

40TH PARLIAMENT



Report 42

STANDING COMMITTEE ON LEGISLATION

Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017

Presented by
Hon Dr Sally Talbot MLC (Chair)
May 2020

Standing Committee on Legislation

Members as at the time of this inquiry:

Hon Dr Sally Talbot MLC (Chair)

Hon Pierre Yang MLC

Hon Colin de Grussa MLC

Hon Nicholas Goiran MLC (Deputy Chair)

Hon Aaron Stonehouse MLC substitute

for Hon Simon O'Brien MLC

Staff as at the time of this inquiry:

Ben King (Advisory Officer (Legal))

Tracey Sharpe (Committee Clerk)

Kimberley Ould (Advisory Officer (Legal))

Address:

Parliament House

4 Harvest Terrace, West Perth WA 6005

Telephone: 08 9222 7300

Email: lcco@parliament.wa.gov.au

Website: www.parliament.wa.gov.au

ISBN 978-1-925578-94-2



CONTENTS

Executive summary	i
1 Introduction.....	1
Referral and procedure.....	1
Policy and purpose of the Bill	2
Purpose of the Bill	2
Policy of the Bill.....	2
Committee approach.....	3
Consideration of fundamental legislative principles.....	3
Structure of report	4
2 Current law and amendments proposed by the Bill.....	5
Introduction.....	5
Current provisions for trial by judge alone in Western Australia.....	6
Presumptive mode of trial	7
Proposed new s 118(4) and deletion of ss 118(5) and (6)	8
3 Trial by judge alone legislation in Australia, New Zealand and the United Kingdom	9
Introduction.....	9
Election Model.....	9
South Australia	9
Australian Capital Territory	10
Interests of justice model.....	11
New South Wales	11
Western Australia	11
Queensland	12
Jurisdictions where trial by judge alone is not available	12
Victoria, Tasmania and the Northern Territory.....	12
Commonwealth offences.....	13
Summary of trial by judge alone provisions in Australia.....	13
New Zealand	15
United Kingdom	15
4 Scrutiny of selected clauses in the Bill.....	16
Introduction.....	16
Clause 2 – commencement.....	16
FLP 12, Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?.....	16

Clause 4 – new test.....	17
The nature of the new test proposed by the Bill	17
FLP 11, Is the Bill unambiguous and drafted in a sufficiently clear and precise way?	20
5 Increase in trials by judge alone and appeals.....	22
Introduction.....	22
Potential increase in the number of trials by judge alone	22
Increase in appeals	23
6 Efficiencies achieved by trial by judge alone.....	26
Introduction.....	26
Direct costs of jury trials.....	26
Dispensing with formalities of jury trial	27
Advantages of dispensing with formalities	27
Disadvantages of dispensing with formalities	28
Committee comment	30
No hung juries.....	31
The view that hung juries are undesirable.....	31
The view that hung juries are not undesirable	31
Committee comment	32
Aborted trials caused by juries	32
Requirement for judges to prepare written reasons.....	33
The view that writing reasons takes longer than a day or two	33
The view that writing reasons does not take longer than a day or two	34
Requirement for more judges.....	35
7 Other consequences of the Bill	36
Introduction.....	36
The impact on public confidence in the criminal justice system.....	36
Community participation in the criminal justice system.....	36
Perceptions of juries and judges as decision-makers	38
Delay in decisions in judge-alone trials	39
Impact on witnesses and victims of the availability of written reasons	40
8 Other incidental issues	42
Introduction.....	42
Juries preparing reasons	42
Special verdicts.....	42
Alternative systems of trial	44
Requiring an applicant to understand legal implications.....	44

9 Conclusion.....	46
Conclusions on policy.....	46
Policy objective (a)	46
Policy objective (b)	46
Policy objective (c).....	47
Policy objective (d).....	47
Policy issues outside the scope of the Bill	47
Conclusions on the Bill.....	47
Appendix 1 Stakeholders, submissions and public hearings	48
Stakeholders contacted	48
Submissions received	49
Public hearings	50
Appendix 2 Fundamental legislative principles	51
Does the Bill have sufficient regard to the rights and liberties of individuals?	51
Does the Bill have sufficient regard to the institution of Parliament?	51
Appendix 3 Proposed amendments to Criminal Procedure Act 2004	52
Glossary.....	54

Tables

Table 1. <i>Main amendment proposed by the Bill</i>	8
Table 2. <i>Deletion of current ss 118(5) and (6) of the Act</i>	8
Table 3. <i>Breakdown of indictable trials in Western Australia in the last five years</i>	12
Table 4. <i>Summary of provisions governing trial by judge alone in Australia</i>	14

EXECUTIVE SUMMARY

- 1 The Legislative Council referred the Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 (Bill) to the Standing Committee on Legislation (Committee) with the power to inquire into and report on the policy of the Bill.
- 2 The Bill proposes amendments to provisions of the *Criminal Procedure Act 2004* (Act) that govern how an accused person or the prosecution may apply for a trial by judge alone, instead of the case being determined by a jury.
- 3 Under the provisions currently governing trial by judge alone in Western Australia, an accused or the prosecution can make an application for trial by judge alone if an accused is committed or indicted on a charge in the Supreme Court or the District Court. Once an application has been made, the court may only make the order if the accused gives their consent and it is in the interests of justice to do so.
- 4 The main change proposed by the Bill is to amend the Act so that the court would be required to allow an application for a trial by judge alone unless it is not in the interests of justice to do so.
- 5 The Bill also proposes removing three criteria listed in the Act which the court may currently consider when determining whether it is appropriate to make an order for trial by judge alone. They are:
 - when the trial is expected to be an unreasonable burden on the jury due to being particularly long or complex¹
 - there is a risk that jurors will be threatened or interfered with²
 - the trial will involve a factual issue that requires the application of objective community standards.³

The first two criteria weigh in favour of a trial by judge alone, while the third factor favours a trial by jury.
- 6 In conducting this inquiry, the Committee has focussed on whether the Bill would achieve the following policy goals as set out in the Explanatory Memorandum:
 - (a) Increase individual liberty by allowing the accused and his or her defence team the option of trial by judge alone;
 - (b) Increase transparency, given that judges are required to set down their reasoning, whereas juries are not;
 - (c) Reduce average trial times, by removing the need to empanel and instruct juries;
 - (d) Reduce the impost on the public purse, given that shorter trials are generally less expensive.⁴

¹ *Criminal Procedure Act 2004*, s 118(5)(a).

² *ibid.*, s 118(5)(b).

³ *ibid.*, s 118(6).

⁴ Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017, *Explanatory Memorandum*, Legislative Council, p 1.

- 7 In summary, the Committee has found the following in relation to these policy goals:
- (a) An accused would have increased liberty to be tried by judge alone but the drafting of the Bill could be improved to make this new statutory right of election clearer.⁵
 - (b) Allowing an accused to be tried by judge alone would increase transparency as a result of the requirement for judges to prepare written reasons. However, this would need to be balanced against the risk of reducing transparency as a result of the way in which judge-alone trials are conducted.⁶
 - (c) Average trial times could be reduced if trials by judge alone increase in prevalence however this should be weighed against other considerations such as the increased time resulting from the requirement for judges to prepare written reasons for their decisions.⁷
 - (d) While the Committee found that the Bill would be likely to result in increased trials by judge alone and require additional judicial resources, a specialist assessment would need to be undertaken into the financial implications of the Bill to determine if it would reduce or increase the impost on the public purse.⁸
- 8 The Committee made 10 findings.

Findings

Findings are grouped as they appear in the text at the page number indicated:

FINDING 1

Page 16

There are justifiable reasons for leaving the commencement of the key operative clauses of the Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 to the Executive.

FINDING 2

Page 21

The Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 is not drafted in a sufficiently clear and precise way. The court's discretion which appears to arise under section 118(4) of the *Criminal Procedure Act 2004* as proposed by the Bill is unlikely ever to be exercised.

FINDING 3

Page 23

The Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 is likely to result in an increase in trials conducted by judge alone.

FINDING 4

Page 25

The Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 is not likely to result in fewer appeals.

⁵ Paragraph 9.2–9.4.

⁶ Paragraph 9.5–9.7.

⁷ Paragraph 9.8–9.10.

⁸ Paragraph 9.11–9.13.

FINDING 5

Page 32

The cost of retrials arising from hung juries is a potential cost avoided in judge-alone trials.

FINDING 6

Page 32

The cost of retrials arising from aborted trials is a greater risk in jury trials than in trials by judge alone.

FINDING 7

Page 34

The Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 is likely to increase the workload of judges.

FINDING 8

Page 35

The extra burden on judges caused by the requirement to provide reasons for their decisions in judge-alone trials would be offset, at least in part, by a reduction in retrials associated with jury trials and the dispensing of formalities associated with jury trials.

FINDING 9

Page 35

The Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 is likely to require additional judicial resources to enable judges to prepare adequate reasons for their decisions.

FINDING 10

Page 45

Various incidental issues raised during the inquiry into the Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 fell outside the scope of the Bill (namely, the requirement for juries to prepare reasons, the use of special verdicts, alternative systems of trial and a requirement for an accused to understand the effect of an order for trial by judge alone) but could be considered in any subsequent broader review of the criminal justice system in Western Australia.

