Judge Alone Trials

Introduction and Disclaimer

1. As you all know, it is extremely likely that judge alone trials will soon become part of the legal landscape in Tasmania. The *Criminal Code Amendment (Judge alone trials) Bill* 2021 was introduced into the House of Assembly in October 2021, and passed through that house on 24 November 2021. The bill is currently before the Legislative Council.

2. It is a reasonable inference that the impetus for the introduction of judge alone trials in Tasmania was the Covid 19 pandemic, and its impact on jury trials. Jury trials were suspended in 2020 and have now been suspended again because of the introduction of the Omicron variant into Tasmania. Even when jury trials start again, which will happen hopefully on 28 March, there will be real potential for trials to be impacted or even aborted because of the incapacity of key participants arising from illness or restrictions associated with the pandemic. The link between the introduction of this procedure and the pandemic is strongly supported by the timing of the legislation, and comments by the Attorney in the second reading speech.

3. Further, although the pandemic, which hopefully is a temporary condition, may have triggered its introduction, there is nothing temporary about the proposed operation of this legislation. Judge alone trials are intended to become a permanent feature of the criminal justice system in this state. They have been in place in mainland jurisdictions, in particular the ACT, South Australia, New South Wales, Queensland and Western Australia, for considerable and varying periods of time. The first was South Australia, where they were introduced in 1984, followed by New South Wales in 1990. In Victoria, they were introduced in July 2020 expressly for the purpose of dealing with problems caused by the pandemic. That legislation was repealed in April 2021, but is about to be reinstated, again for a limited period, probably 12 months. This is being done because of concerns over the criminal trial backlog. It is important to understand the widespread nature of judge alone trials in Australia, because, although the legislative framework in each state is different, there are features which are similar to our proposed legislation, and there has now developed in many of these jurisdictions a body of jurisprudence around the interpretation and application of the provisions. A number of cases have come before the High Court. I have no doubt that cases from other jurisdictions will be useful in construing the new legislation in this State.

4. The other aspect of the experience in other jurisdictions that is worth mentioning is that the procedure has engendered considerable policy debate, both within the legal profession and the wider community. Quite frankly, the debate seems to focus more on the desirability of, and efficiencies of, jury trials by way of direct comparison with judge only trials, and seems, to me, to largely miss the point. The introduction of judge alone trials should not and will not, if the legislation is applied correctly, create an either/or situation. There is no question that judge only trials have proved popular in those jurisdictions where they are currently in place, but there is no suggestion that they have taken over or even threatened the jury trial system. On the other hand, it is beyond dispute that judge alone trials, used appropriately, complement the jury trial system by catering for those cases which test the adequacy and fairness of the jury system. This use of judge alone trials was highlighted by the Attorney in the second reading speech of this legislation, where it was acknowledged that trial by jury is, and will remain, the cornerstone of the legal system, but that the introduction of judge only trials was not just to respond to challenges due to the Covid 19 pandemic, but would improve options for determining matters within the criminal justice system. The conversion of this aspiration into reality will, as with all legislative schemes, depend largely on the judgement and vigilance of the courts in the application of the new legislation.

5. It is difficult to obtain detailed statistical analysis on the use of this procedure in other jurisdictions. However, some statistics out of New South Wales, which has had judge alone trials since 1990, indicate increased use of judge alone trials. For example, in 1993, judge alone trials accounted for 7% of all criminal trials. By 2013, this figure had risen to 17%. Interestingly, as the process has become more entrenched, acquittal rates have actually declined. In 1993, acquittal rates for judge alone trials were 62.4%, but by 2013, only 25% of Judge alone trials resulted in acquittal. By comparison, the acquittal rate for jury trials in 1993 was 52.3% and in 2013, 35%. It is impossible and dangerous to draw any firm conclusions from such a narrow statistical example. It would seem, however, that, at least in New South Wales, the increased use of the procedure is not being driven by a perception that results are weighted in favour of the accused. Hopefully, this confirms the utility of the process for reasons other than simply the perceived result.

6. It is useful to have some understanding of the policy debate, because many of the underlying philosophical arguments for or against judge alone trials have obviously informed the policy considerations reflected in the proposed legislative model. It will

become apparent as we discuss the details of the bill that judge alone trials seem to be targeted at cases in which a jury trial might be seen as less effective in ensuring a just outcome and protecting the rights of the accused than normal. However, it is also apparent that an effort has been made to preserve the use of jury trials in cases which are seen as traditionally amenable to determination by a jury, for example, where the decision-making will involve the application of community standards.

