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TWELVE ANGRY PEERS OR ONE ANGRY JUDGE: AN ANALYSIS OF JUDGE ALONE TRIALS IN AUSTRALIA

JODIE O'LEARY*

Recently, New South Wales amended its legislation to provide for judicial discretion when determining, upon request, whether an accused will face a trial by judge alone for indictable criminal matters. This article examines the application of those provisions and comparable legislation in Queensland and Western Australia, revealing an overarching tension as to the correct legal approach. Broadly, there is a dispute over the weight that should be afforded to the accused's right to choose or whether a presumption of a jury trial exists. Such a conflict arises from the different justifications for jury trials. On the one hand the jury trial was envisaged to protect the rights of accused. On the other, jury trials involve the community in the administration of justice. The acceptable reasons for granting judge alone trials and the grounds for excluding matters from their ambit are applied inconsistently, depending on whether the protection theory or the community participation theory is preferred.

Introduction**

The move by a number of Australian jurisdictions to legislate for the substitution of judges, in place of the jury, in the role of fact finder in criminal trials upon indictment has been described as 'novel and radical.'¹ This novelty may explain the propagation of High Court

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¹ *AK v Western Australia* (2008) 232 CLR 438 at 470.

cases surrounding judge alone trials. Two years after the implementation of the ground-breaking legislation in South Australia, in *Brown v The Queen* (1985-1986) 160 CLR 171, the High Court considered whether the accused's ability to elect a judge alone trial in that State extended to Commonwealth criminal offences.² The majority of the Court found that s 80 of the *Commonwealth of Australia Constitution*, providing the right to trial by jury for indictable Commonwealth matters, prevented such an interpretation.³ The minority reasoned that this constitutional provision's object was to protect the accused, so, to limit the accused's election would be akin to imprisoning a person in their own privilege.⁴ Conversely, the majority thought that s 80 was not only proposed for the benefit of the accused but also had public advantages in the administration of justice which could not be defeated at the accused's election.⁵ This decision highlights the dichotomy between the protection theory behind jury trials and that of community participation.

At the time of writing the Australian Capital Territory had introduced a Bill recommending reforms to their judge alone legislation.⁶ New South Wales also recently reconsidered and subsequently amended its provisions conditionally permitting judge alone trials,⁷ and late last year the Queensland Court of Appeal considered Queensland's comparable legislation in the case of *R v Fardon* [2010] QCA 317. Despite these developments there has been little recent academic writing about judge alone trials.⁸

² SA was the first Australian State to introduce such provisions however it was not the first in the common law world. See for example Canada (*Criminal Code*, CRC c 46, Pt XIX), New Zealand (*Crimes Act 1961* (NZ), s 361D), and the United Kingdom (*Criminal Justice Act 2003* (UK), c 44, Pt 7).

³ *Brown v The Queen* (1985-1986) 160 CLR 171, per Brennan, Deane and Dawson JJ.

⁴ *Brown v The Queen* (1985-1986) 160 CLR 171, per Gibbs CJ and Wilson J.

⁵ *Brown v The Queen* (1985-1986) 160 CLR 171 at 216.

⁶ *Criminal Proceedings Legislation Amendment Bill 2011* (ACT) presented 17 February 2011.

⁷ See the Standing Committee on Law and Justice, *Inquiry into Judge Alone Trials under s.132 of the Criminal Procedure Act 1986* (November 2010) Report 44 resulting in amendments to s 132 that commenced in January this year.

⁸ For older articles see Hidden P AM SCJ, "Trial by Judge Alone in New South Wales" (1997) 9 JOB 41 and Willis J, "Trial by Judge Alone" (1998) 7 J Jud Admin 144. Wayne V, "Judicial Fact-Finding: Trial by Judge Alone in

Heenan SCJ confirmed the significance of this gap in 2006, noting the absence of material dealing 'directly with the principles or criteria to be applied when faced with a decision about a choice of one of the two modes of trial.'⁹

Judges have proffered their views in support of judge alone trials and against.¹⁰ Law Reform Commissions have considered the role of the jury and some have specifically considered judge alone trials.¹¹

Those who support judge alone trials suggest jurors are impacted by prejudices, at times convicting upon weak evidence, or acquitting when the evidence is overwhelming.¹² This is exacerbated by lack of transparency and accountability in jury deliberations.¹³ And while jury trials exist in common law countries, the civil law tradition often operates without them.¹⁴ Further, there are economic arguments that judge alone trials provide savings in time and money.¹⁵ Some advocate that it is unreasonable to expect jurors to understand scientific or technical evidence or arguments, especially given the tendency of more educated potential jurors to avoid jury duty or the practice of counsel excluding such jurors

Serious Criminal Cases" (2003) 27 MULR 423 considered the approach of judges to fact finding. A recent article that considered judge alone trials briefly was Burgess C, "Prejudicial Publicity: When Will it Ever Result in a Permanent Stay of Proceedings?" (2009) 28 U Tas LR 63 and relating to the value of juries see McCusker MJ AO QC (2009) "Bad Press: Does the Jury Deserve it?", paper presented at the 36th Australian Legal Convention, September.

⁹ *Western Australia v Martinez* (2007) 172 A Crim R 389 at [9].

¹⁰ In support see French V DCJ, "Juries - a Central Pillar or an Obstacle to a Fair and Timely Criminal Justice System" (2007) 90 Reform 40, against see Heenan DC SCJ, "Trial by Judge Alone" (1995) 4 J Jud Admin 240 and White SCJ in *R v Marshall* (1986) 43 SASR 448.

¹¹ Law Reform Commission of Western Australia (LRCWA), *Review of the Criminal and Civil Justice System in Western Australia (Consultation Papers)* Project No 92 (June 1999) Vol 2, s 4.8 and LRCWA, *Review of the Criminal and Civil Justice System in Western Australia (Final Report)* Project No 92 (September 1999) Ch 30. See also the New South Wales Law Reform Commission (NSWLRC) Report No 48 (1986) Chs 7 and 10.

¹² In relation to convicting see Willis n8 at 152 and on acquittal see LRCWA (June 1999) p 926.

¹³ Samuels A, "Trials on Indictment without a Jury" (2004) 68 J Crim L 125 at 126; French n10 at 40; McCusker n8 at 8.

¹⁴ See for example Leib E, "A Comparison of Criminal Jury Decision Rules in Democratic Countries" in Malleswari, V (ed) *Jury Trial: A Legal Concept* (Icfai University Press, Hyderabad, 2008) p49.

¹⁵ Willis, n8 at 151; French, n10 at 40-41; LRCWA (June 1999) pp 926, 929; Dessau L, "Speedy Trials and a Speedier Criminal Justice System: Recent Observations in Overseas Jurisdictions" (1995) 5 J Jud Admin 43 at 48.

through the challenge process.¹⁶ This restricted jury pool (not representative of the community) has been argued to undermine the original purpose of the jury as reflecting community values.¹⁷

Those against judge alone trials rely on quotes such as Lord Devlin's that a 'trial by jury is ... the lamp that shows that freedom lives.'¹⁸ They suggest that judge alone trials are a step towards the abolition of jury trials.¹⁹ Advocates of jury trials argue that they are necessary to ensure community confidence in the verdict and to avoid allegations that decisions are being made by judges who are out of touch with the community.²⁰ Others state that the pressure on judges when presiding alone can be enormous and they are not immune from the impact of prejudicial material and/or may be over conditioned.²¹ This issue is said to be magnified as judges, unlike jurors, do not have the benefit of the checks and balances provided by their peers.²²

This article examines the legal developments regarding judge alone trials in Australia. It analyses all Australian jurisdictions with statutory provisions of this nature and corresponding significant judicial decisions. It focuses on Western Australia and Queensland as the content of the legislation in those States, allowing as it does a discretion for judges to

¹⁶ Willis, n8 at 153; Samuels, n13 at 125; French, n10 at 41; LRCWA (June 1999) p 926. See also Heydon in *AK v Western Australia* (2008) 232 CLR 438 at 471.