CHAPTER 1

Introduction

Referral and procedure

- 1.1 The Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 (Bill) was referred to the Standing Committee on Legislation (Committee) on 26 September 2019 with a reporting date of 12 May 2020.
- 1.2 The referral motion as passed was:
 - (1) That the order of the day for the Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 be discharged and the bill be referred to the Standing Committee on Legislation for consideration and report not later than 12 May 2020; and
 - (2) The committee has the power to inquire into and report on the policy of the bill.¹
- 1.3 Pursuant to Standing Order 163, Hon Aaron Stonehouse, MLC substituted for Hon Simon O'Brien, MLC for the duration of the inquiry. The President of the Legislative Council reported the substitution to the House on 24 October 2019.
- 1.4 The Committee called for submissions from the stakeholders listed in Appendix 1 and advertised the inquiry in *The West Australian*. Submissions were received from 13 interested parties (see Appendix 1). Media statements were released for the inquiry and its hearings.
- 1.5 Public hearings were held with the following witnesses:²
 - Department of Justice
 - Joanne Stampalia, Executive Director of Court and Tribunal Services
 - Teresa Tagliaferri, Director of Court Counselling and Support Services
 - Mark Street, Sheriff of Western Australia.
 - Hon Philip McCann.
 - Director of Public Prosecutions Western Australia (DPP), Amanda Forrester, SC.
 - Supreme Court and District Court of Western Australia³
 - Hon Peter Quinlan, SC, Chief Justice of Western Australia (Chief Justice)
 - Hon Kevin Sleight, Chief Judge of the District Court of Western Australia (Chief Judge).⁴
 - Hon Malcolm McCusker, AC, CVO, QC.
 - Office of the Commissioner for Victims of Crime

¹ Hon Alison Xamon, MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 26 September 2019, pp 7416–7.

² Broadcast live over the internet. Videos of each broadcast are available on the Committee's webpage: www.parliament.wa.gov.au/leg. The hearing with Hon Wayne Martin, AC, QC was held by teleconference and was not broadcast live. A copy of the audio recording was subsequently made available on the Committee's webpage.

³ A short section of this hearing was held in private session.

⁴ Chief Judge Kevin Sleight retired as a judge of the District Court on 1 May 2020.

- Katalin Krazlin, Acting Commissioner for Victims of Crime
 - Thomas Samuels, Legal Policy Officer.
 - Hon Wayne Martin, AC, QC.
- 1.6 The Committee extends its appreciation to those who made submissions and appeared at hearings.

Policy and purpose of the Bill

- 1.7 The purpose and policy of the Bill are set out in the second reading speech⁵ and the Explanatory Memorandum.⁶

Purpose of the Bill

- 1.8 The Bill proposes amendments to the *Criminal Procedure Act 2004* (Act) so that:

If an accused requested a trial by judge alone, the court would be obliged to adhere to that request unless it was clearly not in the interests of justice for it to do so.⁷

- 1.9 Specifically, the Explanatory Memorandum notes the purpose of the Bill is to:

amend the Criminal Procedure Act in such a way as to shift the onus of proof away from the defendant (who must currently argue why the case should be tried by a judge alone) and towards the Crown and the court (who must now argue why it is not in the best interests of justice to grant such an application). It therefore removes a level of discretion currently granted to the court, in that it replaces “may” with “must” unless the interests of justice dictate otherwise.⁸

Policy of the Bill

- 1.10 In the second reading speech, Hon Aaron Stonehouse, MLC advised the House that the genesis of the Bill was wide consultation in the legal community with policy aims of seeking to:

introduce an element of personal choice into the legal system...streamline elements of our criminal justice system ... It seeks, first and foremost, to ensure that justice remains at the heart of our legal determinations here in Western Australia.⁹

- 1.11 In considering the overarching policy aim of ensuring justice remains at the heart of the legal determinations the Committee heard evidence expressing concern that an increased rate of jury trials may impact other stakeholders within the justice system including witnesses in trials by judge alone.

- 1.12 The second reading speech also identified that the policy:

is not to attack the concept of trial by jury ... It is one of the cornerstones of our judicial system and should be available to anyone who requests it.¹⁰

⁵ Hon Aaron Stonehouse, MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 7 December 2017, p 6669.

⁶ Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017, *Explanatory Memorandum*, Legislative Council.

⁷ Hon Aaron Stonehouse, MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 7 December 2017, p 6669.

⁸ Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017, *Explanatory Memorandum*, Legislative Council, p 1.

⁹ Hon Aaron Stonehouse, MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 7 December 2017, p 6668.

¹⁰ *ibid.*

- 1.13 The Explanatory Memorandum crystallises specific policy goals, providing a list of outcomes the Bill seeks to achieve:
- (a) Increase individual liberty by allowing the accused and his or her defence team the option of trial by judge alone;
 - (b) Increase transparency, given that judges are required to set down their reasoning, whereas juries are not;
 - (c) Reduce average trial times, by removing the need to empanel and instruct juries;
 - (d) Reduce the impost on the public purse, given that shorter trials are generally less expensive.¹¹

Committee approach

- 1.14 The Committee has primarily focussed on whether the Bill will achieve the policy goals listed in the Explanatory Memorandum. The findings in this report were largely guided by the evidence received over the course of this inquiry. The Committee was broadly informed by research material dealing with similar subject matter, but focussed its inquiry on the direct implications of the Bill.¹²

Consideration of fundamental legislative principles

- 1.15 As with previous inquiries, the Committee's method of scrutinising the Bill included an assessment as to whether its provisions are consistent with fundamental legislative principles (FLPs).¹³
- 1.16 FLPs are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.¹⁴ They fall under two broad headings:
- Does the Bill have sufficient regard for the rights and liberties of individuals? (FLPs 1–11)
 - Does the Bill have sufficient regard to the institution of Parliament? (FLPs 12–16).
- 1.17 The Committee has routinely used FLPs as a convenient and informal framework for scrutinising proposed legislation since 2004. They are not enshrined in Western Australian law, and for some bills, many FLPs do not apply. The question the Committee asks is not whether there is strict compliance with FLPs, but whether a bill has sufficient regard to them.
- 1.18 The Committee has concluded that FLP 11 and 12 are relevant to the Bill. That is, whether:
- the new test contained in clause 4 has been drafted in a sufficiently clear and precise way in accordance with FLP 11
 - the commencement clause in clause 2 is an appropriate delegation of legislative power in accordance with FLP 12.
- 1.19 The Committee's analysis is set out in chapter 4.

¹¹ Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017, *Explanatory Memorandum*, Legislative Council, p 1.

¹² See for example: Law Reform Commission of Western Australia, *Review of the criminal and civil justice system in Western Australia*, Project 92, 1999; New South Wales, Legislative Council, Standing Committee on Law and Justice, Report 44, *Inquiry into Judge Alone Trials under s. 132 of the Criminal Procedure Act 1986*, November 2010.

¹³ The FLPs are set out in Appendix 2.

¹⁴ The FLPs are based on principles set out in the *Legislative Standards Act 1992* (QLD), though other Parliaments often rely on similar principles.

Structure of report

- 1.20 The Committee's scrutiny of the Bill in this report begins in chapter 2 with a brief explanation of the current process for applying for a trial by judge alone in Western Australia, and the amendments to this process contemplated by the Bill.
- 1.21 Chapter 3 looks at the legislation dealing with trial by judge alone in Australia.
- 1.22 Chapter 4 scrutinises select clauses of the Bill against the FLPs. Specifically, it considers whether:
- the commencement provision is an appropriate delegation of legislative power
 - the new test proposed by the Bill is drafted in a sufficiently clear and precise way.
- 1.23 Chapter 5 considers the impact of the Bill on the number of trials by judge alone and the rate of appeals. It also considers whether the policy of individual liberty is achieved.
- 1.24 Chapter 6 considers whether the implementation of the Bill will help to streamline the criminal justice system. In particular, it explores whether conducting more trials by judge alone will result in:
- cost savings by avoiding the expenses associated with a trial by jury
 - time savings by dispensing with the formalities of a trial by jury
 - a reduction in hung juries and aborted trials.
- This chapter also considers the implications for increased transparency through the provision of judicial reasons.
- 1.25 Chapter 7 summarises evidence received on the issue of whether a decision made by a judge alone or by a jury is likely to have more support from the public.
- 1.26 Lastly, for information purposes, chapter 8 discusses four issues that were raised during the inquiry but do not fall squarely within the inquiry's terms of reference:
- juries preparing reasons
 - the role of special verdicts
 - alternative systems of trial
 - requiring an accused to obtain legal advice and/or understand the legal implications of an application for trial by judge alone.

CHAPTER 2

Current law and amendments proposed by the Bill

Introduction

- 2.1 This chapter sets out how the process for applying for a trial by judge alone currently operates in Western Australia and provides a brief explanation of the amendments contemplated by the Bill.
- 2.2 In Western Australia, the majority of criminal matters are dealt with in the Magistrates Court where an accused does not have the right to a trial by jury. These matters include simple offences and indictable offences that can be dealt with summarily.²³ The Bill will not change the way these cases are resolved.
- 2.3 Rather, the Bill will change the process of applying for a trial by judge alone for matters on indictment in the District Court or the Supreme Court. The starting point for an accused person in these matters is that they will be entitled to a trial by jury unless the court makes an order for a trial by judge alone under s 118 of the Act.²⁴ Section 118 allows the accused or the prosecutor to apply for a matter to be tried by judge alone.²⁵ The court will only allow the application if it makes a positive finding that it is in the interests of justice to do so.²⁶
- 2.4 The amendments to s 118 of the Act proposed by the Bill are shown in Appendix 3.
- 2.5 The first amendment, contained in the proposed new s 118(4), would require the court—upon an application by either the accused or the prosecutor with the consent of the accused—to make an order for trial by judge alone unless it is not in the interests of justice to do so.²⁷ In other words, an application could only be refused if a trial by judge alone was considered to be ‘not in the interests of justice’.²⁸
- 2.6 The second amendment proposed by the Bill removes three criteria listed in the Act which the court may currently consider when determining whether to allow or refuse an application for trial by judge alone.²⁹ They are:
- when the trial is expected to be an unreasonable burden on the jury due to being particularly long or complex³⁰
 - there is a risk that jurors will be threatened or interfered with³¹
 - the trial requires the application of objective community standards.³²

²³ *Magistrates Court Act 2004*, s 11.