7. At this point, I should insert a brief disclaimer. The purpose of this session is to give a brief outline of the legislation and offer some thoughts on practical considerations and issues which may arise in its application. Obviously, I am speaking on extra curial basis, and my comments are my own and certainly not intended to reflect the views of my colleagues. I do not intend to offer any concluded views as to any specific legal question, and do not intend to examine the case law in any detail. I am sure that I will be involved in such an examination, in my day job, soon enough. Any views I express are formed on a very preliminary basis and will not necessarily reflect how I would approach any particular question after argument in court.

8. As a further point of disclaimer, I am obviously dealing with the provisions in the bill on the assumption that they will pass through the Parliament and without amendment. Time will tell as to whether that assumption is justified.

Making the order

9. When the bill becomes law, the provisions dealing with an application for a judge alone trial will be contained in the new section 361AA of the *Criminal Code*. That section will operate as an exception to section 361, which provides for trial by jury in the case of a plea of not guilty, or indeed any other plea other than one of guilty or as to jurisdiction. Under subsection 9 of the new provision, if an order is granted, then a reference in the *Code* or any other legislation to a trial by jury is taken to include trial by a single judge. An example of this in operation would seem, to me, to be in respect of the requirement in section 15(3) of the *Criminal Justice (Mental Impairment) Act* 1999. That section expressly requires that in a special hearing in the Supreme Court, the question of whether a defendant is not guilty of the offence must be determined by a jury. The effect of subsection 9 is that the reference to trial by jury will be taken to include trial by single judge where the order has been made. It will be interesting to see how this plays out in practice given that a person who is unfit may have difficulty in providing instructions to his or her lawyers to make the application

and/or to give informed consent, which, as we will see, is an essential precondition of the making of a judge alone order. On the other hand, the experience in other jurisdictions would indicate that judge only trials are seen as particularly appropriate and frequently used in cases involving the resolution of mental health issues. This is undoubtedly because of the need to consider and resolve expert psychiatric evidence.

10. In terms of the availability of a judge alone trial, no state crime is excluded from the ambit of the provision. However, as we will see, the type of crime can play a role in the factors relevant to the Court's assessment as to whether there should be a judge alone trial. Further, the bill specifically provides that an order may not be made in respect of an offence against the law of the Commonwealth. This provision acknowledges section 80 of the Australian Constitution which provides for trial by jury exclusively in respect of indictable offences against Commonwealth law. As a matter of practice, it would seem probable that a judge alone trial will not be available where the indictment includes a Commonwealth offence, albeit that it also includes state offences.

11. The Court's jurisdiction to make an order for judge alone trial will be activated by an application by a party to the proceedings in respect of a crime. This obviously includes the prosecution and the accused. Where there is more than one accused to be tried together for the crime, an order can only be made if each accused has made an application. There is no apparent provision for the Court to make the order of its own motion. Further, the right of the prosecution to make an application is restricted to circumstances in which the accused person in respect of the crime has given informed consent to the proposed order, or, where as part of the application, the prosecutor requests the Court to make the order without such consent in accordance with subsection 8. The wording is a little clumsy, but in effect subsection 8 provides that the Court may make an order without the informed consent of the accused if it is satisfied that there is a significant risk that an offence under section 63 of the *Juries Act* may occur if the accused is tried by jury. That section creates offences dealing with influencing or threatening jurors. Because this consideration is a pre-requisite to the right of the prosecution to make the application, and reliance on subsection 8 must be included as part of the prosecution's application, presumably the prosecution would need to be in possession of sufficient material to satisfy the Court of the significant risk of jury tampering, at a relatively early time in the proceedings.

12. I make this comment because the provision also provides for a fairly tight time limit in respect of any application, whether by prosecution or defence. An application by any party for a judge alone trial may only be made within a three month period immediately after the accused person has been committed for trial for the crime. It would seem, therefore, that the three month period commences on the date that the order for committal is made by the magistrate. There is provision for the Court to consider an application made outside of this period "if the Court is satisfied that the applicant has provided a reasonable explanation for the delay in the making of the application".

13. This time limit may raise some interesting practical questions. The second reading speech of the Attorney suggests that this time restriction was chosen to provide "transparency and certainty as to when the timeframe commences, and avoids the potential adverse consequences of unfettered right to apply at any time". The adverse consequences include the potential for judge shopping, delays and unnecessary use of resources if applications are made at the last minute. I think it remains to be seen how this time limit will play out in practice. As we are all keenly aware, a trial often takes place well over a year, and sometimes much more, after committal. It is highly unlikely that the defence will have an indictment or Crown papers within three months of committal. However, I am not sure if the transfer of preliminary proceedings to the Magistrates Court will, or is, affecting this situation. Certainly, the second reading speech would suggest that the provisions of the backlog bill were seen as aligning with the process for judge alone trials, so the theory at least is that they would be having some effect in reducing the gap between committal and trial. In any event, there is no guarantee that the crime for which the accused has been committed will be the crime charged in the indictment. In the case of the prosecution, one would think that the potential for jury tampering is something most likely to come to the attention of the authorities as the trial becomes imminent. One can therefore envisage many situations in which a late application will be made, with the claim that there is a reasonable explanation for the delay.