¹⁷ McCusker, n8 at 7.

¹⁸ Devlin P, *Trial by Jury* (Metheun & Co Ltd, London 1966), p 164 cited in the second reading speech of the Criminal Code and Jury and Another Act Amendment Bill: Queensland, Parliamentary Debates, 26 August 2008, 2773 (Mr Messenger).

¹⁹ See Willis, n8 at 152 and a similar concern voiced by Blackstone in Commentaries, Book 4 pp 349-350 and cited by Lord Devlin in a discussion of the increased summary jurisdiction that 'though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern': Devlin, n18, p 165.

²⁰ Samuels, n13 at 127 states judges' 'experience of "life" will necessarily be limited.' See also French, n10 at 40 and LRCWA (June 1999) p 927.

²¹ Willis, n8 at 154; Samuels, n13 at 127; see also reference to *Taylor v Louisiana* (1975) 419 US 522 at 530 which said that juries can guard against 'the professional or perhaps overconditioned or biased response of the judge': cited in LRCWA (June 1999) p 923 and Fricke G, *Trial by Jury* (Parliamentary Library, Parliament of Australia, 1996-1997) p 3.

²² LRCWA (June 1999) p 927.

refuse a 'no jury' order, provides fertile ground for analysis not present in the States with no such discretion.²³

The author observes that there are conflicting results, nationally and even intra-State, depending upon whether the protection theory or the community participation theory is preferred. This is sometimes reflected in the so-called presumption of a trial by jury. Further, although the reasons that judge alone trials are requested correspond across jurisdictions, even when not specifically mentioned in the legislation, with prejudice, identified because of pre-trial publicity or due to other reasons, factoring highly, as well as other technical legal reasons or the need to avoid lengthy trials, their application is inconsistent. Finally, the necessity to apply community values sometimes acts as a tool of exclusion. There is, however, disagreement as to when this prohibition applies leading to uncertainty in the law in this area.

Early approaches

South Australia embraced the use of judge alone trials in 1984, New South Wales in 1991 and the Australian Capital Territory in 1993.²⁴

Both South Australia and the Australian Capital Territory allow an accused to elect to proceed without a jury, not vesting any discretion in either the prosecutor or the court to

²³ New South Wales is not considered in depth as its discretionary provisions only commenced earlier this year.

²⁴ *Juries Act 1927 (SA)*, s 7; *Criminal Procedure Act 1986 (NSW)*, s 132; *Supreme Court Act 1933 (ACT)*, s 68B.

refuse such an election.²⁵ The legislation in these States currently pays heed to the protection theory, giving priority to the accused's choice to waive their right to a jury trial.²⁶

Originally in New South Wales the prosecutor had to consent to an accused's election for a judge alone trial.²⁷ The Director of Public Prosecution (DPP) developed guidelines informing the exercise of this discretion,²⁸ which were reflective of the community participation theory of jury trials, referring to the importance of the community's role in the administration of justice and noting that a jury trial should be the norm in cases where community values arise, such as reasonableness, provocation, dishonesty, indecency, substantial impairment, or in circumstantial cases or those involving substantial issues of credit. The guidelines stated that judge alone trials may be pertinent in cases:

- of a technical or trivial nature; or
- where the issue to be determined is one of law; or
- where judicial directions or other measures will prove inadequate to address prejudice from pre-trial publicity or another cause; or

²⁵ The court can only refuse the exercise of this election if the accused has not complied with statutory provisions – eg the accused must have sought and received advice from a legal practitioner about their choice: *Juries Act 1927* (SA), ss 7(1)(b), 7(2) and 7(3); *Supreme Court Act 1933* (ACT), s 68B.

²⁶ Note that the *Criminal Proceedings Legislation Amendment Bill 2011* (ACT) presented on 17 February 2011 recommends changes to these provisions. While still not allowing the court or prosecutor discretion to refuse the accused's election for trial by judge alone, it provides for statutory exclusion of certain offences from this election. Those offences involve mostly death of a person and sexual offences.

²⁷ *Criminal Procedure Act 1986* (NSW), s 132(3).

²⁸ For a reproduction of an older version of these guidelines see Willis, n8 at 146. For a more recent version see Office of the Director of Public Prosecutions, *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, <http://www.odpp.nsw.gov.au/guidelines/FullGuidelines.pdf>, viewed 4 September 2010.

- where evidence is technical or likely to raise lengthy arguments as to its admissibility.²⁹

In 2010 the Standing Committee on Law and Justice was requested to conduct an inquiry into a proposal to shift the judge alone application and decision making process to the courts.³⁰ In January this year the relevant sections of the *Criminal Procedure Act 1986* (NSW) were modified. As such, in that State, it remains the case that where the accused elects a judge alone trial, and the prosecutor agrees, the matter is to proceed in that mode.³¹ The difference arises now where a prosecutor does not agree to such a disposition. In those instances, the Court can still order a judge alone trial where it is 'in the interests of justice to do so',³² and may refuse if objective community standards are to be applied during the trial.³³

At the time of writing, there were three published decisions on judge alone applications under the amended legislation, all by Woods DCJ, relating to the same accused.

²⁹ Office of the Director of Public Prosecutions, *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, <http://www.odpp.nsw.gov.au/guidelines/FullGuidelines.pdf>, viewed 4 September 2010.

³⁰ See the Standing Committee on Law and Justice, *Inquiry into Judge Alone Trials under s.132 of the Criminal Procedure Act 1986* (November 2010) Report 44 – Terms of reference p iv.

³¹ *Criminal Procedure Act 1986* (NSW) s 132(2). The section is broader in application when combined with s 132(1) requiring such a trial if either party applies to the Court and both parties agree to this format. Note also the overriding requirement for a jury trial where the accused does not consent to a judge alone trial in s 132(3), subject only to s 132(7) where there is a substantial risk of jury tampering which cannot be mitigated in another way.

³² *Criminal Procedure Act 1986* (NSW) s 132(4).

³³ *Criminal Procedure Act 1986* (NSW) s 132(5) specifically outlines issues of reasonableness, negligence, indecency, obscenity or dangerousness (but notes this is not an exhaustive list).

Two of these applications were granted, largely due to the highly inflammatory pre-trial publicity the accused had suffered.³⁴ The one application that was refused was based on a technical procedural error, rather than any exercise of discretion.³⁵

In one of the successful judge alone applications Woods DCJ outlined five relevant factors considered to determine where the interests of justice lay. The prejudicial publicity was the predominant consideration, with the nature of the offences also rating as important.³⁶ Although the case involved the offences of indecent assault, Woods DCJ found that a jury was unnecessary to clarify any objective community standard, as on any scale the conduct would be indecent.³⁷ The context that most trials are by jury, although significant, was determined to be less powerful when balanced against the other factors,³⁸ and Woods DCJ found that the two other considerations, the accused's wishes and the possible shortening of the trial, were not of great moment in this case.³⁹

Western Australia

Western Australia implemented judge alone provisions in 1994.⁴⁰ That legislation largely mirrored the first formulation in New South Wales, particularly the requirement for Crown consent.⁴¹ The Law Reform Commission of Western Australia (LRCWA) reviewed this

³⁴ *R v GSR (1)* [2011] NSWDC 14 at [11]; *R v GSR (3)* [2011] NSWDC 17 at [21]. These cases involved a fraud related offences and offences of indecent assault respectively.

³⁵ *R v GSR (2)* [2011] NSWDC 16.

³⁶ *R v GSR (3)* [2011] NSWDC 17 at [26].

³⁷ *R v GSR (3)* [2011] NSWDC 17 at [19].

³⁸ *R v GSR (3)* [2011] NSWDC 17 at [25].

³⁹ *R v GSR (3)* [2011] NSWDC 17 at [23]-[24].

⁴⁰ *Criminal Code 1913 (WA)*, ss 651A – 651C.