²⁴ *Criminal Procedure Act 2004*, s 92.

²⁵ However the prosecution can only obtain an order for a trial by judge alone with the consent of the accused: *Criminal Procedure Act 2004*, s 118(4).

²⁶ *ibid.*

²⁷ Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017, cl 4.

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ *Criminal Procedure Act 2004*, s 118(5)(a).

³¹ *ibid.*, s 118(5)(b).

³² *ibid.*, s 118(6).

- 2.7 The existence of the first two criteria would weigh in favour of a trial by judge alone while the third factor, a requirement for the application of objective community standards, would favour a trial by jury.

Current provisions for trial by judge alone in Western Australia

- 2.8 The provisions currently governing applications for trial by judge alone in Western Australia are contained in the Act. The Act sets out the procedures for dealing with alleged offenders.
- 2.9 Under the current provisions an accused or the prosecution can make an application for trial by judge alone if an accused is committed or indicted on a charge in either the Supreme Court or the District Court.³³ However the prosecution can only seek such an order with the consent of the accused.³⁴
- 2.10 An application must be made before the identity of the trial judge is known to the parties.³⁵ Further, the court cannot cancel the order after the identity of the trial judge is known to the parties.³⁶
- 2.11 Once an application has been made, the court may only make the order if it considers it is in the interests of justice to do so.³⁷ Previous situations in which the court has ordered a trial by judge alone include where:
- pre-trial publicity resulted in hostility or prejudice to the accused which a jury may not have been able to put aside³⁸
 - evidence was so disturbing that the jury might not have been able to consider its relevance or significance³⁹
 - disputed expert evidence or difficult legal principles arose that the jury might have had trouble understanding or applying.⁴⁰
- 2.12 The court is entitled to inform itself in any way it considers fit in determining whether ordering a trial by judge alone would be in the interests of justice.⁴¹ In *LFG v The State of Western Australia*, Buss JA described the test as one that involves weighing up any factors that are relevant to the case:

The phrase 'in the interests of justice', in s 118, contemplates the analysis and weighing of a group of factors. The specific factors which are relevant, and the weight to be given to each of those factors, will depend on the matters in issue in the specific application under s 118(1). They will vary from case to case and must be determined on a case by case basis. The relevant factors in each case will be those which bear upon why it is or is not in the interests of justice, in the particular case, to order a trial by a judge alone. No one factor will necessarily be paramount

³³ *Criminal Procedure Act 2004*, s 118.

³⁴ *ibid.*, s 118(4).

³⁵ *ibid.*, s 118(2).

³⁶ *ibid.*, s 118(9).

³⁷ *ibid.*, s 118(4).

³⁸ *The State of Western Australia v Rayney* [2011] WASC 326; (2011) 42 WAR 383.

³⁹ *Bell v The State of Western Australia [No 2]* [2014] WASC 260.

⁴⁰ *The State of Western Australia v Brown [No 2]* [2013] WASC 280; *Chiha v The State of Western Australia [No 2]* [2015] WASC 147.

⁴¹ *Criminal Procedure Act 2004*, s 118(3). *BHP Billiton Ltd v Schultz* [2004] HCA 61; (2004) 221 CLR 400; *TVM v The State of Western Australia* (2007) 180 A Crim R 183 at [28].

or superior to any other factor. Each must be given its appropriate weight in light of the particular facts and circumstances.⁴²

- 2.13 In this way, under the current test the courts are allowed to consider any factors that are relevant to the case, and to balance them as they consider appropriate, in their determination of whether it is in the interests of justice to order a trial by judge alone.

Presumptive mode of trial

- 2.14 The Supreme Court of Western Australia has on a number of occasions considered whether an accused applying for a trial by judge alone has a presumptive right to either mode of trial. These decisions are summarised in paragraphs 2.15–2.19.

- 2.15 In *The State of Western Australia v Martinez*, EM Heenan J held that the court should adopt a neutral position as to the preferred mode of trial in determining applications for trial by judge alone:

one should not approach an application for trial by Judge alone for a serious offence on the footing that there is a preliminary, presumptive or other inclination that trial by jury must be regarded as the preferential starting point.⁴³

- 2.16 Martin CJ followed this decision in *Arthurs v The State of Western Australia*, agreeing with the proposition that the court should not approach an application for a trial by judge alone on the basis that there is a presumption in favour of trial by jury.⁴⁴

- 2.17 However, McKechnie J later disagreed with these decisions in the case of *TVM v The State of Western Australia*.⁴⁵ His Honour found that since indictable charges are tried before a jury by default—that the court should start from a presumption that the accused will be tried by a jury.

- 2.18 In *The State of Western Australia v Schmidt*, Hall J also followed the court's decisions in *Martinez* and *Arthurs*:

The interests of justice does not assume a preference for one form of trial over the other. Each has its advantages and disadvantages...⁴⁶

- 2.19 These competing constructions of s 118 were settled in *LFG v The State of Western Australia* where the Court of Appeal held that an accused does not have a presumptive right to trial by judge alone:

Although s 118(4) confers a power on the court to make an order that an accused, who is committed on a charge to a superior court or indicted in a superior court on a charge, be tried by a judge alone, the court may only make that order 'if', relevantly, it considers it is 'in the interests of justice' to do so. In other words, the court may not make an order that the trial of the charge be by a judge alone unless the court considers, relevantly, that it is in the interests of justice to do so. Accordingly, the court's power to make an order for a trial by a judge alone will not be enlivened unless the court is affirmatively satisfied that, in the particular case, it is in the interests of justice to do so.⁴⁷

⁴² *LFG v The State of Western Australia* [2015] WASCA 88; 48 WAR 178 [324].

⁴³ *The State of Western Australia v Martinez* [2006] WASC 25; (2006) 159 A Crim R 380, 389.

⁴⁴ *Arthurs v The State of Western Australia* [2007] WASC 182 [67].

⁴⁵ *TVM v The State of Western Australia* [2007] WASC 299; (2007) 180 A Crim R 183.

⁴⁶ *The State of Western Australia v Schmidt* [2012] WASC 172 [24].

⁴⁷ *LFG v The State of Western Australia* [2015] WASCA 88; 48 WAR 178 [318] per Buss JA with Mazza JA agreeing.

Proposed new s 118(4) and deletion of ss 118(5) and (6)

2.20 Clause 4 of the Bill proposes to amend s 118 of the Act by deleting and replacing s 118(4) as shown in Table 1:

Table 1. *Main amendment proposed by the Bill*

Section 118(4) — Trial by judge alone without jury may be ordered	
Current provision	(4) On such an application the court may make the order if it considers it is in the interests of justice to do so but, on an application by the prosecutor, must not do so unless the accused consents. (Emphasis added)
Proposed provision	(4) Except as provided in subsection (5), (7) and (8), the court must make the order unless the court is satisfied that the order is not in the interests of justice . (Emphasis added)

Source: Criminal Amendment (Trial by Judge Alone) Bill 2017

2.21 The current requirement in s 118(4) that the consent of the accused is required where an application is made by the prosecutor is to be retained in the new s 118(5).

2.22 The Bill also proposes to remove the three sections outlined in Table 2.⁴⁸ These sections identify specific factors which a judge may take into account when determining whether to allow or refuse an application for trial by judge alone (without limiting the assessment of the 'interests of justice' under s 118(4)).

Table 2. *Deletion of current ss 118(5) and (6) of the Act*

Situations in which a court may make, or refuse to make, an order for trial by judge alone	
Current provisions of ss 118(5) and (6)	<p>(5)(a) The court may make the order if it considers that the trial, due to its complexity or length or both, is likely to be unreasonably burdensome to a jury.</p> <p>(5)(b) The court may make the order if it considers that it is likely that acts that may constitute an offence under The Criminal Code section 123 would be committed in respect of a member of a jury.</p> <p>(6) The court may refuse to make the order if it considers the trial will involve a factual issue that requires the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness.</p>
Proposed amendment	Sections 118(5) and (6) to be deleted.

Source: Criminal Amendment (Trial by Judge Alone) Bill 2017

2.23 The effects of these amendments are compartmentalised within s 118 and do not interact with other parts of the Act.

⁴⁸ *Criminal Procedure Act 2004*, ss 118(5)(a)–(b), (6).

CHAPTER 3

Trial by judge alone legislation in Australia, New Zealand and the United Kingdom

Introduction

- 3.1 This chapter sets out an overview of the provisions regarding trial by judge alone in Australia for indictable offences in the various Australian jurisdictions.
- 3.2 The legislation can be broadly divided into the following two models:
 - The accused is able to elect to be tried by judge alone, subject to some qualifications (South Australia and the Australian Capital Territory (ACT)).
 - An application must be made for a trial by judge alone and the court must apply an 'interests of justice test' (Western Australia, New South Wales and Queensland).
- 3.3 Trial by judge alone for indictable offences is not available in Victoria, Tasmania, or the Northern Territory; or in any jurisdiction where an accused has been charged with a Commonwealth offence.
- 3.4 This chapter also provides a brief insight into the comparative laws in New Zealand and the United Kingdom.