14. However, I would think that the judges will be wary about permitting the time restriction to be undermined. This is mainly because of the potential for judge shopping. Because this Court does not operate with a docket system, it seems to me that there is real opportunity for judge shopping, and late applications are likely to facilitate this. The identity of the judge may be considered by some to be a critical factor in deciding whether a judge alone trial in a particular case is desirable. However, the policy behind the legislative model is

clear: the identity of the judge must not be a factor in a party's determination as to whether or not to seek or agree to a judge alone trial. I don't think anyone would seriously quibble with the validity of this policy. Judge shopping is generally considered to be undesirable and not amenable to the proper administration of criminal justice. It is regarded as posing a threat to the fairness and consistency of outcomes, and to the efficient operation of the criminal justice system. I think that the Court will be very careful about keeping faith with this policy. In practical terms, this means, I think, that the parties will need to act promptly if fresh circumstances which might support a late application, arise outside the three month period. Any undue delay in making the application after the relevant circumstances arise, is likely to tell against the success of time being extended.

15. There are some other provisions which are of importance with respect to limiting the potential for judge shopping. These provisions complement the time limit. They are all effectively designed to lock the parties into a judge only trial at a relatively early stage in the proceedings, and to avoid a change of mind and hence process, late in the proceedings. The particular provisions are:

    (a) There is provision that if an application is made but later withdrawn before determination, then the applicant may not make another application in respect of the crime except if the Court is satisfied that exceptional circumstances exist. Exceptional circumstances is not defined. This provision restricts the right of the applicant to make a second application whether it be prosecution or defence. However, it applies only to the applicant for the order. It will not stop the other party from making an application, provided the time limit can be overcome.

    (b) There is also provision that an order made for a judge alone trial can only be revoked if the Court is satisfied that the information upon which the order was made was false or misleading in a material particular, or the Court otherwise considers that there are reasonable grounds to revoke the order. There is no reference as to who may apply for a revocation, so presumably it could be the applicant or any other party. Apart from the specification of false or misleading information, there is no guidance as to what else might constitute reasonable grounds for revocation. However, without wanting to pre-empt any determination in that regard, I think it is likely that the courts will be reluctant to accede to applications based, either expressly or apparently, on tactical considerations, including in particular the identity of the judge who is to hear the trial.

16. A question may arise as to whether a party is entitled to make a second application if the first is unsuccessful. The legislation seems to be silent on this question although the provision which restricts a second application where the first is withdrawn may arguably imply an assumption that a second application is otherwise permitted. An order for judge alone trial may also be regarded as a procedural or interlocutory matter and this question may be relevant to the argument.

17. I will now deal with the provisions which inform the Court's determination as to whether there is to be a judge alone trial. The critical features of the scheme are that, with one specific exception, there cannot be a judge alone trial without the informed consent of the accused and, where there is more than one accused, all of them. The prosecution does not have a similar right of veto. On the other hand, no party has a right to a judge alone trial. This is because although the Court cannot make an order of its own motion, the Court will have the final say as to whether there is to be a judge alone trial. It may be implicit in the legislative scheme that the Court has a general discretion with respect to this question, but, in any event, there is specific provision that the Court may not order a judge alone trial unless satisfied that it is in the interests of justice for there to be such a trial. This is the case even if all parties desire a judge alone trial.

18. Subsection 5 sets out the essential preconditions of an order. It provides that the Court must not make an order unless it is satisfied of the following matters:

    (a) The accused person has given informed consent to the order. I note that the only exception to this is in the case of the prosecution application where the Court is satisfied of a significant risk of jury tampering. I will come back to what is meant by informed consent.

    (b) It is in the interests of justice for the order to be made. I will come back to this question as well.

    (c) If the accused person is charged with more than one offence and the offences are to be tried together, that the order will relate to all charges to be tried together. I must say at first glance I found this to be both a strange and perhaps unnecessary provision. Firstly, if there is to be a judge alone trial, it is a little difficult to see how, in the same trial, the judge would be determining one charge and the jury others, although that may simply be what the section, in an abundance of caution, seeks to guard against. A more practical

issue is that once again it is highly unlikely that the defence, and indeed the Court, will know what charges are to be included in the indictment until well after the expiration of the three month period. Also, one would think that, in practice, it will be necessary to deal with severance applications before considering whether there is to be a judge alone trial. It remains to be seen how all this will play out.