⁴¹ *Criminal Code 1913 (WA)*, s 651A(5).

legislation, making recommendations, some of which were implemented in the *Criminal Procedure Act 2004 (WA)*.⁴²

The changes mean the prosecutor can apply for a judge alone trial (but the order can only be granted if the accused consents) and the introduction of an overriding judicial discretion.⁴³ The legislation provides examples of when such an order may be appropriate; focusing on complex or lengthy trials and instances where it is likely that jury members may be subjected to threats or bribes.⁴⁴ In addition, the Act describes when a 'no jury' order may not be appropriate, that is, where the trial would require the application of objective community standards, specifically reasonableness, negligence, indecency, obscenity or dangerousness.⁴⁵

Cases

Heenan SCJ provided one of the first considered judgments about the application of the discretion in determinations of judge alone applications in *Western Australia v Martinez* (2006) 159 A Crim R 380.⁴⁶ The accused applied for a judge alone trial due to the extensive pre-trial publicity, the volume of complex evidence and the length of the trial.⁴⁷ The Judge also recognised that some evidence to be introduced would act prejudicially on the minds of potential jurors,⁴⁸ but refused the application. Although the publicity in this case was significant, he considered any prejudgment in the jurors could be rectified by judicial

⁴² LRCWA (September 1999).

⁴³ LRCWA (September 1999).

⁴⁴ *Criminal Procedure Act 2004 (WA)*, s 118(5).

⁴⁵ *Criminal Procedure Act 2004 (WA)*, s 118(6).

⁴⁶ The accused were charged with murder.

⁴⁷ *Western Australia v Martinez* (2007) 172 A Crim R 389 at [18], [24] and [28].

⁴⁸ *Western Australia v Martinez* (2007) 172 A Crim R 389 at [19].

direction.⁴⁹ The evidence was not seen to be unduly complex and the Judge was not persuaded by the economics argument.⁵⁰

Heenan SCJ found that there was no starting presumption in favour of either a trial by jury or by judge. He stated 'that one should adopt a neutral position in relation to the preferred mode of trial ... and focus upon what are the interests of justice in the particular case.'⁵¹ The interests of justice, he thought, may be impacted by the non-exclusive list of objective factors in the legislation or other factors requiring value judgments best served by a panel of fact finders.⁵² In this difficult circumstantial case of importance to the community, which would involve multiple complex value judgments, including about the reliability of evidence and the resulting inferences, the Judge thought a collective judgment would be more appropriate.⁵³

The reasons for the judge alone application in *Arthurs v Western Australia* [2007] WASC 182⁵⁴ were the prejudice that the accused would suffer due to inflammatory pre-trial publicity and the nature of the evidence that would be presented. Martin CJ agreed with Heenan SCJ's earlier assertion that a neutral starting position was required.⁵⁵ Martin CJ found that there were factors favouring a judge alone trial,⁵⁶ specifically taking the subjective view of the accused into account, as long as that view was not 'fanciful or irrational.'⁵⁷

⁴⁹ *Western Australia v Martinez* (2007) 172 A Crim R 389 at [35].

⁵⁰ *Western Australia v Martinez* (2007) 172 A Crim R 389 at [29].

⁵¹ *Western Australia v Martinez* (2007) 172 A Crim R 389 at [23].

⁵² *Western Australia v Martinez* (2007) 172 A Crim R 389 at [6].

⁵³ *Western Australia v Martinez* (2007) 172 A Crim R 389 at [36].

⁵⁴ The charges in that case were murder and sex offences against a child.

⁵⁵ Martin CJ referred to the LRCWA's final report as a tool of construction: *Arthurs v Western Australia* [2007] WASC 182 at [44]-[57].

⁵⁶ *Arthurs v Western Australia* [2007] WASC 182 at [85].

⁵⁷ *Arthurs v Western Australia* [2007] WASC 182 at [79].

Starkly contrasting these earlier cases is *TVM v Western Australia* (2007) 180 A Crim R 183.⁵⁸ The accused was concerned that a jury would be prejudiced against him given his identification as homosexual and an active Jehovah's Witness.⁵⁹ McKechnie SCJ, focusing on a literal interpretation of the Act, proposed that determinations of judge alone trial applications should start from a presumption of trial by jury.⁶⁰ In the judgment, McKechnie SCJ identified a pattern of cases that were run without a jury. These included trials involving: questions of an accused's mental state; comprehensive considerations of scientific evidence; and those with prejudicial publicity.⁶¹ The application in this case instead centred around the accused's subjective perception of possible unfairness. The Judge discounted this in the determination of the interests of justice, instead posturing that such a decision must be 'an objective deduction reached judicially.'⁶²

In *Coates v Western Australia* [2009] WASCA 142, Buss JA commented that a judge alone trial is necessary if 'there is a real and substantial (as distinct from remote) doubt as to whether the accused will receive a fair trial according to law before a judge sitting without a jury.'⁶³ The accused was charged with murder and the determination of his guilt or innocence would largely turn on a particular witness' credibility. The DPP consented to a judge alone trial. The appeal considered whether the assessment of credibility required in this case was better determined by a jury. Owen JA reasoned that credibility was a

⁵⁸ The charges in that case were arson and murder.

⁵⁹ *TVM v Western Australia* (2007) 180 A Crim R 183 at 184.

⁶⁰ *TVM v Western Australia* (2007) 180 A Crim R 183 at 186.

⁶¹ *TVM v Western Australia* (2007) 180 A Crim R 183 at 185.

⁶² *TVM v Western Australia* (2007) 180 A Crim R 183 at 189.

⁶³ *Coates v Western Australia* [2009] WASCA 142 at [104].

subjective consideration, despite objective elements being involved in the assessment.⁶⁴ As such the Court did not consider that the judge alone trial was unfair.⁶⁵

Queensland

In 2008 Queensland introduced provisions into the *Criminal Code* allowing for a pre-trial application for a 'no jury' order.⁶⁶ Like New South Wales and Western Australia, the prosecution or defence can make an application and the court can make these orders if it is in the interests of justice, with the consent of the accused.⁶⁷ The Act provides examples of when these orders may be made, including if:

- (a) The trial, because of its complexity or length or both, is likely to be unreasonably burdensome to a jury; ...
- (c) There has been significant pre-trial publicity that may affect jury deliberations.⁶⁸

The courts are guided by the *Criminal Code* s 615(5) which allows refusal of such an order if the trial would necessitate contemplation of objective community standards.

Overview of Applications Made

Since the legislation took effect in September 2008 until 13 August 2010 there had been 16 judge alone applications.⁶⁹ Of those, five succeeded. Table 1 outlines the reasons cited in the applications requesting no jury orders:

⁶⁴ *Coates v Western Australia* [2009] WASCA 142 at [9].

⁶⁵ This decision was unchanged following refusal of a special leave application to the High Court: *Coates v Western Australia* [2010] HCA Trans 135.

⁶⁶ Introduced by the *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld). Queensland previously had provision to allow judge alone trials in the Children's Court of Queensland: *Juvenile Justice Act 1992* (Qld), s 102.

⁶⁷ *Criminal Code 1899* (Qld), s 615.

⁶⁸ *Criminal Code 1899* (Qld), s 615(4). This section also includes where '(b) there is a real possibility that acts that may constitute an offence under section 119B would be committed in relation to a member of a jury.' Section 119B provides for an offence of retaliation against judicial officers, jurors, witnesses, etc.

Table 1: Applications for Judge Alone Trials in Queensland
(September 2008 - 13 August 2010)⁷⁰

Reasons cited in the Application	Granted	Refused	Total
1. Complexity and length of trial would be burdensome to a jury		1	1
2. Graphic evidence	1	3	4
3. Graphic evidence and to prevent publicity	1		1
4. Large amount of media coverage	1	2	3
5. Previous convictions would come to juries attention	1	1	2
6. Publicity and prejudice may be suffered by accused		2	2
7. Accused well known and was thought could not get a fair trial		1	1
8. Three previous trials resulting in jury being discharged		1	1
9. Jury would not have to be called as witnesses in an international court upon appeal	1		1
	5	11	16

Four applications directly related to the examples provided in the *Criminal Code*.⁷¹ In addition, publicity was a factor in three other applications (along with other reasons).⁷² But of these seven applications within the legislative categories, only two succeeded.⁷³

The other nine applications did not rely on the legislative examples, instead making requests rooted in a perception that jurors may be prejudiced against the accused, arguing

⁶⁹ In the District and Supreme Courts. The information is based on unpublished data provided by the Department of Justice, current as at 13 August 2010. The source of the data is the Queensland Wide Interlinked Courts (QWIC) system and the information was prepared, following the author's request, by Daryl Villalba, Team Leader (Performance Information Team) Court Performance and Reporting Unit.