Election model

South Australia

- 3.5 South Australia was the first Australian jurisdiction to enact legislation for judge-alone trials in 1984,⁴⁹ adopting an election model which allows an accused to elect to be tried by judge alone in a criminal trial before the District Court or the Supreme Court.⁵⁰
- 3.6 The election model allows an accused person to choose the manner of their trial. This has resulted in a much higher proportion of matters being dealt with by judge alone compared to jurisdictions in which the interests of justice test applies.
- 3.7 In 2016 the District Court of South Australia had a backlog of 577 cases.⁵¹ In a comment published in Adelaide Now it was noted by a court registrar at the time that the increasing number of defendants electing to stand trial by judge alone increased the pressure of the backlog due to the requirement of judges to prepare written reasons.⁵²
- 3.8 The right to elect to be tried by judge alone under the *Juries Act 1927* (SA) (SA Act) is subject to a requirement that the presiding judge is satisfied that the accused, before making the election, sought and received advice in relation to the election from a legal practitioner.⁵³
- 3.9 The right of an accused to elect a trial by judge alone in South Australia is not available where the accused is charged with a minor indictable offence and has elected to be tried in

⁴⁹ *Juries Act Amendment Act 1984* (SA), s 5.

⁵⁰ *Juries Act 1927* (SA), s 7.

⁵¹ S Fewster, Adelaide Now, 24 February 2020. See: <https://www.adelaidenow.com.au/news/south-australia/sa-district-courts-backlog-of-577-cases-would-take-more-than-18-months-to-hear-court-reveals/news-story/bca2c889bdda38e65daab7ef13ea87a2>. Viewed 24 February 2020.

⁵² *ibid.*

⁵³ *Juries Act 1927* (SA), s 7(1)(b).

the District Court.⁵⁴ In contrast, the law in the ACT was amended in 2011 to remove the right to trial by judge alone for people charged with particular serious offences.⁵⁵

Australian Capital Territory

- 3.10 When the ACT introduced judge-alone trials in 1993 they adopted a similar approach to that of South Australia, enabling an accused to elect for a judge-alone trial.⁵⁶ The relevant provisions are contained in the *Supreme Court Act 1933* (ACT) (ACT Act).
- 3.11 The right to elect to be tried by judge alone in the ACT is subject to the following requirements:
- the election is in writing⁵⁷
 - the accused person produces a certificate signed by a legal practitioner stating that:
 - the legal practitioner has advised the accused person in relation to the election
 - the accused person has made the election freely.⁵⁸
- 3.12 As mentioned above, in 2011 the ACT amended their laws to remove the right to trial by judge alone for people charged with specified serious offences.⁵⁹ These serious offences include murder, manslaughter and culpable driving occasioning death, as well as certain sexual offences.
- 3.13 In the second reading speech for the Bill implementing these changes in the ACT, the Hon Attorney General Simon Corbell, MLA explained that the main reason for the exclusion of certain offences was that the ACT had a high proportion of matters proceeding by judge-alone trials (at 56 per cent over a four year period).⁶⁰ By comparison, the jurisdiction with the second highest proportion of matters dealt with by judge alone was South Australia—which also permits an accused person to elect their preferred mode of trial—at 15 per cent. Western Australia had the next highest percentage of matters dealt with by judge alone over the same period at 2.7 per cent. The Hon Attorney General suggested that the higher proportion of trials by judge alone in South Australia and the ACT compared to the other jurisdictions arises from the fact that they share a similar legislative model which gives the accused person discretion to elect their preferred mode of trial.⁶¹
- 3.14 In the same speech the Hon Attorney General also noted that the rate of election for trial by judge alone in the ACT was particularly high for people accused of sex offences and offences involving the death of a person.⁶² The Hon Attorney General advised the conviction rate of judge-alone trials between 30 June 2004 and 30 June 2008 was 47 per cent (for matters other than murder and sex offences); the conviction rate for murder cases conducted by judge alone was 0 per cent; and the conviction rate for sexual offences was 9 per cent over

⁵⁴ *Juries Act 1927* (SA), s 7(2).

⁵⁵ Criminal Proceedings Legislation Amendment Bill 2011 (ACT).

⁵⁶ *Supreme Court (Amendment) Act 1993* (ACT), s 6.

⁵⁷ *Supreme Court Act 1933* (ACT), s 68B(1)(a).

⁵⁸ *ibid.*, s 68B(1)(b).

⁵⁹ Criminal Proceedings Legislation Amendment Bill 2011 (ACT).

⁶⁰ Hon Simon Corbell, MLA, Attorney General, Australian Capital Territory, Legislative Assembly, *Parliamentary Debates*, 17 February 2011, p 256.

⁶¹ *ibid.*

⁶² *ibid.*

the same period.⁶³ It was suggested that this contributed to the removal of those categories from being determined by trial by judge alone.⁶⁴

- 3.15 It has been argued that preventing people charged with certain offences from being tried by judge alone may be inconsistent with the *Human Rights Act 2004* (ACT).⁶⁵ For example, this may result in an accused person being denied a fair trial because it is not possible to find a jury that is not affected by pre-trial publicity. A number of witnesses who spoke to the Committee gave evidence that fettering the right to apply for trial by judge alone based on the particular offence in this way does not make sense.⁶⁶

Interests of justice model

New South Wales

- 3.16 New South Wales was the second Australian jurisdiction to legislate for judge-alone trials when it moved to this approach in 1991.⁶⁷
- 3.17 Initially the relevant provisions of the *Criminal Procedure Act 1986* (NSW) (NSW Act) allowed an accused person to elect to be tried by judge alone as long as they had the consent of the prosecution.⁶⁸ However this was amended in 2011 to enable the accused to make an application without the consent of the prosecution.⁶⁹
- 3.18 Under the current law in New South Wales, the court must make an order for trial by judge alone if both the accused person and the prosecutor agree for the trial to proceed by judge alone.⁷⁰ However if the prosecutor does not consent, the court can allow the application if they consider it to be in the interests of justice to do so.⁷¹ The requirement for the court to determine an application based on the interests of justice is similar to the current position in Western Australia.

Western Australia

- 3.19 The provisions allowing for trial by judge alone were first introduced in Western Australia in 1994.⁷² They were modelled on the interests of justice test used in New South Wales at the time. The provisions in Western Australia were subsequently amended in 2004 following recommendations by the Law Reform Commission of Western Australia arising from a review of the criminal and civil justice system in Western Australia.⁷³ These amendments included allowing the court to make an order for trial by judge alone even if the prosecution does not

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ J O'Leary, 'Inspiring or Undermining Confidence? Amendments to the Right to Judge Alone Trials in the ACT', (2011) 10 *Canberra Law Review* 30.

⁶⁶ Hon Kevin Sleight, Chief Judge, District Court of Western Australia, *Transcript of evidence*, 14 February 2020, p 10; Hon Philip McCann, *Transcript of evidence*, 14 February 2020, p 8; Hon Malcolm McCusker, AC, CVO, QC, *Transcript of evidence*, 14 February 2020, p 10.

⁶⁷ *Criminal Procedure Legislation (Amendment) Act 1990* (NSW).

⁶⁸ *ibid.*, Schedule 1.

⁶⁹ *Courts and Criminal Legislation Further Amendment Act 2010* (NSW), Schedule 12.2.

⁷⁰ *Criminal Procedure Act 1986* (NSW), s 132(2), however this is subject to s 132(7) where the court may refuse the order if there is a substantial risk of jury tampering which cannot be mitigated.

⁷¹ *Criminal Procedure Act 1986* (NSW), s 132(4).

⁷² *Criminal Law Amendment Act 1994*.

⁷³ Law Reform Commission of Western Australia, *Review of the criminal and civil justice system in Western Australia*, Project 92, 1999.

consent to the application (as mentioned at paragraph 3.17, this was later adopted in New South Wales in 2011).

- 3.20 In Western Australia, the court has a discretion to order a trial by judge alone 'if it considers it is in the interests of justice to do so'.⁷⁴ Unlike in New South Wales, this discretion applies even where applications are made by the prosecution with the consent of the accused. In this way, the interests of justice test designates the court with a gatekeeping role regarding applications for trial by judge alone.
- 3.21 The breakdown of criminal cases in Western Australia over the past five years is set out in Table 3. As can be seen, most indictable offences in Western Australia are tried before a jury with approximately 1 per cent tried by judge alone.⁷⁵

Table 3. *Breakdown of indictable trials in Western Australia in the last five years*

	Trial by jury	Trial by judge alone
District Court of WA	2188	8
Supreme Court of WA	326	17
Total	2514	25

Source: Mark Street, Sherriff of Western Australia, Department of Justice, *Transcript of evidence*, 11 December 2019, p 5.

Queensland

- 3.22 Trial by judge alone was legislated in Queensland in 2008, with the relevant provisions similar to those in the Act.⁷⁶
- 3.23 Under the *Criminal Code Act 1899* (QLD) (QLD Act) the court may make an order for a trial by judge alone if it considers it is in the interests of justice to do so.⁷⁷ In doing so it may inform itself in any way it considers appropriate, including the length and complexity of the trial, whether there is likely to be jury interference, if there has been significant pre-trial publicity and whether the trial will involve the application of objective community standards.⁷⁸

Jurisdictions where trial by judge alone is not available

Victoria, Tasmania and the Northern Territory

- 3.24 The law in Victoria, Tasmania and the Northern Territory does not allow trials by judge alone for criminal offences.
- 3.25 The implications of not providing for a trial by judge alone recently caught the attention of the media when Cardinal George Pell was unable to apply for a trial by judge alone for the charges he faced in Victoria despite extensive pre-trial publicity of his case.⁷⁹ The Attorney General of Victoria, Hon Jill Hennessey, MP, has since advised that the government is considering whether to introduce judge-alone trials in limited circumstances such as this.⁸⁰

⁷⁴ *Criminal Procedure Act 2004*, s 118(4).