(d) Similarly, if there is more than one accused to be tried in respect of the crime, the order can only be made if all accused have made the application and each of them has given informed consent. Again, the question of joinder is something that may not be resolved within three month period. In any event, an order cannot be made in a multiparty case unless all accused join in.

19. There are specific provisions in relation to what is meant by informed consent. In fact, the Court may only be satisfied that the accused person has given informed consent if satisfied of each of the following matters:

(a) That the accused person understands the nature and effect of the proposed order;

(b) That the accused person has either been provided with legal advice about the effect of the order or has been offered and advised to obtain such advice, but has refused to do so; and

(c) That the legal practitioner who provided such advice has certified in writing as to its provision and as to whether the practitioner believes that the accused person has freely given the informed consent.

20. These are necessary preconditions to the Court making the relevant determination about informed consent. Ultimately, and notwithstanding the satisfaction of these preconditions, the Court must be satisfied as a matter of fact of the existence of informed consent. These new provisions are to be contained in the *Criminal Code* so, of course, the definition of consent in section 2A of the *Code* will apply. The basic premise under that provision is that for there to be consent, there must be free agreement. It would seem to me that these provisions will preclude agreement resulting from any form of pressure, threat or condition irrespective of its origin. It is not helpful for me to speculate about cases in which apparent agreement might not amount to free agreement.

21. The requirement that the Court be satisfied that a judge alone trial is in the interests of justice takes the ultimate decision out of the hands of the parties and places that decision in the hands of the Court. My preliminary thought is that this requirement does not provide the Court with a general discretion, but rather calls for an evaluative judgement. Of course, it might also be arguable that even if all of the preconditions including a finding that it is in the interests of justice are satisfied, that the question of whether the Court makes the order is still a matter of discretion. I have not really thought this through but it is difficult to imagine a circumstance in which a court who has made a positive determination that the order is in the interests of justice, would not then make the order in the exercise of discretion.

22. Subsection 7 provides that, in determining whether it is in the interests of justice to make an order for a judge alone trial, the Court is to take into account whether the crime to which the order relates involves an element of a question of fact that is more appropriate to be determined by a jury, to ensure the community standards and opinions are reflected in the determination. This includes, but is not limited to, an element relating to or a question of reasonableness, dangerousness, indecency, negligence and obscenity. It also provides that the Court may take into account any other matter or circumstance that the Court considers relevant. Another provision provides that in determining any question in respect of this application, the Court may inform itself in any manner it thinks appropriate.

23. A number of other jurisdictions have similar provisions requiring the Court to determine whether it is in the interests of justice to have a judge alone trial. It follows that there is a substantial body of case law dealing with this question, although much of it is views expressed by a single judge, often in the district or County Court, when determining an application. There are a few, not many, appellate cases. Most of these are from New South Wales although there are also examples from Queensland, Victoria and Western Australia. I do not intend to engage on a thorough examination of this jurisprudence, but it is worth mentioning in a general way some of the views expressed by courts in other states. There is, of course, a need to exercise some caution around this when seeking to apply these authorities in this state. The legislative context differs from state to state and this might affect the significance of these decisions.

24. In a general sense, it is possible to distil some principles which seem to have been applied by courts in other jurisdictions in respect of the application of the interests of justice test,

despite the different legislative models. A non-exhaustive list of principles and factors considered relevant to this question beyond the legislative factors already referred to include:

(a) The expression "the interests of justice" has a broad ambit. It includes not only the interests of the parties, but also the public interest in ensuring the integrity and proper functioning of the criminal justice system. The specific factors which may affect a particular case are not capable of exhaustive definition and the weight to be attributed to individual factors will vary from case to case.

(b) It has been accepted in a number of cases that there is no presumption or starting point for or against a jury trial. However, it has also been stated that the applicant carries the burden of convincing the Court that it is in the interests of justice that such an order be made. In the New South Wales decision of *Belghar,* [2012] NSWCCA 86, the Court of Criminal Appeal reasoned that the absence of a presumption in favour of a jury trial means that there is no burden of proof on an applicant to convince the Court that a judge alone trial is in the interests of justice. However, the Court also held that the decision "must be founded upon evidence", and that the applicant does carry at least the evidential onus. The evidential burden was important to the determination of that case. It is an interesting example of how these cases are determined in practice. The principal argument in favour of a judge only trial was the nature of the allegations and the potential for prejudice. The accused was alleged to have attacked his sister-in-law because of what the court described as extreme beliefs arising from his Muslim faith. The accused was concerned that he may not receive a fair trial because of the effect on the jury of adverse publicity about this question, as well as the risk that members of the jury may hold prejudicial views about people of the relevant faith. The trial judge ordered a judge only trial on this basis. However, the appeal court held that the trial judge had incorrectly assessed these risks in circumstances in which there was no adequate evidence as to whether "such views are widespread in the Australian community and will be likely to influence jurors". The Court also held that there was a need to consider whether such prejudice could be appropriately dealt with by jury directions. Needless to say, the judge alone order was overturned.