⁷⁰ This information was gathered from examining the applications not the reasons provided in the judgments and these may sometimes differ.

⁷¹ Those provided in Table 1 - 1. Complexity and length of trial would be burdensome to a jury and 4. Large amount of media coverage.

⁷² That is Table 1 - 3. Graphic evidence and to prevent publicity and 6. Publicity and prejudice may be suffered by accused.

⁷³ On publicity grounds.

that it was otherwise in the interests of justice to have a judge alone trial. This prejudice (outlined in seven of these applications) was asserted to have arisen because of the graphic nature of the evidence, the fact that the accuseds' previous convictions would be made known to jurors, or due to the accused's notoriety.⁷⁴

Eight of these 16 matters are considered further below.⁷⁵

Cases

The first judge alone application heard in Queensland was *R v Clough* [2009] 1 Qd R 197.

Clough was charged with murder and the defences of insanity and diminished responsibility were to be raised at trial, complicated as Clough had voluntarily consumed drugs.

Mackenzie SCJ found that the matter would be unusually complex but did not proceed to consider whether it would be unreasonably burdensome for a jury.⁷⁶ Instead, he noted that the categories of cases for which a no jury order could be made were not limited to those in the legislation and found here that it would be in the 'interests of justice' to make the order.⁷⁷

The second application was *R v Schloss* (District Court of Queensland, unreported, 5 November 2008).⁷⁸ Schloss was a notorious paedophile. His counsel argued that Schloss' convictions and alleged misconduct were 'a cause célèbre.'⁷⁹ The prosecutor virtually

⁷⁴ This last example of notoriety correlates to Table 1 – 7. Accused well known and thought could not get a fair trial. This example may also be linked to publicity but it is unclear on the information provided. The final two applications relate to process considerations. These are Table 1 - 8. Three previous trials resulting in the jury being discharged and 9. Jury would not have to be called as witnesses in an international court upon appeal.

⁷⁵ The selection is based on accessibility.

⁷⁶ *R v Clough* [2009] 1 Qd R 197 at 203.

⁷⁷ *R v Clough* [2009] 1 Qd R 197 at 200 and 203. Clough was convicted at trial: see *R v Clough* [2009] QSC 231. On appeal the decision was upheld: see *R v Clough* [2010] QCA 120.

⁷⁸ Cited in Yule J, "Accident, Provocation and Jury Reforms" (2009) 29 Qd L 183. The application in this case correlates to the application granted given the large amount of media coverage (number 4 in Table 1). Schloss was charged with child sex offences.

⁷⁹ Particularly in Ipswich: Outline of Argument filed on behalf of Schloss at [3] (copy on file with author).

conceded (without arguing for, for example, a change of venue) that a judge alone trial would be appropriate and one was ordered.⁸⁰ At the trial, the first under the Queensland provisions, Schloss was acquitted.⁸¹ The Judge considered that the onus of proof had not been satisfied, particularly given a significant contradiction between a vital witness and the complainant's account.⁸²

R v SAA [2009] QDC 5 involved a count of maintaining an unlawful sexual relationship with a child. SAA had pleaded guilty to four counts of indecent dealing with the same child, which meant that the issue before the court was whether these were isolated incidents or whether they bore some regularity.⁸³ Referring to *R v Clough* [2009] 1 Qd R 197, Robertson DCJ noted that the case did not fall into the categories outlined in the Act but that his discretion was unfettered and in the interests of justice made a 'no jury' order.⁸⁴ The basis was the complexity of the charge itself as well as the 'danger that a jury would be overcome' in their consideration as they would be aware of the accused's pleas of guilty to the indecent dealing charges.⁸⁵

Notorious Queensland paedophile, Dennis Ferguson, also applied for a 'no jury' order for a child sex offence trial. His counsel argued that the prejudicial pre-trial publicity Ferguson endured meant that he would not receive a fair trial before a jury.⁸⁶ Earlier, Botting DCJ had described the publicity as vitriolic and so pervasive that it would be

⁸⁰ Andrew West, Personal correspondence with author, 27 July 2010 and 26 August 2010.

⁸¹ Andrew West, Personal correspondence with author, 27 July 2010.

⁸² Andrew West, Personal correspondence with author, 26 August 2010.

⁸³ *R v SAA* [2009] QDC 5 at 6.

⁸⁴ *R v SAA* [2009] QDC 5 at 6.

⁸⁵ *R v SAA* [2009] QDC 5 at 7. The accused was convicted at trial and successfully appealed: see *R v DAT* [2009] QCA 181.

⁸⁶ Ferguson was previously granted a permanent stay in the District Court: *R v Ferguson* [2008] QDC 136. However this was overturned by the Court of Appeal: *R v Ferguson; Ex parte Attorney-General (Qld)* (2008) 186 A Crim R 483. For discussion of both decisions see O'Leary J, "Understanding the Dennis Ferguson Debate - Part 1" (Spring 2008) *Legal Eagle* and Burgess, n8. The judge alone application here correlates to the application granted where there was graphic evidence and to prevent publicity (number 3 in Table 1).

impossible to empanel a jury who would not be familiar with the accused's history and who would be able to be dispassionate.⁸⁷ Robin DCJ, on hearing the unopposed application, acceded that the interests of justice required a judge alone trial.⁸⁸ The Chief Judge of the District Court found Ferguson not guilty.⁸⁹

In *R v Brady* [2009] QDC 48, which involved a father allegedly unlawfully wounding his son, the reasons for the judge alone application included concerns about the method of jury selection and the process of a jury trial, and that the defendant did not want certain information (such as his relationship with his son) to be subjected to jury deliberation. It was submitted that a judge alone trial would be more expeditious. The Crown contended that a jury trial was more appropriate as the reasonableness of the force used would be in issue. The Judge refused the application.⁹⁰

The next two judge alone applications involved the accused seeking to rely on evidence that may be perceived as prejudicial. In these applications the accuseds' counsel proposed that they would need to disclose previous charges against the accused of a similar nature as those faced at trial.⁹¹ Such tactics were thought necessary to explain the complaints in the instances before the Court. That is, it was to be argued that the complainants' knowledge of the accuseds' history influenced the making of the complaint. Both applications failed.

In the first case the Crown convinced the Judge that the defence could be run in a way that did not require disclosure of the history and that even if the evidence was

⁸⁷ *R v Ferguson* [2008] QDC 136 at 7, 6 and 26.

⁸⁸ *R v Ferguson* [2009] QDC 158.

⁸⁹ *R v Ferguson* [2009] QDC 049.

⁹⁰ *R v Brady* [2009] QDC 48 at 3.