⁷⁵ Mark Street, Sherriff of Western Australia, Department of Justice, *Transcript of evidence*, 11 December 2019, p 5.

⁷⁶ *Criminal Code and Jury and Another Act Amendment Act 2008* (QLD).

⁷⁷ *Criminal Code Act 1899* (QLD), s 615.

⁷⁸ *Criminal Code Act 1899* (QLD), s 615(4)–(5).

⁷⁹ *DPP v Pell* [2019] VCC 260.

⁸⁰ Parliament of Victoria Public Accounts and Estimates Committee, 24 February 2020. See: https://www.parliament.vic.gov.au/images/stories/committees/paec/2019-20_Budget_Estimates/Transcripts_and_tabled_docs/2019-20_BEH_Attorney-General_Verified_Transcript.pdf. Viewed 24 February 2020.

Commonwealth offences

- 3.26 Shortly after South Australia legislated to allow election by an accused for trial by judge alone, a person charged with a Commonwealth offence sought to be tried by judge alone under the SA Act in the case of *Brown v The Queen*.⁸¹ In that case the High Court ruled that s 80 of the Commonwealth Constitution precludes Commonwealth trials from being conducted by judge alone.
- 3.27 Section 80 of the Constitution states that trials on indictment for Commonwealth offences 'shall be by jury'.⁸² The majority of judges in *Brown v The Queen* relied on this section in finding that the right to trial by jury cannot be waived, for the primary reason that the right to trial by jury is not only for the benefit of the accused but also has public advantages in the administration of justice. The majority held that the right to trial by jury could not be waived at the accused's election.⁸³
- 3.28 The minority of judges in *Brown v The Queen* held that an accused person can waive their right to a trial by jury under s 80 since this provision is intended for their benefit.⁸⁴ To prevent an accused person from waiving this right has been described in a later journal article as 'akin to imprisoning them in their own privilege'.⁸⁵
- 3.29 This issue was recently revisited by the High Court in *Alqudsi v The Queen* where a person accused of a Commonwealth offence applied for an order to be tried by judge alone—this time under the NSW Act.⁸⁶ The High Court reaffirmed the decision in *Brown v The Queen* by a 6–1 majority, finding that an accused does not have a right to apply for trial by judge alone when charged with a Commonwealth offence.⁸⁷

Summary of trial by judge alone provisions in Australia

- 3.30 The provisions governing trial by judge alone in Australia are summarised in Table 4 on the following page.

⁸¹ *Brown v The Queen* [1986] HCA 11; 160 CLR 171.

⁸² *Australian Constitution*, s 80.

⁸³ *Brown v The Queen* [1986] HCA 11; 160 CLR 171, 201 per Brennan J, 207 per Deane J, 218 per Dawson J.

⁸⁴ *Brown v The Queen* [1986] HCA 11; 160 CLR 171, 183 per Gibbs CJ, 193 per Wilson J.

⁸⁵ J O'Leary, 'Twelve angry peers or one angry judge: An analysis of judge alone trials in Australia' (2011) *Criminal Law Journal*, 35(3), 155.

⁸⁶ *Alqudsi v The Queen* [2016] HCA 24; 258 CLR 203 [120] per Kiefel, Bell and Keane JJ, [150] per Gageler J, [212]–[213] per Nettle and Gordon JJ.

⁸⁷ Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ formed the majority. French CJ dissented.

Table 4. *Summary of provisions governing trial by judge alone in Australia*

State	Year	Terms
South Australia	Since 1984	Accused can elect to be tried by judge alone in a trial before the Supreme Court or the District Court unless the accused is charged with a minor indictable offence and has elected to be tried in the District Court.
New South Wales	Since 1991	<p>Accused or the prosecution can apply for a judge-alone trial in criminal proceedings in the Supreme Court or District Court.</p> <p>The court must make the order if both the accused and the prosecutor agree to the accused being tried by judge alone.</p> <p>If the prosecution does not support the accused's application for a trial by judge alone the court may order a trial by judge alone if it considers it is in the interests of justice to do so.</p>
Australian Capital Territory	Since 1993	Accused can elect to be tried by judge alone unless charged with an excluded offence (including murder, manslaughter and culpable driving occasioning death, as well as certain sexual offences).
Western Australia	<p>Since 1994</p> <p>Bill</p>	<p>Accused or the prosecution may apply for trial by judge alone for criminal matters on indictment in the District Court or the Supreme Court. The court will only make the order with the consent of the accused and if it is in the interests of justice to do so.</p> <p>Accused or the prosecution may apply for trial by judge alone for criminal matters on indictment in the District Court or the Supreme Court. The court must make the order unless the accused does not consent or it is not in the interests of justice to do so.</p>
Queensland	Since 2008	Accused can apply for trial by judge alone in matters where they are committed for trial on a charge of an offence or charged on indictment for an offence. The court will allow the application if it is in the interests of justice to do so.
Victoria	N/A	N/A
Northern Territory	N/A	N/A
Tasmania	N/A	N/A
Commonwealth	N/A	N/A

New Zealand

- 3.31 Trial by judge alone was introduced in New Zealand in 1979.⁸⁸
- 3.32 In New Zealand, trial by judge alone is provided for in the *Criminal Procedure Act 2011* (NZ) (NZ Act). Under the NZ Act, minor offences (punishable by imprisonment of less than two years) are dealt with by judge alone while people accused of serious offences (punishable by imprisonment of two or more years) can elect for a trial by jury.⁸⁹
- 3.33 While the NZ Act permits an accused person to elect their preferred mode of trial for most serious offences, the legislation also retains judicial discretion to order a trial by judge alone in cases that are likely to exceed 20 days or where the court is satisfied there are reasonable grounds to believe juror intimidation may occur.⁹⁰

United Kingdom

- 3.34 Trial by judge alone can be applied for in the United Kingdom in serious fraud cases with the court's discretion to allow an application turning on whether it is in the interests of justice to do so.⁹¹ Separately, there is another provision allowing the court to make an order in a jury trial where there is evidence of real and present danger that jury tampering will occur.⁹²

⁸⁸ Courts Amendment Bill 1979 (NZ).

⁸⁹ *Criminal Procedure Act 2011* (NZ), s 50.

⁹⁰ *ibid.*, ss 102–3.

⁹¹ *Criminal Justice Act 2003* (UK), s 43.

⁹² *ibid.*, ss 44, 46.

CHAPTER 4

Scrutiny of selected clauses in the Bill

Introduction

- 4.1 As stated at paragraphs 1.15–1.17, the Committee’s scrutiny of the Bill has included an assessment of whether it is consistent with the FLPs.⁹³ Specifically, the Committee considered whether:
- the commencement provision in clause 2 of the Bill is an appropriate delegation of legislative power pursuant to FLP 12
 - the new test proposed by the Bill is drafted in a sufficiently clear and precise way pursuant to FLP 11.

Clause 2 – commencement

FLP 12, Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?

- 4.2 The commencement provision in clause 2(b) of the Bill provides that all sections other than ss 1 and 2 would come into operation on a day fixed by proclamation. Whilst similar provisions are routinely found in bills, this clause raises FLP 12, which asks the question: Does the Bill have sufficient regard to the institution of Parliament by ‘allowing the delegation of legislative power only in appropriate cases and to appropriate persons’?
- 4.3 The Committee notes that proclamation is an executive action and affects the Parliament’s sovereignty as the commencement dates will be controlled by the Executive. There is nothing in the Bill that requires the substantive provisions be proclaimed within a specified time. It is conceivable that a proclamation may never be made and the will of the Parliament, if the Bill was passed, would be frustrated.
- 4.4 Delay in the commencement of laws is often required due to the need for regulations to be drafted or a public education campaign mounted in preparation for commencement. In the case of the Bill, the Committee notes:
- The Bill has not been subject to a specialist assessment by the Department of Justice or Treasury into the likely additional resourcing requirements in the courts. If the Bill were to be passed, some of these requirements would need to be quantified before the amendments could be implemented without creating unintended consequences.
 - Implementation of the changes proposed by the Bill may require the making of new rules by the District Court and Supreme Court.
- 4.5 The Committee considers that the above reasons justify commencement of the substantive provisions of the Bill upon proclamation, given the Bill has been introduced by a private member and not the Executive.

FINDING 1

There are justifiable reasons for leaving the commencement of the key operative clauses of the Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 to the Executive.

⁹³ The fundamental legislative principles are set out in Appendix 2.

Clause 4 – new test

The nature of the new test proposed by the Bill

- 4.6 Clause 4 of the Bill amends s 118 of the Act by deleting existing ss 118(4)–(6) and inserting proposed new ss 118(5)–(8) (see Appendix 3).
- 4.7 Section 118 of the Act currently creates a discretion for a court to order a trial by judge alone if it considers it in the interests of justice to do so.⁹⁴ The section also sets out a non-exhaustive list of criteria the court may consider when deciding whether to grant an application for trial by judge alone.⁹⁵ The application must be made before the parties know the identity of the trial judge and the court cannot cancel an order for trial by judge alone once the identity of the trial judge is known to the parties.⁹⁶ The court must not make an order for trial by judge alone without the consent of the accused.⁹⁷
- 4.8 The amendments in clause 4 of the Bill delete both the existing test and the criteria. The Bill preserves the requirement for:
- the application to be made before the trial judge's identity is known
 - consent of the accused prior to the making of an order.
- 4.9 Clause 4 replaces the existing test with a requirement that an application for trial by judge alone 'must' be allowed unless it is not in the interests of justice to do so.⁹⁸ The proposed amendments to s 118 are as follows:

Trial by judge alone without jury may be ordered

(1) If an accused is committed on a charge to a superior court or indicted in a superior court on a charge, the prosecutor or the accused may apply to the court for an order that the trial of the charge be by a judge alone without a jury.