(c) A number of cases from other jurisdictions tend to suggest that the subjective views of the accused is a relevant consideration and weight should be given to the subjective

preference of the accused. This might particularly be so if the accused expresses a wish to be tried expeditiously by judge alone rather than endure a substantial delay for a trial by jury. This implies that the potential for delay might itself be an important consideration.

(d) Some particular factors which may be relevant to the interests of justice of trial by judge alone include:

(i) The length of the trial. This might apply particularly in the case of a long trial where a jury would be engaged for a lengthy period, increasing the difficulties with jury management and the risk that the trial might be aborted for some reason. Related considerations might be where, if there is to be a jury, there will be a need for lengthy legal argument, which could be dispensed with or at least significantly shortened if the trial is by judge alone.

(ii) The potential for complex, distressing, graphic or technical evidence.

(iii) The potential for prejudice. This can come in a number of forms. I have already mentioned the particular context of the *Belghar,* case. However, other examples are where the accused is publicly known, where there has been extensive pre-trial publicity in respect of the case, or where significant prior convictions are, in the particular circumstances of the case, likely to come to the knowledge of the jury.

(iv) The case in favour of a judge only trial might also arise where have been previous trials which have ended with jury discharge, either because of problems arising during the trial, which might well be repeated, or because of jury deadlocks. This would be particularly pertinent where it has happened more than once.

(v) I have already mentioned the question of delay. A particular example of this may be where future difficulties associated with the Covid 19 pandemic affect the capacity of the Court to conduct jury trials expeditiously.

25. The provisions which refer the Court to community standards and opinions also require a word or two. It would seem clear enough that cases involving dangerous driving, self-defence, indecency and obscenity will probably still be decided by juries. Other cases in which community standards may be important would include allegations of murder based on what the accused ought to have known under section 157 (1) (c), and those requiring

proof of dishonesty, where the jury must consider the standards of ordinary, decent people. However, the full ambit of this provision may throw up some interesting questions. In a paper entitled "Judge Alone Trials in NSW: Practical Considerations" presented by Peter Krisenthal, a Public Defender in Newcastle, to a continuing professional development seminar in 2016, the author examined cases in New South Wales which suggested that a decision as to whether community standards and opinions are likely to be reflected in the determination of the trial must necessarily be made in the context of the particular factual issues which arise in the case in question. He also discussed a controversy which had arisen in cases in that jurisdiction as to whether in appropriate cases, community standards and opinions inform factual determinations concerning the subjective intention of the accused. The thesis advanced in those cases was that judge alone trials were appropriate for cases where the issue was intention. Again, I do not intend to embark on a detailed consideration of this question, but raise it as an example of the grey areas which may arise when this legislation is in effect.

26. Another issue of interest, which may also involve consideration of the community standards provision, is the question of credibility, particularly where the case turns on assessment of credibility, such as in a word-on-word case. It is not clear as to whether this is a factor for or against a jury trial. I suspect that this is an area in which different judges will have different views. Once again, the circumstances of the particular case are likely to be important. Such a question actually involves fundamental considerations, such as the public interest in the proper administration of justice, including the need for the community to perceive that a trial has been fair and impartial, and to have confidence in the administration of the criminal justice system. In this sense, the underlying policy debates about the jury system may be reflected in the arguments in a particular case as to whether it is in the interests of justice to resolve a criminal case by a judge alone trial. Consider, for example, the high profile case involving a serious crime, where the verdict turns on the credibility of a single witness. Is public confidence better served by the case being decided by a judge, who will provide reasons which are exposed publicly and can be subjected to appellate review, or is the public likely to have more confidence in a verdict reached by the collective wisdom of 12 members of the community?. I am certainly not going to proffer my view about the answer to that question in this forum, but I suspect that we can look forward to many interesting arguments incorporating such high level philosophical considerations as this legislation is applied in practice.

Appeals in respect of applications

27. The legislation includes express provision authorising a party to appeal to the Court of Criminal Appeal against a decision granting or refusing to make an order for a judge alone trial; although the right of an accused to appeal a decision to make an order is limited to circumstances in which the order was made without his or her informed consent. As we have seen, this can only apply in circumstances where the prosecution has applied for the order and satisfied the court of a significant risk of jury tampering. An appeal is to be by way of a new hearing.