⁹¹ *Unreported Case - File No. 845/09, 846/09* (Brisbane District Court, 1 July 2009) and *R v Pretorius* [2009] QDC 414. Both involved sex offences.

presented, any potential prejudice suffered could be assuaged by directions to the jury. The Judge was also influenced by the reasoning behind the *Criminal Code* s 615(5) that community standards, which require value judgments, are thought to be more adequately reflected in decisions by a number of persons.⁹² Here Searles DCJ thought that the assessment of the complainant's credibility would, for example, be determined by whether their actions in not disclosing the offending conduct at an earlier time were reasonable, enlivening the need for a jury.⁹³

The accused in *R v Pretorious* [2009] QDC 414 had previously been convicted of three indecent assault charges, amid significant publicity, some of which remained available on the internet.⁹⁴ Martin DCJ, after hearing the application, which the Crown opposed, decided that unfairness was not experienced where it was the accused's choice whether or not to introduce the prejudicial evidence.⁹⁵ In addition, he noted that it was not uncommon for an accused to come to trial with convictions that could be revealed by an internet search.⁹⁶ Such a risk though, he thought, could be adequately dealt with by judicial directions.⁹⁷ Martin DCJ reasoned that as the trial would require an evaluation of credibility the jury were best placed to determine the facts and so refused the application.⁹⁸

The Queensland Court of Appeal commented on Queensland's judge alone provisions in *R v Fardon* [2010] QCA 317. Fardon, who was charged with rape, applied for a

⁹² *Unreported Case - File No. 845/09, 846/09* (Brisbane District Court, 1 July 2009) at [37].

⁹³ *Unreported Case - File No. 845/09, 846/09* (Brisbane District Court, 1 July 2009) at [36]. The defence in this case did ultimately run the case without referring to the previous convictions and the jury found the accused not guilty: Tracy Mossop, Personal communication with author, 26 July 2010.

⁹⁴ *R v Pretorious* [2009] QDC 414 at [13].

⁹⁵ *R v Pretorious* [2009] QDC 414 at [24].

⁹⁶ *R v Pretorious* [2009] QDC 414 at [17].

⁹⁷ *R v Pretorious* [2009] QDC 414 at [18].

⁹⁸ *R v Pretorious* [2009] QDC 414 at [31]-[33].

judge alone trial on account of his notoriety as a sex offender and the associated publicity.⁹⁹

The Trial Judge approached the application ‘without any preconception or presumption about the appropriate mode of trial’ but refused the application finding that objective community standards would need to be applied in the trial.¹⁰⁰ The jury convicted Fardon, however this conviction was overturned in the Court of Appeal on the ground that it was unreasonable on the evidence.¹⁰¹ Such a finding meant that the Court was not required to determine the other ground of appeal that the primary judge erred in failing to order a judge alone trial. Nevertheless both Muir JA and Chesterman JA provided *obiter* statements as to the proper exercise of the discretion in such applications.¹⁰²

The Accused’s Right to Choose v the Presumption of a Jury Trial

Those Australian jurisdictions that have not implemented legislation permitting judge alone trials on indictable offences afford an accused little right to choose and presume jury trial as the norm. Although the ability in some jurisdictions to elect that certain indictable matters be tried summarily provides some choice this is generally for less serious offences, the kind for which the reasons involved in requesting or electing judge alone trials, of possible prejudice arising from the nature of the charge or the publicity generated and the complexity of the evidence, are less likely to arise.

South Australia and the Australian Capital Territory favour the accused’s right to choose, allowing for an election for judge alone trial that is largely immune from prosecutorial or judicial review.

⁹⁹ *R v Fardon* [2010] QCA 317 at [30]-[31].

¹⁰⁰ *R v Fardon* [2010] QCA 317 at [34] and [37].

¹⁰¹ *R v Fardon* [2010] QCA 317.

¹⁰² *R v Fardon* [2010] QCA 317, Muir JA at [39]-[45] and Chesterman JA at [69]-[89].

New South Wales originally imposed a layer of accountability over the accused's election, requiring prosecutorial consent. Such consent was determined in accordance with the DPP's guidelines which eventually stressed the public interest in jury trials, shifting the focus from the earlier significant weighting afforded to the accused's choice.¹⁰³ Woods DCJ though has moved to middle ground, with 'no presumption for or against either mode of trial', considering both the accused's wishes and the time-honoured tradition of the jury trial.¹⁰⁴

The most obvious intra-State conflict about whether there is a presumption of trial by jury is in Western Australia. The Supreme Court's debate, starting with *Western Australia v Martinez* (2006) 159 A Crim R 380, added to in *Arthurs v Western Australia* [2007] WASC 182 and culminating in *TVM v Western Australia* (2007) 180 A Crim R 183 has not been finalised, with the Court of Appeal expressly declining to consider the issue.¹⁰⁵

This state of flux in the law has meant that lower court judges have decided according to their preferred view. In *Western Australia v ARF* [2009] WADC 156 Martino DCJ adopted a neutral position in determining the mode of trial, given the lack of indication of any particular preference in the Act.¹⁰⁶ The decisive factor in ordering the judge alone trial was the accused's desire for that course. The accused's wishes (based on their views as to possible unfairness arising from a jury trial but limited to those accused who possessed some justification) was earlier advanced in the Supreme Court as a factor to be considered

¹⁰³ See discussion about the original form of DPP guidelines and the change in: Standing Committee on Law and Justice, *Inquiry into Judge Alone Trials under s.132 of the Criminal Procedure Act 1986* (November 2010) Report 44 [4.47]-[4.52].

¹⁰⁴ *R v GSR (1)* [2011] NSWDC 14 at [16]; *R v GSR (3)* [2011] NSWDC 17 at [14]-[16].

¹⁰⁵ *Coates v Western Australia* [2009] WASC 142 at [104]. The WA DPP guidelines state that there is no presumption in favour of or against consent to trial by judge alone: Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, p 18, http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf viewed 4 September 2010.

¹⁰⁶ *State of Western Australia v ARF* [2009] WADC 156 at [12].

when deciding whether a judge alone trial should be ordered,¹⁰⁷ but, in a subsequent decision of the same Court it was discounted by a different judge.¹⁰⁸

While only McKechnie SCJ has denied the relevance of the accused's choice in the determination of applications for judge alone trials and advanced the presumption of trial by jury in Western Australia,¹⁰⁹ the reasoning has been favoured in Queensland. In *R v Pretorious* [2009] QDC 414 Martin DCJ referred with approval to McKechnie SCJ's reasoning, specifically that the interests of justice are not confined only to the accused's interests, extending 'to the public interest in the due administration of justice.'¹¹⁰ And in *R v Brady* [2009] QDC 48 the Judge warned against judge alone trials becoming routine, implying that there was a presumption in favour of the time-honoured process of trial by jury, which could only be bypassed in compelling or exceptional situations.¹¹¹ Some Queensland cases have positively referred to the neutral position Heenan SCJ and Martin CJ advanced, that is, they considered applications for judge alone trials without a preconception about the appropriate mode of trial.¹¹² However, the numbers of applications for judge alone trials that have been refused in Queensland militates against widespread acceptance of this view and supports instead Chesterman JA's *dicta* that a 'trial before a judge without a jury is exceptional.'¹¹³

¹⁰⁷ *Arthurs v Western Australia* [2007] WASC 182.

¹⁰⁸ *TVM v Western Australia* (2007) 180 A Crim R 183. This approach is supported by reasoning of the ACT Court of Appeal. See the comment of Besanko J that 'fairness cannot turn on the perception of the defendant; it is a question of objective fact, although clearly the perception of an objective member of the public may be relevant to other issues such as bias': *R v Fearnside* (2009) 193 A Crim R 128 at 99.

¹⁰⁹ *TVM v Western Australia* (2007) 180 A Crim R 183.

¹¹⁰ *R v Pretorious* [2009] QDC 414 at [5]-[6].

¹¹¹ *R v Brady* [2009] QDC 48 at 4.

¹¹² See for example *R v Clough* [2009] 1 Qd R 197 at 200. However, note Mackenzie SCJ's comment that it was unnecessary to express a final view. See also *Unreported Case - File No. 845/09, 846/09* (Brisbane District Court, 1 July 2009) at [23] that 'there is no rebuttal presumption in favour of a trial by jury to be rebutted by the applicant.' Further, the primary judge in *R v Fardon* [2010] QCA 317 at [34] worked from a neutral position.

¹¹³ *R v Fardon* [2010] QCA 317 at [81].