(2) Any such application must be made before the identity of the trial judge is known to the parties.

(3) On such an application, the court may inform itself in any way it thinks fit.

~~(4) On such an application the court may make the order if it considers it is in the interests of justice to do so but, on an application by the prosecutor, must not do so unless the accused consents.~~

~~(5) Without limiting subsection (4), the court may make the order if it considers —~~

~~— (a) — that the trial, due to its complexity or length or both, is likely to be unreasonably burdensome to a jury; or~~

~~— (b) — that it is likely that acts that may constitute an offence under The Criminal Code section 123 would be committed in respect of a member of a jury.~~

⁹⁴ *Criminal Procedure Act 2004*, s 118(4).

⁹⁵ *ibid.*, s 118(5)–(6).

⁹⁶ *ibid.*, s 118(2), (9).

⁹⁷ *ibid.*, s 118(4).

⁹⁸ Note exception where prosecution applies and accused's consent required under *Criminal Procedure Act 2004*, s 118(4).

~~(6) Without limiting subsection (4), the court may refuse to make the order if it considers the trial will involve a factual issue that requires the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness.~~

(4) Except as provided in subsection (5), (7) and (8), the court must make the order unless the court is satisfied that the order is not in the interests of justice.

(5) If an application is made by the prosecutor, the court must not make the order without the consent of the accused.

(7) If an accused is charged with 2 or more charges that are to be tried together, the court must not make such an order in respect of one of the charges unless the court also makes such an order in respect of each other charge.

(8) If 2 or more accused are to be tried together, the court must not make such an order in respect of one of the accused unless the court also makes such an order in respect of each other accused.

(9) If such an order is made, the court cannot cancel the order after the identity of the trial judge is known to the parties.

- 4.10 Witnesses were clear that the new test gives primacy to the wishes of the accused. For example, the Chief Judge, Hon Kevin Sleight stated in his submission:

The effect of the Bill would be to create a presumptive right of an accused person to elect whether their trial on indictment be by judge alone (sitting without a jury).⁹⁹

- 4.11 As noted in paragraph 2.22, in addition to creating a new test the Bill proposes removing the three criteria that guide the court in determining whether an order for trial by judge alone is in the interests of justice. The amendment does not replace the criteria with other provisions that offer guidance on the factors to be considered when determining when an application will not be in the interests of justice.

- 4.12 When asked, witnesses found it difficult to provide an example of where it would not be in the interests of justice for a judge to preside over a trial without a jury.

- 4.13 In his submission, the Parliamentary Inspector of the Corruption and Crime Commission of Western Australia, Hon Michael Murray, AM, QC, gave the following opinion on the effects of the Bill:

I am simply unable to conceive how a judge might conclude that the interests of justice would not be adequately served by a trial by a judge, knowing the law and able to find the relevant facts before considering whether guilt had been established beyond reasonable doubt. The proposed reversal of the onus seems to incorporate an unworkable test for the making of the decision.¹⁰⁰

- 4.14 The Chief Justice, Hon Peter Quinlan, SC, stated in his written submission:

While cl 4 of the Bill requires that the court must make an order for trial by judge alone 'unless the court is satisfied that the order is not in the interests of justice', it is unclear by what criteria the latter determination could be made. Under the law

⁹⁹ Submission 11 from Hon Kevin Sleight, Chief Judge, District of Western Australia, 29 November 2019, p 1; see also Amanda Forrester, SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions of Western Australia, *Transcript of evidence*, 14 February 2020, p 7.

¹⁰⁰ Submission 12 from Hon Michael Murray, AM, QC, Parliamentary Inspector of the Corruption and Crime Commission of Western Australia, 29 November 2019, pp 2–3.

as it presently stands, it is easy to identify criteria upon which it may be in the interests of justice for there not to be a jury (e.g. pre-trial publicity, complexity or length of trial).

If, however, an accused has a presumptive right to trial by judge alone, by what criteria could it be said that a court should refuse the exercise of that right in the 'interests of justice'? The material in support of the Bill does not identify any such criteria.¹⁰¹

- 4.15 The Chief Justice suggested the application of community standards might weigh in favour of refusing an application for trial by judge alone, however he noted that it would be difficult for the court to refuse an application on this basis:

This was one of the issues that I raised in my submission, and I noticed that the parliamentary inspector had also raised; that is, if the law is that there is a presumptive entitlement of an accused person to trial by judge alone, it is difficult to see by what criteria a judge could then determine the opposite, because all of the things that a judge would take into account are the reasons we have juries—community involvement, 12 people, anonymity. Those are all the reasons we have juries, so there could not be anything that I can foresee about a particular matter. The one exception to that might be the issue that is expressed in section 118(6), which is you might be able to say that there are some questions that are so wrapped up in the community's view and opinion about decency or matters of that kind that compel having a jury, but it is difficult, it seems to me, to see once one has a presumption of an entitlement, by what criteria does one then say that it is not in the interests of justice for that entitlement to be exercised?¹⁰²

- 4.16 Similarly the DPP, Amanda Forrester, SC, gave evidence that:

If the legislation is drafted so that the wishes of the accused are to take primacy in the determination, then I do not believe, or I cannot think of an example that says it would not be in the interests of justice.¹⁰³

- 4.17 On the issue of objective community standards as a factor to be considered under the new test the DPP noted:

It is unlikely that the fact that objective community standards are an issue in that particular trial will outweigh the principal consideration that the accused wishes to have a trial before a judge alone.¹⁰⁴

- 4.18 Hon Wayne Martin, AC, QC, gave evidence that the Bill preserves the capacity for community standards to outweigh the wishes of the accused in determining an application for trial by judge alone in the following circumstances:

One area where it does arise, where there are community standards—I can give you an example—is in the boundaries between some of our offences so that, for example, somebody can be charged with manslaughter where death arises from the use of a motor vehicle. An alternative verdict in those circumstances is dangerous driving causing death, an offence contrary to the Road Traffic Act. The boundary between those two offences is very grey and it is really one of impression. It is based on the view that one takes about the culpability or

¹⁰¹ Submission 13 from Hon Peter Quinlan, SC, Chief Justice of Western Australia, 2 December 2019, p 3.

¹⁰² Hon Peter Quinlan, SC, Chief Justice of Western Australia, *Transcript of evidence*, 14 February 2020, p 8.

¹⁰³ Amanda Forrester, SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions of Western Australia, *Transcript of evidence*, 14 February 2020, p 7.

¹⁰⁴ *ibid.*, pp 6–7.

seriousness, if you like, of the negligent driving. I had a case, members of the committee might be familiar with it, involving a young boy in Kalgoorlie who was riding a stolen motorcycle, when tragically he collided with a motor vehicle being driven by the man who was looking for the stolen motorbike. He was charged with manslaughter. He offered to plead guilty to dangerous driving causing death. The whole issue became very contentious publicly. There were allegations of racism and, in the end, that went to trial before a jury, over which I presided, and the jury came in with a verdict of dangerous driving causing death, rather than manslaughter. There was, again, contention about that verdict, but I think the contention was mitigated to some extent because that was the verdict of a jury not the verdict of a judge. I think that was a case in which the difference between manslaughter and dangerous driving causing death is really one of impression based upon the culpability of an accused person's conduct. That is a case in which I think it was important for the justice system that that decision be made by a jury. If I put myself back in the shoes I was in then and if there had been application for trial by judge alone, I think I would have ruled against it on the basis that it was the type of case that should be decided by a jury. Those sort of cases I think are very, very rare, but they do exist, which is why I favour the retention, if you like, of that discretion.

...

I think that, if you like, the safety valve should remain there to cover the type of case that I mentioned, but the bill, if passed, would make it clear that the default position is if a person elects trial by judge alone, that election prevails, unless there is a good reason otherwise. That, to me, is the right balance.¹⁰⁵

- 4.19 Despite the helpful explanation given by Hon Wayne Martin, AC, QC, the Committee is not persuaded that, under the new test proposed by the Bill, a court would make a finding that it is not in the interests of justice for a trial by judge alone to be ordered in the case described. While it might be argued that the interests of justice would favour that a jury determine the culpability of the accused, or that public criticisms could be mitigated if the verdict was given by a jury, it does not necessarily follow that the interests of justice could not be satisfied by a trial by judge alone. Further, it remains unclear what criteria the court would apply in determining an application.
- 4.20 When asked if he could envisage a situation in which the courts would refuse an application, Hon Malcolm McCusker, AC, CVO, QC, gave the following response:

No, I cannot. I saw that proposal and I cannot think of any situation where it would not be in the interests of justice because surely it is in the interests of justice to have a person who wishes to be tried by judge alone to be tried and to have reasons given, ultimately, for the decision. That is in the interest of justice.¹⁰⁶

FLP 11, Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

- 4.21 The Committee considered whether clause 4 raised issues under FLP 11 'Is the Bill unambiguous and drafted in a sufficiently clear and precise way?'
- 4.22 The Committee concluded that while the drafting of the discretion is clear the manner in which the discretion could be exercised is, on the basis of the evidence set out in paragraphs 4.10–4.20, uncertain. In the Committee's view, the discretion is unlikely to ever be exercised and arguably is illusory.

¹⁰⁵ Hon Wayne Martin, AC, QC, *Transcript of evidence*, 23 April 2020, p 14.

¹⁰⁶ Hon Malcolm McCusker, AC, CVO, QC, *Transcript of evidence*, 14 February 2020, p 7.