28. The experience in other jurisdictions would suggest that appeals from these decisions are relatively common, and often succeed. They are an exception to the normal position that an interlocutory decision cannot be the subject of appeal. A question may arise where there has been no appeal from the decision initially, and the trial proceeds as ordered, as to whether the grant or refusal of the application can form a ground of appeal to the verdict. This is another of many questions awaiting an answer in due course. Of course, the potential for such appeals at an interlocutory stage is another matter which may impact of the overall efficiency of the system, as time goes on.

Conduct of a judge only trial

29. The judge alone trial as a species is, of course, nothing new in this jurisdiction. Every summary trial before a magistrate and almost all civil trials before a judge are conducted on a judge alone basis. So practitioners are likely to be familiar with many of the general practical consequences of, and methodologies appropriate for, conducting a trial in front of a single judicial officer, as opposed to a jury. The differences in the style and tempo of advocacy are obvious. I imagine that no one will be surprised if some judges tend to become impatient with submissions that are no more than a repetition of trite propositions well-known to all in the court, or with rhetoric more appropriate to jury persuasion. Trials are likely to be shorter, and there will be more capacity for flexibility, particularly when circumstances arise which may require an adjournment. I suspect that most judges will be reluctant to deal with a criminal trial on a part heard basis, but I suppose theoretically there is no reason why that could not occur if the interests of justice so require. The risk of a trial being aborted will be largely eliminated.

30. Having said that, there are some particular observations that apply particularly to the conduct of judge alone trials conducted in respect of an indictment under the *Criminal Code*. An important matter, in my view, is whether the process of the trial prescribed by section 371 of the C*ode* applies to a judge alone trial. It is arguable that this may be the effect of the provision in the new section which provides that where a judge alone order has been made, a reference in the C*ode* to trial by jury is taken to include a trial by single judge. If section 371 applies, then the rules relating to the order of addresses, the effect of the defence adducing evidence, the restriction on the defence right to address at the commencement of the trial, the restriction on the prosecution calling rebuttal evidence and anything else referred to in that section will continue to apply in a judge only trial. Of course, one might expect that addresses will be shorter and involve a different style to a jury case, but the right of counsel to make a speech, and the order in which they occur would be the same. The contrary argument might be that the section refers expressly to addresses to juries, and therefore has no application to a judge only trial. These will be interesting questions. Another interesting question will be the potential for, and use of, written submissions. These are common in judge only civil trials but I am not sure how they will fit in with section 371. Once again, I wait with bated breath for the arguments.

31. Another piece of legislation which will continue to apply, of course, is the *Evidence Act*. One can envisage that the determination of objections in a judge only trial will be a point of difference from a jury trial. A single judge will have far more flexibility with respect to the timing of the determination of evidentiary questions. I see no reason why section 351(6) will not apply to a judge only trial, and therefore, the trial will be deemed to commence when the accused is called upon to plead. Thereafter, subject to the requirements of section 371, to the extent that they are applicable, the way in which the trial proceeds will be in the hands of the judge. It may still be convenient to sort out legal issues prior to taking evidence, but there will not be the same imperative that arises in a jury trial, for this to occur before the jury is sworn. Further, I see no reason why the judge would not have the option of taking evidence which is subject to objection on a *de bene esse* basis. Of course, care needs to be exercised in relation to taking such a course, and there may still be a need in appropriate cases to distinguish between a voir dire and the trial proper, but in general terms, that possibility should be available in appropriate circumstances.

32. A further point is that there is likely to be less argument about admissibility in a judge only trial. The extent to which this is so remains to be seen. Many arguments in jury trials

concern the risk of unfair prejudice, and require an assessment by the Court of the balance between probative value and the risk of unfair prejudice. The question arises as to the extent to which this risk is obviated, or even eliminated, by the fact that the final decision is being made by a judge rather than a jury. Of course, this issue is not new. It is an argument that arises from time to time in summary trials before magistrates, but the argument is likely be of critical importance in an indictable case. For example, the admissibility of tendency and coincidence evidence requires an assessment of the risk of unfair prejudice.

33. Again, I do not want to pre-empt decisions which will need to be made under particular provisions, but I will make some general observations about this question. There is nothing in the *Evidence Act* that limits the assessment of unfair prejudice to a jury. In a judge only trial, the judge, of course, is the fact finder. Contrary to popular belief, particularly among the legal profession, judges are human and subject to emotional reaction and otherwise the potential for misuse of evidence. In Mr Krisenthal's article, he refers to a comment by Martin CJ in *Arthurs v Western Australia* [2007] WASC 182 at [89]:

> "Despite their training and experience, it would, I think, be unwise to assume that Judges are any less vulnerable to human emotions and frailty than any other member of the community. However, it is in this context that an obligation to provide reasons appears to me to be of particular significance."