Reasons for Judge Alone Applications

The Queensland, Western Australian and New South Wales legislation and the New South Wales and Western Australia DPP guidelines provide examples when a judge alone trial may be appropriate.¹¹⁴

A review of the cases suggests that the reasons that judge alone trials are sought are broader than what the legislation outlines. The LRCWA noted reasons an accused may choose a judge alone trial as ‘the belief that his or her trial might otherwise be prejudiced by previous media publicity or by evidence which the jury might find revolting.’¹¹⁵ These two categories of prejudice are broadly reflected in practice, along with categories of technical legal issues and those seeking shorter trials.

Publicity

The concern about the accused’s ability to receive a fair trial following pre-trial publicity, appeared to provide much of the motivation for the introduction of Queensland’s Bill,¹¹⁶ and it is the only State that expressly refers to publicity in its legislation.

The recent decision of *Dupas v The Queen* (2010) 267 ALR 1 involved an appeal following the rejection of an application for a permanent stay based on the unfairness the accused purportedly suffered due to prejudicial pre-trial publicity. The High Court considered that the Judge adequately relieved such prejudice during the course of the trial,

¹¹⁴ Although categories of trials that may be more suited to judge alone, such as heinous crimes and highly technical issues were considered in the inquiry, the Committee did not recommend their inclusion: see Standing Committee on Law and Justice, *Inquiry into Judge Alone Trials under s.132 of the Criminal Procedure Act 1986* (November 2010) Report 44 [4.129] – [4.131]. Instead New South Wales only expressly mentions jury tampering.

¹¹⁵ LRCWA (September 1999) pp 259-260.

¹¹⁶ During the debate on the second reading of the Bill the then Attorney General asserted that the ‘growth in information technology gives rise to new dilemmas when seeking to control the extent to which pretrial publicity affects the administration of justice’: Queensland, Parliamentary Debates, 11 September 2008, 2782 (KG Shine).

particularly through judicial direction. This confirmed earlier jurisprudence which stressed the court's confidence in the jury's capacity to exclude extraneous matters from their deliberations.¹¹⁷ Others are less confident in the value of directions. For example, Bagaric has condemned the 'near heroic belief that jury directions can cure negative impressions formed about an accused', stating '[t]here is no evidence to suggest that this is anything other than judicial wishful thinking.'¹¹⁸ The cases reviewed above indicate that accused persons share Bagaric's concerns. In Queensland the most commonly cited reason for a judge alone trial is related to media coverage and of the cases reviewed in Western Australia and New South Wales this reason is also prominent.¹¹⁹

While Western Australia does not specify publicity in its legislation, the DPP's guidelines provide that if there is a 'real and substantial risk' that judicial directions or other measures will not be sufficient to overcome prejudicial pre-trial publicity, this is a reason supporting judge alone trials.¹²⁰ Judicial directions were thought to be sufficient in one of the three relevant cases and in one of the others the prosecution consented to a judge alone trial.¹²¹

¹¹⁷ Discussed in *Dupas v The Queen* (2010) 267 ALR 1 and *R v Ferguson; Ex parte Attorney-General (Qld)* (2008) 186 A Crim R 483.

¹¹⁸ Bagaric M, "Editorial – The Community Interest in Bringing Suspects to Trial Trumps the Right to an Impartial Decision Maker – At Least in Victoria" (2010) 34 Crim LJ 5 at 6.

¹¹⁹ *R v GSR (1)* [2011] NSWDC 14; *R v GSR (3)* [2011] NSWDC 17; *Western Australia v Martinez* (2007) 172 A Crim R 389; *Arthurs v Western Australia* [2007] WASC 182 and *Coates v Western Australia* [2009] WASCA 142 all cited publicity in their reasons for the judge alone applications. Recall also in *TVM v Western Australia* (2007) 180 A Crim R 183 the comments that the reason of prejudicial publicity was part of a pattern noticed in judge alone trials.

¹²⁰ Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, p 18, http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf viewed 4 September 2010.

¹²¹ Judicial directions were thought to be sufficient to combat any prejudice in *Western Australia v Martinez* (2007) 172 A Crim R 389 and the prosecution consented to a judge alone trial in *Coates v Western Australia* [2009] WASCA 142.

The Queensland legislation does not qualify the concern about publicity to those cases where judicial directions are insufficient.¹²² However, such reasoning has appeared in judicial decisions where judge alone applications were refused.¹²³ Further, the fact that only two of the six Queensland applications citing publicity successfully resulted in ‘no jury’ orders,¹²⁴ with the two that were granted unopposed by the prosecution, suggest that the Queensland courts are taking a cautious approach.

It needs to be questioned whether such an approach is justified. Part of the reasoning behind the rare granting of permanent stays on the grounds of prejudicial publicity relates to the extremity of the result, that is, an accused will escape trial. A judge alone trial cannot be equated with no trial.¹²⁵ In *R v Fardon* [2010] QCA 317 Muir JA confirmed the approach of the primary Judge that the applicant’s burden in requesting judge alone trials was less onerous than that for a stay of proceedings.¹²⁶

Other prejudice

Research in South Australia and New South Wales suggests that sex offenders are most likely to choose judicial fact finders.¹²⁷ Similar results appear in the Western Australian cases researched here, where the most prevalent offences are murder and sex offences.¹²⁸ And of

¹²² The Office of the Director of Public Prosecutions, *Director’s Guidelines*, http://www.justice.qld.gov.au/_data/assets/pdf_file/0015/16701/Directors-guidelines.pdf viewed 4 September 2010 do not mention judge alone trials.

¹²³ *R v Pretorius* [2009] QDC 414 and see *R v Fardon* [2010] QCA 317 at [35] discussing the primary judge’s reasoning.

¹²⁴ See Table 1.

¹²⁵ In *R v Twomey* [2010] 1 WLR 630 at 638 it was said that it ‘does not follow from the hallowed principle of trial by jury that trial by judge alone, when ordered, would be unfair or improperly prejudicial to the defendant. The trial would take place before an independent tribunal.’

¹²⁶ *R v Fardon* [2010] QCA 317 at [43].

¹²⁷ Waye, n8 at 427 and Willis, n8 at 148 and 150. See also recent comments by the Attorney-General of the ACT who noted high levels of choice for judge-alone trials in sex offences and those involving death of persons: in ‘Reform to Judge-Along Trials’ Media Release 12 February 2011 available at <http://www.chiefminister.act.gov.au/media.php?v=10450> viewed 30 March 2011.

¹²⁸ This conclusion though is based only on accessible judgments. Another case involving sex offences, which was the subject of trial by judge alone was *Bropho v Western Australia [No 2]* [2009] WASCA 94. For a judge

the eight Queensland cases examined in detail, only two did not involve sex offences.¹²⁹

Given these results it is unsurprising that a commonly argued reason for a judge alone trial is other prejudice likely to be suffered by the accused, either because of the nature of their offending and the evidence to be disclosed at trial, including for some, their past criminal conduct.¹³⁰ These arguments have met with some success in Western Australia,¹³¹ but on the whole, considering Queensland as well, the Courts have generally reasoned that prejudice can be alleviated by resorting to other measures, such as careful judicial direction. This is particularly the case in matters where the defence intends to introduce the prejudicial material as a tactical decision.¹³²

Technical legal issues

Another category of reasons for when judge alone trials are held is those involving technical legal issues that relate to the particular offences or defences relevant to the cases.¹³³

However, the words of Mackenzie SCJ bear as a warning to those appearing in similar

alone trial for other offences see *Smallbone v Western Australia* (2008) 187 A Crim R 57, involving dishonesty offences.

¹²⁹ The other offences being murder (*R v Clough* [2009] 1 Qd R 197) and unlawful wounding (*R v Brady* [2009] QDC 48.)

¹³⁰ In WA, such reasons were mentioned in *Western Australia v Martinez* (2007) 172 A Crim R 389, *Arthurs v Western Australia* [2007] WASC 182, *TVM v Western Australia* (2007) 180 A Crim R 183, *Coates v Western Australia* [2009] WASC 142 and *State of Western Australia v ARF* [2009] WADC 156. For a discussion of the Qld position see the comments following the table above.