- 4.23 The Committee notes that the two Australian jurisdictions that allow an accused to elect to be tried by judge alone, South Australia and the ACT, use the language of 'election' and are not subject to the overriding consideration of the interests of justice.¹⁰⁷

FINDING 2

The Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 is not drafted in a sufficiently clear and precise way. The court's discretion which appears to arise under section 118(4) of the *Criminal Procedure Act 2004* as proposed by the Bill is unlikely ever to be exercised.

¹⁰⁷ See paragraphs 3.5–3.15 and Table 4.

CHAPTER 5

Increase in trials by judge alone and appeals

Introduction

- 5.1 Chapter 5 considers the impact of the Bill on the number of trials by judge alone and the rate of appeals.
- 5.2 These impacts will determine the scale of any savings, or costs, to the State which would result from the passing of the Bill.

Potential increase in the number of trials by judge alone

- 5.3 Submissions to the Committee differed in their opinions about how the Bill would affect the rate of people tried by judge alone, however most agreed there would be an increase of some sort.

- 5.4 Hon Wayne Martin, AC, QC, the former chief justice of Western Australia, noted in his submission that the increase in the number of trials by judge alone would not be significant:

there are currently only a handful of trials by judge alone [in Western Australia each year] and even if that number doubled, or even trebled (which I think most unlikely) the workload implications for the courts would not be significant.¹⁰⁸

- 5.5 Further, Mr Martin was not of the view that reducing the discretion of the court to refuse an application would result in a significant increase in the number of trials by judge alone:

however liberal the availability of trial by judge alone, I would expect that the vast majority of accused will elect trial by jury because of the forensic advantages which that means of trial offers to an accused.¹⁰⁹

- 5.6 When asked to elaborate on the ‘forensic advantages’ of a trial by jury, Mr Martin explained:

The first forensic advantage is the one I mentioned; that is, the perception that a jury is more likely to acquit than a judge. A jury is more likely to take into account circumstances that might be regarded as extraneous by a judge—sympathy, emotion. Those sorts of things are more likely to influence a jury in their decision than a judge.

The other forensic advantage, of course, is that the standard of proof in criminal cases is beyond a reasonable doubt. A lot of defences are conducted on the basis that there is a reasonable doubt—irrespective of whether the jury thinks the accused might have committed the offence, they must entertain a reasonable doubt. So a lot of defence strategies—not a lot, but sometimes—a common defence strategy is to create doubt; to create confusion, complexity and doubt in the hope that the jury will think, “Well, we don’t know what the answer is, but I do have a doubt, therefore, I acquit.” That type of defence strategy is much harder to maintain in front of a judge, because a judge will reason through whether or not there is a doubt.¹¹⁰

¹⁰⁸ Submission 6 from Hon Wayne Martin, AC, QC, 16 November 2019, p 6.

¹⁰⁹ *ibid.*

¹¹⁰ Hon Wayne Martin, AC, QC, *Transcript of evidence*, 23 April 2020, p 3.

- 5.7 The DPP, Amanda Forrester, SC, said she ‘anticipate[s] there would be an increase’ in trials by judge alone.¹¹¹ She gave evidence that even though there are currently only a handful of applications being made for trials by judge alone each year, this may be because the test under the current legislation ‘inhibits people from making applications in the first place’.¹¹²
- 5.8 The Solicitor General, Joshua Thomson, SC, submitted that reducing the court’s discretion to refuse an application would result in an increase in the number of trials by judge alone being ordered:
- It should be anticipated that the effect of the proposed amendments will be to increase the number of trials which occur by judge alone, as the default position will be that such an order will be made if the accused seeks it, subject to the Court positively forming the view that such an order is not in the interests of justice.¹¹³
- 5.9 Hon Malcolm McCusker, AC, CVO, QC, was of the opinion that the number of trials by judge alone would ‘probably increase, but not very significantly’.¹¹⁴
- 5.10 The Chief Justice, Hon Peter Quinlan, SC, anticipated that there would be some increase in the number of people tried by judge alone in the Supreme Court.¹¹⁵
- 5.11 The Chief Judge, Hon Kevin Sleight expressed the view that there would be an increase:
- because there are a number of applications made to the court that are rejected, so that in itself suggests there will be an increase.¹¹⁶
- 5.12 In his submission, the Chief Judge noted that following the introduction of judge-alone trials at the election of accused persons, in South Australia and the ACT the rate of trials by judge alone have been as high as 15 per cent and 56 per cent.¹¹⁷ In calculating the number of additional District Court judges that may be required by the changes in the Bill he estimated that the proportion of trials by judge alone in Western Australia could be somewhere in the middle of these two figures, 35.5 per cent.¹¹⁸ For more discussion see chapter 6, paragraphs 6.42 to 6.44.

FINDING 3

The Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 is likely to result in an increase in trials conducted by judge alone.

Increase in appeals

- 5.13 The second reading speech suggested that an increase in trials by judge alone will cut down on appeals.¹¹⁹ However, when questioned on this issue, most witnesses before the Committee were of the view that the requirement for judges to provide written reasons

¹¹¹ Amanda Forrester, SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions of Western Australia, *Transcript of evidence*, 14 February 2020, p 1.

¹¹² Amanda Forrester, SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions of Western Australia, *Transcript of evidence*, 14 February 2020, p 1.

¹¹³ Submission 10 from Joshua Thomson, SC, Solicitor General, Department of Justice, 22 November 2019, p 2.

¹¹⁴ Hon Malcolm McCusker, AC, CVO, QC, *Transcript of evidence*, 14 February 2020, p 1.

¹¹⁵ Hon Peter Quinlan, SC, Chief Justice of Western Australia, *Transcript of evidence*, 14 February 2020, p 2.

¹¹⁶ Hon Kevin Sleight, Chief Judge, District Court of Western Australia, *Transcript of evidence*, 14 February 2020, p 2.

¹¹⁷ Submission 11 from Hon Kevin Sleight, Chief Judge, District Court of Western Australia, 29 November 2019, p 2.

¹¹⁸ Hon Kevin Sleight, Chief Judge, District Court of Western Australia, Answer to question on notice C1 asked at hearing held 14 February 2020, dated 3 March 2020, p 2.

¹¹⁹ Hon Aaron Stonehouse, MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 7 December 2017, p 6669.

would actually increase avenues for appeal as legal and factual reasoning expressed in the reasons could be unpacked and criticised in a way that is not currently possible in trials by jury.¹²⁰

- 5.14 The Chief Justice argued that 'one could expect that there would be an increase in the number of appeals'.¹²¹ His Honour gave this opinion, firstly, because an acquittal from a trial by judge alone can be appealed by the state, while this is not available from an acquittal by a jury.¹²² In this way, the number of potential avenues of appeal would increase. Secondly, His Honour noted that:

The articulation of individual factual findings in the course of a matter are inevitably, I would suggest, going to be more likely to the subject of a focussed challenge on appeal. That does not necessarily mean that there would be more successful appeals, but it would mean that person seeing the particular matters taken into account may wish to challenge individual particular matters that are referred to by a trial judge in reasons.¹²³

- 5.15 His Honour was not able to estimate how much appeals would increase under the changes proposed by the Bill. However, he was of the view that the 'workload of the Court of Appeal would increase'.¹²⁴
- 5.16 The Chief Judge shared the Chief Justice's view that the number of appeals would increase.¹²⁵
- 5.17 Hons Wayne Martin, AC, QC and Malcolm McCusker, AC, CVO, QC both submitted that although appeals may increase, this would actually be a welcome improvement to the system. In his submission, Mr Martin noted that the process of appealing a jury verdict has been subverted and distorted by the lack of reasons:

The lack of reasons of jury decisions has a profoundly detrimental effect upon the capacity of the justice system to correct error.

Because there are no reasons in jury trials, apart from the largely unsuccessful appeals on the ground that the jury verdict of conviction was unreasonable, appeals have to be brought on the ground that the process which resulted in the jury verdict miscarried in some way or another.

The most common allegation of miscarriage is to the effect that the trial judge misdirected the jury in his or her directions to them. This results in the directions given by trial judges to juries being sifted with a fine-toothed comb, by eyes keenly attuned to the perception of error. The directions of the judge become a form of surrogate for the reasons of the jury, even though they most likely bear little correlation to the actual reasoning process utilised by the jury (which will never be known). The directions are subjected to minute syntactical and grammatical analysis in the Court of Appeal at a level of detail which assumed a completely unreal reliance by the jury upon each and every precise word used by the judge in what may be a lengthy direction. The result of these appeals oblige

¹²⁰ See for example: Hon Malcolm McCusker AC, CVO, QC, *Transcript of evidence*, 14 February 2020, p 4; Hon Peter Quinlan, SC, Chief Justice of Western Australia, *Transcript of evidence*, 14 February 2020, p 4.

¹²¹ Hon Peter Quinlan, SC, Chief Justice of Western Australia, *Transcript of evidence*, 14 February 2020, p 4.