His Honour went on to indicate that the requirement to provide reasons was an appropriate safeguard in this regard. Of course, the suggestion is that judges will need to be alive to this issue and may need, in an appropriate case, to deal with their assessment of potentially prejudicial material in the reasons for the verdict.

34. On the other hand, it is obvious that many of the arguments which concern the potential for unfair prejudice in respect of a jury will be significantly obviated in a judge only trial. Firstly, the judge is, by training and experience, far more capable of separating emotional reaction from decision-making. Secondly, a fundamental difference between a jury trial and judge alone trial is that the judge will need to expose reasons for reaching a verdict. Hence, as already noted, the judge's use or misuse of evidence is far more likely to be detected than in a jury trial where there are no reasons given for the verdict. These considerations are likely to significantly impact on arguments which require a balance between probative value and unfair prejudice. The effect is likely to be a significant reduction in the need for legal argument.

The verdict

35. This leads to another important aspect of judge only trials: the verdict. The amendments will add a new subparagraph to section 383, which currently deals only with jury verdicts. The new subsection will provide that, in a judge alone trial:

    (a) The judge may return any verdict or make any finding that could have been made by a jury, and

    (b) Before returning the verdict or making a finding, the judge is to take into account any warning that would have been given to a jury and as far as practicable use the same principles of law and procedure as would have been used by a jury in returning the verdict or making the finding.

    (c) There is specific provision that the judge is to record in the judgment for the trial, the principles of law applied, and the findings of fact relied on when returning the verdict or making the finding.

36. So, again without offering a legal interpretation, I think the following practical observations can be made. Firstly, counsel will be expected to provide the same assistance to the judge in respect of directions, including warnings and matters of law, as is currently done in a jury trial. The reference to any warning that would have been given to the jury means that the judge will need to self-warn, not only as mandated by the *Evidence Act,* but also generally as arises from case law. It will also be necessary for the judge to set out the warnings and other legal directions in the written reasons, and to explain in the reasons the manner in which the warning has been taken into account. This was explained by the High Court when dealing with a similar provision in New South Wales legislation in *Fleming v R* (1998)197 CLR 250:

    > "The result is to require the recording and heeding of a warning, if one is called for in the particular case, and the giving of effect to it in a real sense by stating reasons why, notwithstanding the warning or as a consequence of it, a particular verdict is reached. A mere recording or statement of it, without more, would amount to an empty incantation. If these criteria are not satisfied in a particular case, then the judge is to be taken as not discharging the obligation imposed by s 33(3) that the warning be taken into account."

37. Secondly, the judge's power and right to convict of alternative crimes will be identical to that of a jury, as prescribed by s 332 of the *Criminal Code*. I would imagine that the same

considerations as currently apply in jury trials will apply to the single judge. An interesting question that will arise is the extent of any discretion reposed in the judge to ignore an alternative technically available, but simply not appropriate in the circumstances of the case. I note that s 332 uses the word "may", and, in practice, it is common for the judge, after consulting with the parties, to decline to leave one or more alternatives, notwithstanding that on a bare analysis of the case, they may be available. That question can go on the growing list of matters to be thrashed out in court in due course.

38. Thirdly, while it might be technically possible for a judge to return the verdict and promise to deliver reasons later, I think it is highly unlikely that most judges will adopt that course. Apart from the obvious and probably immediate interest of the complainant, the accused, and the public in knowing why a charge has been upheld or dismissed, the statutory requirement to fully expose reasons and the strict appeal time limits all compel a timely if not immediate delivery of reasons. Of course, this may have practical flow on effects. Speaking for myself, I think it is likely that I will want to prepare the decision immediately, and exclusively of taking on any other business. Perhaps I am being unduly optimistic, but my current thinking is that I will not start another case until I have prepared the reasons and delivered judgment after the judge only trial has finished. In that event, the effect will be similar to a jury trial, except that it will take longer because of the need to prepare detailed reasons before the delivery of the verdict. It will also delay the commencement of the next case. In a complex case, the delay could be significant. If this practice is adopted generally, there is a risk that any time gained during the trial by not having to deal with legal questions, and manage and direct juries will be lost by the time taken to prepare reasons. Once again, we will have to wait and see.

Appeals from the verdict

39. The next logical subject after verdicts is, of course, the appeal. I have already mentioned that the amended *Code* will contain specific provision for appeal to the Court of Criminal Appeal from the decision of a judge in respect of an application for trial by judge alone. However, I also want to briefly touch on the question of an appeal from the verdict after the trial.

