regarded text: *A History of Criminal Law in NSW; The Colonial Period 1788-1900* [29]:

> I appreciate that it is not an insignificant matter to remove from democratic jury judgment a criminal trial into the arena of judicial judgment. It is a step which I am reluctant to take, quite distinct from any personal concern I or any other judge might have about the stress and burden of decision making being placed on the trial judge, rather than on the jury. Any such factor is of course irrelevant. My reluctance arises because the determination of major criminal trials historically has been within the constitutional province of the jury of twelve. The right to trial by jury is a right which was battled for and hard won in this State. It was a constitutional right even before the establishment of responsible government. ...

We have advocated for this change as a common-sense step to overcome otherwise insurmountable prejudice, or to sensibly shorten some trials without detracting from the fairness of the process; a step nevertheless that we fear may materialise into a path leading, in whole or in part, to the loss of the accused's *right* to a jury trial. Our concern is that, advocating an increase in the opportunities for the accused to voluntarily forego this fundamental right, is to lay the groundwork for its devaluation in the eyes of the community

---

[25] At the time of writing, the DPP guidelines have not been reviewed in light of the amendments, and include the following: "Cases which may be better suited to trial by judge alone include cases where: ... there is a real and substantial risk that directions by the trial judge or other measures will not be sufficient to overcome prejudice arising from pre-trial publicity or other cause".

and legislators, and ultimately expose it to legislative removal, as for example has been suggested by the DPP to the Standing Committee in certain circumstances or, in time, more comprehensively. It is not impossible to imagine a financially-constrained future state government being tempted by the short-term savings of a mandatory expansion of non-jury trials, justifying the policy by the accused's selective relinquishing of that right.

However, to not advocate for sensible changes to criminal procedure where it is clearly warranted, for fear of facilitating an attack on fundamental rights at some indiscernible future point, is to submit to current poor policy by default, which would be a sad day for law reform. The remedy for such fears is a solid foundation in fundamental principle for the changes advocated, and vigilance.

In my opinion the Graeme Reeves cases were precisely the type of case that the amendments were intended to apply to. In a case of such extreme and penetrating adverse publicity, the accused was afforded the option of foregoing his right to a jury trial in exchange for a trial judge experienced in dispassionate fact-finding.

Mark Ierace SC

Senior Public Defender

9 September 2011

Appendix I: Criminal Procedure Act, 1986

132 Orders for trial by Judge alone

(1) An accused person or the prosecutor in criminal proceedings in the Supreme Court or District Court may apply to the court for an order that the accused person be tried by a Judge alone (a "trial by judge order").

(2) The court must make a trial by judge order if both the accused person and the prosecutor agree to the accused person being tried by a Judge alone.

(3) If the accused person does not agree to being tried by a Judge alone, the court must not make a trial by judge order.

(4) If the prosecutor does not agree to the accused person being tried by a Judge alone, the court may make a trial by judge order if it considers it is in the interests of justice to do so.

(5) Without limiting subsection (4), the court may refuse to make an order if it considers that the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness.

(6) The court must not make a trial by judge order unless it is satisfied that the accused person has sought and received advice in relation to the effect of such an order from an Australian legal practitioner.

(7) The court may make a trial by judge order despite any other provision of this section or section 132A if the court is of the opinion that:

(a) there is a substantial risk that acts that may constitute an offence under Division 3 of Part 7 of the *Crimes Act 1900* are likely to be committed in respect of any jury or juror, and

(b) the risk of those acts occurring may not reasonably be mitigated by other means.

132A Applications for trial by judge alone in criminal proceedings

(1) An application for an order under section 132 that an accused person be tried by a Judge alone must be made not less than 28 days before the date fixed for the trial in the Supreme Court or District Court, except with the leave of the court.

(2) An application must not be made in a joint trial unless:

(a) all other accused person apply to be tried by a Judge alone, and

(b) each application is made in respect of all offences with which the accused persons in the trial are charged that are being proceeded with in the trial.

(3) An accused person or a prosecutor who applies for an order under section 132 may, at any time before the date fixed for the accused person's trial, subsequently apply for a trial by a jury.

(4) Rules of court may be made with respect to applications under section 132 or this section.

Appendix II: NSW DPP Statistics 1.1.11-7.9.11

NOTE: the figures are provided with the proviso that they were first collated some weeks after the amendments commenced, and depend upon the recollections of the prosecutors involved, rather than contemporaneously-made records.

The combined Supreme and District Court total is indicated with the Supreme Court figure in brackets.

Jury Trials

Guilty verdicts, all counts: 76 (4)
Guilty verdicts, some counts: 46 (0)
Not Guilty verdicts: 126 (4)
Not Guilty verdicts by direction: 7 (1)
Hung Jury: 11 (0)
Trial aborted: 46 (2)

Total: 312

Judge-Alone Trials

Guilty verdicts, all counts: 10 (1)
Guilty verdicts, some counts: 11 (0)
Not Guilty verdicts: 30 (6)
Trial aborted: 2 (1)

Total: 53

Total trials (Jury + Judge-alone): 312 + 53 = 365.