¹³¹ For example in *Arthurs v Western Australia* [2007] WASC 182 and in *Coates v Western Australia* [2009] WASC 142 (but the judge alone application here was unopposed).

¹³² See *R v Pretorious* [2009] QDC 414; *Unreported Case - File No. 845/09, 846/09* (Brisbane District Court, 1 July 2009). This may be a distinguishing factor from *Arthurs v Western Australia* [2007] WASC 182 where a judge alone trial was ordered where prejudicial material was necessarily going to be introduced as part of the prosecution's case.

¹³³ See for example *Western Australia v Tarau* [2005] WASC 290, *Western Australia v Illey* [2006] WASC 107 and *Hone v Western Australia* (2007) 179 A Crim R 138 in which applications for judge alone trials were made where a defence of insanity was to be raised, and in Qld see *R v Clough* [2009] 1 Qd R 197 and *R v SAA* [2009] QDC 5. Note also the reference to technicalities and matters of law in the WA and NSW DPP Guidelines: Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf viewed 4 September 2010 and Office of the Director of Public Prosecutions, *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, <http://www.odpp.nsw.gov.au/guidelines/FullGuidelines.pdf>, viewed 4 September 2010.

matters:

Judicial comments that certain kinds of cases tend to be heard by Judge alone should not be treated as more than an observation based on current experience, or perhaps fashion, in the jurisdiction in which they are made and perhaps a reflection that the kinds of issues in them are often of a kind which influences the decision whether it is in the interests of justice that there should be trial by Judge alone or not.¹³⁴

Lengthy trials

There is some controversy as to whether the desire to condense lengthy proceedings is a valid reason to grant a judge alone trial. The Western Australia DPP guidelines specifically recognise that ‘cases which are likely to continue over a long period of time may be better suited to trial by judge alone.’¹³⁵ The New South Wales DPP also recognised an underlying principle, in their determinations, of achieving justice in the most expeditious manner.¹³⁶ Such considerations were not included in the amended provisions but the length of the trial was a factor to which Woods DCJ referred.¹³⁷ Judges in both Western Australia and Queensland are not convinced. Heenan SCJ acknowledged that a judge alone trial may be shorter but asserted that it may not always be the case, especially given the requirement for judges to supply detailed written reasons.¹³⁸ Everson DCJ stated that ‘amorphous concerns

¹³⁴ *R v Clough* [2009] 1 Qd R 197 at 202.

¹³⁵ Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, p 19, http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf, viewed 4 September 2010. The legislation in Qld and WA specifically refers to trial length, concerned with lengthy trials being unreasonably burdensome on a jury: *Criminal Code 1899* (Qld)s 615(4)(a); *Criminal Procedure Act 2004* (WA) s 118(5)(a).

¹³⁶ Willis, n8 at 146; Office of the Director of Public Prosecutions, *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, <http://www.odpp.nsw.gov.au/guidelines/FullGuidelines.pdf>, viewed 4 September 2010.

¹³⁷ *R v GSR (3)* [2011] NSWDC 17 at [22].

¹³⁸ *Western Australia v Martinez* (2007) 172 A Crim R 389 at 391.

about the nature and cost of jury trials do not ... present sufficient grounds' for a judge alone trial.¹³⁹

Matters that Ought to be Excluded

In an early judge alone trial in South Australia, the presiding Judge recommended legislative amendments to exclude the capacity of an accused to elect judge alone trials in serious matters such as treason and murder. White SCJ was concerned that, in cases of murder, issues that require the application of community values, such as self-defence, provocation and intention, arise frequently.¹⁴⁰ No such amendments were made in South Australia. In fact early research indicated that murder was one of the most common offences for which the election was exercised.¹⁴¹ And at least one Western Australian Judge contends that often in notorious cases of homicide, objective contemporary community standards do not arise for consideration.¹⁴² There is no question that taking a human life is wrong, the question in most cases is instead whether the accused has committed the offence.¹⁴³

The proposed Bill in the Australian Capital Territory aims to automatically exclude particular offences from the realm of judge alone election, specifically sex offences and those involving the death of a person.¹⁴⁴ Although the importance of jurors in reflecting community standards was provided as justification for this proposal,¹⁴⁵ a generic exclusion

¹³⁹ *R v Brady* [2009] QDC 48 at 3.

¹⁴⁰ *R v Marshall* (1986) 43 SASR 448 at 497.

¹⁴¹ Willis n8 at 147 looked at the number of judge alone trials between 1989 and 1 September 1993 and found that murder featured in the top three offences.

¹⁴² *Arthurs v Western Australia* [2007] WASC 182 at [65]. The exceptions included cases that involved self-defence or provocation.

¹⁴³ *Arthurs v Western Australia* [2007] WASC 182 at [65].

¹⁴⁴ *Criminal Proceedings Legislation Amendment Bill 2011* (ACT) presented 17 February 2011, Pt 3, s 10 and s 13, sch 2.

¹⁴⁵ 'Reform to Judge-Alone Trials' Media Release 12 February 2011 available at <http://www.chiefminister.act.gov.au/media.php?v=10450> viewed 30 March 2011.

of the more serious matters with no discretion seems instead to be more concerned with simply reducing the numbers of judge alone trials.

The list of matters where jury trials take precedence was most extensive in the New South Wales DPP guidelines. The statement that circumstantial cases or those where credit is in issue 'should ordinarily be heard by a jury'¹⁴⁶ extended the sphere of exclusion far greater than any State's legislation. However, express statements by some members of the Queensland judiciary appear to accord with this extension. Two cases have mentioned the need for questions of credibility to be heard by a jury.¹⁴⁷ But, in at least two of the judge alone trials in Queensland, witness credibility was important in the decision.¹⁴⁸

An early Western Australian judgment also supported the larger sphere of exclusion in circumstantial cases where evidence reliability would need to be considered and inferences drawn.¹⁴⁹ The reasoning is consistent with assertions by Lord Devlin that the jury is superior to judges in evaluating credibility or reliability as the 'impression made upon a mind of twelve is more reliable.'¹⁵⁰ However, the Court of Appeal deflated the sphere, not conceding that cases involving credibility judgments are more appropriately dealt with by a jury:

While the trial judge may be deprived of the advantage of a free interchange of ideas with peers he or she has an advantage that ordinary members may lack. Trial judges

¹⁴⁶ As stated in the guidelines referred to in Willis, n8 at 146; Office of the Director of Public Prosecutions *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*, <http://www.odpp.nsw.gov.au/guidelines/FullGuidelines.pdf>, viewed 4 September 2010.

¹⁴⁷ *Unreported Case - File No. 845/09, 846/09* (Brisbane District Court, 1 July 2009) and *R v Pretorius* [2009] QDC 414.

¹⁴⁸ *R v Schloss* (District Court of Queensland, unreported, 5 November 2008) and *R v Ferguson* [2009] QDC 049.

¹⁴⁹ *Western Australia v Martinez* (2007) 172 A Crim R 389. Shortly afterwards though this aspect of the decision was called into question: see earlier discussion of *Arthurs v Western Australia* [2007] WASC 182.

¹⁵⁰ Devlin, n18, p 140.

have consistent and continuing experience of fact-finding and of the making of the decisions in a situation that demands an objective and dispassionate mind.¹⁵¹

In some Western Australian cases that have proceeded to trial by judge alone credibility was in issue. In *AK v Western Australia* (2008) 232 CLR 438 the High Court considered an appeal in such a case. Heydon J was the only judge to outline the arguments for and against judges making credibility decisions, but as the issue was not directly on point it was not finally determined. Nevertheless, as confirmed in that case, the required transparency in the judge's reasons provides added protection from the infallibility of a single mind.¹⁵²

As such, while the provisions about the sort of matters that may produce refusals of a 'no jury' order are identical, they have generated different results in each jurisdiction.

Conclusion

The legislative advances in New South Wales, Queensland and Western Australia, moving from the election to judge alone trials, first flirted with in South Australia, to a statutory discretion to be exercised by a judge following an application for a 'no jury' order, reignite the debate as to the value of jury trials as opposed to decisions made by professional judiciary.