40. The bill does not propose any amendment to the right of a person convicted, to appeal from the verdict. This is currently provided for by section 401(1). However, the bill will insert a new provision in section 401(2) which will provide the Attorney General with what would

seem to be an unrestricted right to appeal against a decision on a question of law or a question of fact, or against the verdict, presumably of not guilty, on the ground that it is unreasonable or cannot be supported having regard to the evidence. This raises some interesting questions. Under section 401(1), a person convicted requires leave to appeal on a ground which involves a question of fact or a mixed question of fact and law. This remains unchanged in respect of a judge alone trial. However, under the new provisions, the prosecution will not require leave to appeal on a question of fact. This difference may not have a significant effect in practice, but I think it is an interesting distinction in principle. Of course, because a judge will be required to expose findings of fact, the situation will be very different to a jury verdict. It remains to be seen, but one would expect that grounds asserting specific errors of fact are likely to become a regular feature of appeals from judge only verdicts.

41. I think it will also be interesting to see how the prosecution's right to appeal on the basis of an unreasonable verdict plays out in practice. Of course, appeals of this nature by the prosecution from summary decisions are not unknown. However, given the presumption of innocence, one would think that it will be a difficult task for the prosecution to convince the appeal court that a finding of not guilty is unreasonable or cannot be supported having regard to the evidence. I will not comment on the formulation of the test, because I think that is likely to be an issue for future determination. It would certainly seem that the traditional formulation of the test when the appeal is from a finding of guilt, which derives from *M v the Queen* [1994] HCA 63; (1994) 181 CLR 487, is not particularly relevant when the appeal is from the prosecution. I am thinking in particular of the comment "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced". I am not aware as to whether this expanded right of appeal for the prosecution has been introduced in other jurisdictions. If not, then it may well be that the interpretation and application of this provision is unencumbered by existing case law and this will provide an interesting question for the court of criminal appeal at some stage.

42. On the other hand, brief research would indicate that there are numerous cases from other jurisdictions dealing with appeals from findings of guilt in judge alone trials. Many of these cases are concerned with the sufficiency of reasons. I have already touched on the need for reasons to set out the principles of law and warnings, and to expose how the judge has dealt with these in coming to the ultimate conclusion. Another matter which is likely to be a

common feature of many cases, and will need to be dealt with in reasons, is the question of witness credibility. Of course, there is nothing new about this, it is a matter that is a regular feature of lower court appeals. There is no reason why the principles explained in cases such as *Phillips v Arnold* would not be applicable to credibility decisions by a judge sitting alone in an indictable case. The cases recognise the advantage enjoyed by a tribunal of fact in determining credibility, and I would think that these principles will apply to a judge sitting alone. This advantage is already recognised on appeals from judge alone decisions in the civil jurisdiction and decisions of magistrates. It is difficult to identify any significant difference in the criminal jurisdiction, apart from the fact that the judge will need to take into account warnings and apply the proper onus of proof when assessing the credibility and reliability of witness and its effect on the ultimate verdict.

Conclusion

43. In conclusion, I just want to touch briefly on the practical impact of the introduction of this process on the criminal case backlog. I think that there is real question mark as to how significant this impact will be, at least in the short term. Firstly, there is no question that there will be a need for judges to give reasons for granting or refusing an application, and, as I have already noted, that decision can be the subject of appeal. It remains to be seen what effect this extra pre-trial litigation will have on the already considerably overloaded criminal justice system and the criminal trial backlog. In theory, a judge only trial should be quicker and more efficient, but if there are a large number of applications and considerable controversy about whether the judge only trial is in the interests of justice in a particular case, then the extra arguments, judgement writing and appeals may neutralise the benefits, at least in terms of workload. I hope this is not the case because, as I have already discussed, I think that the judge only trial procedure has a real capacity to positively enhance and complement the jury trial system, but there is a need to be realistic about this.

44. Secondly, on any view, the amendments, once passed, will do nothing to bring forward the resolution of cases already awaiting trial. The three month time limit means that it will only be an exceptional case in which a judge only trial will be ordered in respect of cases where the committal date is more than three months before the eventual passing of the legislation. Because of this, the practical consequence is that although I suspect judges will be dealing with applications in respect of new cases soon after the legislation passes, if priority is

given to cases already awaiting trial, we are not likely to see judge alone trials actually conducted as a common feature of the criminal justice system for some years.

45. On a more positive note, I would predict that the introduction of judge only trials will not foreshadow the end of the jury trial system in this state. Jury trials will continue to form the cornerstone of our criminal justice system and will be the preferred means of determination of criminal charges into the future. However, there is a reasonable prospect that judge only trials will strengthen the system in areas where the jury trial system is vulnerable. In this sense, I predict that, in the fullness of time, the process will be positive and judge only trials, instead of threatening the existing system, will complement and strengthen it.

Justice Michael Brett