As previously discussed, in *Brown v The Queen* (1985-1986) 160 CLR 171, the High Court was split as to the purpose of s 80 of the *Commonwealth Constitution*. The minority

¹⁵¹ *Coates v Western Australia* [2009] WASCA 142 at [10].

¹⁵² *AK v Western Australia* (2008) 232 CLR 438 at 478. The case of *R v DAT* [2009] QCA 181 provides an example of a successful appeal against conviction following a judge alone trial on the basis that it was unreasonable and unsupported. The Court of Appeal determined that a finding that his Honour had articulated on the facts was speculative. This information would not have been available for review following a jury trial, given the confidence of jury deliberations.

argued that it was the accused's choice to waive the right to trial by jury and the majority proposed that the provision had broader application, to what was in the interests of justice. From the preceding analysis it appears that there is still little consensus in the Australian judiciary or the legislature as to whether the accused's choice is to be preferred or whether there is a presumption of a jury trial due to the community's interest.

Certainly in Queensland, if Chesterman JA's *dicta* is followed, the courts will continue down the path of favouring jury trials, whatever the reason advanced for the judge alone application. Such an approach will likely result in the persistent reliance on judicial directions to avert any prejudice that may be anticipated and a continued burden on judges to be able to simply explain complex evidence and legal concepts to juries in the hope that they understand. Any arguments as to the length of the trial would also seem redundant and matters involving witness credibility and circumstantial evidence will likely take a permanent place in the sphere of exclusion from judge alone trials.

Currently, the percentage of accused that actually face judge alone trials is low and it is not clear whether there is a significant difference in numbers between the jurisdictions where there is an election to proceed by judge alone and those jurisdictions that are subject to discretion.¹⁵³ As such, concerns that judge alone trials are in danger of superseding trials by jury seem largely unfounded and if the community participation theory continues to be

¹⁵³ Waye, n8 at 427 reported a figure in SA of 3 to 5 % of all trials. Willis, n8 at 148 provided figures that equated to approximately 6% in SA in the years 1993-1995 and 5% in NSW in the years 1992-1995. Dessau n15 at 48 reported that between August 1991 and May 1993 in NSW it was 5 % but rising and for SA in 1992 it was 7.5%. For recent figures see the Standing Committee on Law and Justice, *Inquiry into Judge Alone Trials under s.132 of the Criminal Procedure Act 1986* (November 2010) Report 44 who noted at [2.9] that in NSW 5.1% of trials were judge alone between 1993 – 2007, at [2.31] that in WA the number of judge alone trials represent approximately 1% of all trials and, at [2.32] that in Qld since the date of assent in 2008 to 30 June 2010 the number of judge alone trials granted represent only 0.5% of the trials over that time. Note however that it has been reported that in the ACT the rate of election for judge-alone trials was 56% and that South Australia was at 15%: 'Reform to Judge-Along Trials' Media Release 12 February 2011 available at <http://www.chiefminister.act.gov.au/media.php?v=10450> viewed 30 March 2011.

advanced this position will be maintained. But whether this presumption in favour of jury trials is ideal requires further examination.

Those advocating a presumption of trial by jury often rely on arguments, already stated, regarding the need to maintain public confidence in the system. But does a judge alone trial undermine public confidence? The dissatisfaction sparked following the judge alone decision to acquit in *R v Ferguson* [2009] QDC 158 illustrated by the comment below, could be cited in support of an affirmative answer:

This is a perfect example as to why we should NEVER have a judge only trial...This make [sic] no sense to me!¹⁵⁴

However, the community reaction following the Ferguson acquittal was a drop in the ocean when compared to the outrage he faced pre-trial. Also, the community reaction following the *jury's* verdict of guilt in the case of *Martinez v Western Australia* also met with disquiet. This disquiet continued, following the Court of Appeal's decision to overturn the conviction,¹⁵⁵ and was argued to undermine community confidence in the justice system.¹⁵⁶

Members of the judiciary have questioned '[t]he proposition that "the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge"', finding it not supported by empirical evidence, nor having any basis in law.¹⁵⁷

Further, there is an absence of reporting of significantly lower levels of public confidence in systems where the accused elects judge alone trial without the public interest protection of the discretion. This may be due to the requirement of transparency in judge

¹⁵⁴ Posted by: Annoyed of Melbourne 1:36pm March 06, 2009

<http://www.news.com.au/heraldsun/story/0,21985,25147471-661,00.html> viewed 23 July 2009.

¹⁵⁵ *Martinez v Western Australia* (2007) 172 A Crim R 389.

¹⁵⁶ *McCusker*, n8 and *Arthurs v Western Australia* [2007] WASC 182 at [73].

¹⁵⁷ *Arthurs v Western Australia* [2007] WASC 182 at [72] and *R v Fardon* [2010] QCA 317 at [84]-[86]. See also *New Jersey v Dunne* (1991) 590 A.2d 1144, 124 NJ 303 at 332 per Handler J (dissenting).

alone decisions, which also assists the appellate courts in detecting error.¹⁵⁸ The New South Wales legislation echoes that of the other jurisdictions with respect to judge's verdicts.¹⁵⁹ That is, judges 'must include the principles of law applied ... and the findings of fact on which the Judge relied'.¹⁶⁰ In 1998 the High Court heard an appeal against a conviction following a judge alone trial.¹⁶¹ This case highlighted the benefit of the extra transparency in reasoning in appeals against judges' verdicts. Indeed, the High Court noted that such reasoning was necessary so that justice is not only done but seen to be done.¹⁶²

The necessity to give reasons ensures that any prejudice or other errors in applying complex evidence to the decision can be objectively determined following a judge alone trial. The same cannot be guaranteed following a jury trial and the experience in both Queensland and Western Australia of trials proceeding by jury after judge alone trials were refused, ultimately resulting in convictions that were later found to be unsupportable on the evidence, illustrates this quandary.¹⁶³

Consideration must also be given to the role of choice or any presumption of a jury trial or otherwise in other proceedings presided over by professional decision makers, such as in some Children's Courts or Mental Health Courts. And the expanding ability to have indictable offences dealt with summarily, often at the accused's election, should also be

¹⁵⁸ *AK v Western Australia* (2008) 232 CLR 438 at 478.

¹⁵⁹ *Juries Act 1927* (SA), s 7(4); *Supreme Court Act 1933* (ACT), s 68C; *Criminal Procedure Act 2004* (WA), ss 119 – 120; *Criminal Code 1899* (Qld), s 615C.

¹⁶⁰ And the judge must take relevant warnings into account: *Criminal Procedure Act 1986* (NSW), s 133.

¹⁶¹ *Fleming v The Queen* (1998) 197 CLR 250.

¹⁶² *Fleming v The Queen* (1998) 197 CLR 250 at 265.

¹⁶³ In *R v Fardon* [2010] QCA 317 Chesterman JA noted that the confidence the trial judge placed in the jury's ability to disregard prejudicial publicity was misplaced. See also: *Western Australia v Martinez* (2007) 172 A Crim R 389.

remembered, so too the ability of the accused to avoid trials entirely by pleading guilty.¹⁶⁴

The question must be asked: are these proceedings justifiably different that public confidence is not required or indeed not existent?

Like South Australia and the Australian Capital Territory, Canada gives precedence to an accused's choice to waive their right to a jury trial unless legislated otherwise.¹⁶⁵ To do otherwise, in Australian States where the Courts have a discretion, by preferring the participation theory, may indeed be appropriate if the grounds of that theory are solid, the difficulty lies in finding that this is the case.

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¹⁶⁴ *New Jersey v Dunne* (1991) 590 A.2d 1144, 124 NJ 303 at 332 per Handler J (dissenting) 'Moreover, the Supreme Court in *Patton* noted that the argument that public policy requires a jury trial is fallacious, observing that a defendant may plead guilty and thus dispense with trial altogether.'

¹⁶⁵ See for example *R v Turpin* [1989] 1 SCR 1296.