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ *ibid.*

¹²⁵ Hon Kevin Sleight, Chief Judge, District Court of Western Australia, *Transcript of evidence*, 14 February 2020, p 4.

trial judges to give ever more detailed and complex directions to juries, extending the length of the directions and reducing their comprehensibility.¹²⁶

- 5.18 Mr Martin considered that this can be remedied by trial by judge alone as judges are required to state the reason for their decision with the result that any possible errors of fact or law made in the process of the decision can be identified and fully reviewed by the appellate court. He noted the recent decision in the jury trial of Cardinal Pell in support of this argument:

Because a trial by judge alone was not available in Victoria, Cardinal Pell was tried by a jury. I suspect that in any other jurisdiction where trial by judge alone was available, the extent of the pre-trial publicity would have been such that he would have been tried by judge alone. The consequence of being tried by a jury was that when the verdict came out, as you will recall, there was an awful lot of speculation, mainly in the media, about the jury's verdict. A lot of commentators said the jury's verdict was unreasonable, but there was no basis for the public to form any view as to whether that proposition was right or wrong because the jury's verdict was entirely opaque and inscrutable. And so, far from enhancing the public's impression of the justice system, I think the opacity of the verdict in that case really diminished the public's view of the justice system and, of course, that was compounded when, more than a year later, the High Court came out and said that the jury could not have permissibly arrived at that conclusion, but we will never know why it did arrive at that conclusion. So, not only does it expand the right of appeal, but also the transparency that it provides is a very important aspect of improving the public perception of the justice system.¹²⁷

- 5.19 The recent high profile case involving the murder of Hayley Dodd is also a good example of this.¹²⁸ The decision of the trial judge was overturned on the basis that the judge incorrectly dealt with the alibi evidence of the accused in an impermissible way.¹²⁹ An appeal on this ground would not have been possible if the matter had been tried by a jury and the Court of Appeal had not been able to scrutinise the written reasons for the decision.

FINDING 4

The Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 is not likely to result in fewer appeals.

¹²⁶ Submission 6 from Hon Wayne Martin, AC, QC, 16 November 2019, p 4; Hon Malcolm McCusker, AC, CVO, QC, *Transcript of evidence*, 14 February 2020, p 4.

¹²⁷ Hon Wayne Martin, AC, QC, *Transcript of evidence*, 23 April 2020, p 10.

¹²⁸ *The State of Western Australia v Wark* [No 2] [2018] WASC 18.

¹²⁹ *Wark v The State of Western Australia* [2020] WASCA 19.

CHAPTER 6

Efficiencies achieved by trial by judge alone

Introduction

- 6.1 The second reading speech refers to a number of policy aims that may be achieved by encouraging more trials by judge alone including streamlining elements of the criminal justice system and shortening the length of trials.¹³⁰
- 6.2 This chapter explores whether conducting more trials by judge alone will result in:
- cost savings by avoiding the costs associated with a trial by jury
 - time savings by dispensing with the formalities of a trial by jury
 - less retrials caused by hung juries and aborted trials
 - additional work for judges due to the requirement to prepare written reasons.
- 6.3 This chapter also considers whether the passing of the Bill would be likely to require the appointment of additional judges.
- 6.4 While direct savings are easy to account for, there was no clear consensus from stakeholders whether the Bill would achieve net savings in time and expense to the State. Some stakeholders thought the proposed amendments would allow cases to be dealt with more quickly and cheaply.¹³¹ Others thought that any efficiencies would be outweighed by judges spending more time writing reasons, thereby causing delays and backlogs in the processing of criminal cases.¹³²

Direct costs of jury trials

- 6.5 The Committee received evidence that increasing access to trial by judge alone would save the State many of the costs associated with running a trial by jury.¹³³
Hon Malcolm McCusker, AC, CVO, QC made the following comment:

There will be savings in a lot of ways. For a start, the state does not have to pay both the judge and 12 jurors and the sheriff's officer who shepherds the jurors around the place and morning tea and afternoon tea and all those kinds of things. Admittedly, the jurors do not get paid all that much, but it is all an expense. I think there would be a real saving in that regard, not that savings should really drive the decision on whether or not to have trials by judge alone. But I think there would definitely be a saving.¹³⁴

¹³⁰ Hon Aaron Stonehouse, MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 7 December 2017, p 6670.

¹³¹ Submission 1 from Hon Malcolm McCusker, AC, CVO, QC, 28 October 2019, p1; Submission 6 from Hon Wayne Martin, AC, QC, 16 November 2019, p 6; Submission 7 from Australian Lawyers Alliance, 21 November 2019, p 9.

¹³² Submission 11 from Hon Kevin Sleight, Chief Judge, District Court of Western Australia, 29 November 2019, p 4; Submission 13 from Hon Peter Quinlan, SC, Chief Justice of Western Australia, 2 December 2019, p 3.

¹³³ Amanda Forrester, SC, Director of Public Prosecutions of Western Australia, Office of the Director of Public Prosecutions of Western Australia, *Transcript of evidence*, 14 February 2020, p 6; Hon Malcolm McCusker, AC, CVO, QC, *Transcript of evidence*, 14 February 2020, p 6.

¹³⁴ Hon Malcolm McCusker, AC, CVO, QC, *Transcript of evidence*, 14 February 2020, p 6.

- 6.6 The Department of Justice advised that the average trial by jury costs \$67500.¹³⁵ Although some of the costs are 'fairly fixed'¹³⁶, direct costs such as remuneration of jury members (which average \$6750 per trial¹³⁷) would be avoided in trials by judge alone.

Dispensing with formalities of jury trial

Advantages of dispensing with formalities

- 6.7 The Committee received evidence that increased access to trial by judge alone would improve the efficiency of the criminal justice system as it would avoid the need to undertake the various formalities of a jury trial. This would include dispensing with the need for:
- empanelling the jury
 - judicial warnings and directions to the jury
 - morning and afternoon tea breaks
 - delays in the event of a juror falling ill
 - retrials in the event of a hung jury
 - procedures of tendering evidence that apply to jury trials
 - summing up the case to the jury.¹³⁸
- 6.8 As with avoiding the direct costs of a jury trial, the net benefit of dispensing with the formalities of a jury trial would depend on whether this would be outweighed by the increased pressure on judges to prepare reasons and if this would contribute to delays. Witnesses to this Committee gave varying opinions on this point.
- 6.9 Hon Philip McCann, a retired judge of the District Court, argued that 'trials should be more streamlined' in a trial by judge alone because 'a lot of effort in jury trials goes into explaining things to the jury'.¹³⁹ However, Mr McCann was ultimately of the view that the saving would be 'time neutral' because the 'judge's workload would increase'.¹⁴⁰
- 6.10 Hon Wayne Martin, AC, QC, who was also of the view that the difference between trial by judge alone and trial by jury would be 'time and cost neutral',¹⁴¹ gave evidence that the most significant time savings could be achieved by dispensing with the procedures of tendering evidence that are required in a trial by jury:

In a trial by jury, all the evidence must be presented in open court and must be presented orally, and it must be explained in simple terms to the jury. For example, if the parties agree that a witness's statement can be presented without the witness being called because the defence, for example, does not want to cross-examine, you still have to read the statement to the jury in open court. You have to tender all the documents; and the expert evidence, when it is given, for example DNA evidence, has to always start with a lengthy explanation to the jury of what DNA is. That usually takes half to three quarters of an hour so they can understand

¹³⁵ Mark Street, Sherriff of Western Australia, Department of Justice, *Transcript of evidence*, 11 December 2019, p 7.

¹³⁶ Hon Philip McCann, *Transcript of evidence*, 14 February 2020, p 7.

¹³⁷ Mark Street, Sherriff of Western Australia, Department of Justice, *Transcript of evidence*, 11 December 2019, p 8.

¹³⁸ Hon Malcolm McCusker, AC, CVO, QC, *Transcript of evidence*, 14 February 2020, p 2; Hon Philip McCann, *Transcript of evidence*, 14 February 2020, p 3.

¹³⁹ Hon Philip McCann, *Transcript of evidence*, 14 February 2020, p 3.

¹⁴⁰ *ibid.*

¹⁴¹ Hon Wayne Martin, AC, QC, *Transcript of evidence*, 24 April 2020, p 4.

it; whereas, judges have heard that explanation many times and they can take that as given and a lot of the evidence can just go straight to it.

In a judge alone trial, the witness statements will not be read in open court; they will just be handed up to the judge, who then reads them in chambers. In the Rayney case, which was a lengthy trial by judge alone, certainly over 100, perhaps closer to 200, statements were handed up to the judge. The perception is that that saved an awful lot of time; indeed, talking to people involved in that trial, the estimate is that perhaps between one and two months of trial time was saved in that case because the trial was by judge alone rather than by jury.¹⁴²

- 6.11 By contrast, the DPP, Amanda Forrester, SC, submitted that trials by judge alone are not always more efficient and in some cases take longer than if tried by a jury:

I can think of five trials that have finished that have been conducted by judge alone that involved all of the facts being an issue.

In all of those cases, there was no saving in terms of the time taken to lead the witnesses' evidence. The exhibits still needed to be produced. All the same things needed to be dealt with in open court. Addresses were given. There were, in fact, in some cases an additional layer of complexity because counsel were asked to provide written submissions, which were extensive and took a week in themselves to do, and then the judge had to go away and draft reasons resolving all of the factual issues, matters of credibility and things of nature, which took much more time than it would to deliver closing addresses, charge the jury and for the jury to return with a verdict.¹⁴³

Disadvantages of dispensing with formalities

- 6.12 The Chief Justice, Peter Quinlan, SC, gave evidence that the formalities of a jury trial promote transparency in the criminal justice system by allowing the proceedings to be more easily understood:

One of the things that presenting a case before 12 lay persons does is discipline both the judge and the lawyers to express the case and the issues in the case in a manner that is properly understood by 12 intelligent lay persons but who are not lawyers. For purposes of efficiency, lawyers and judges when they are talking only to each other will tend to use a language that efficiently communicates issues in a manner that is not easily understood by non-lawyers. If you were to go and visit any civil trial on most days of the week, you would find that even the most intelligent, educated lay person has difficulty following what happens in a trial with lawyers and judges because of the language that is used. There is a certain transparency associated with the discipline of the onlooker being able to understand a jury trial as much as the jury.¹⁴⁴

- 6.13 The DPP, noted that 'the basis upon which criminal trials are decided would be far less transparent to members of the public' if more trials were conducted by judge alone.¹⁴⁵

¹⁴² *ibid.*

¹⁴³ Amanda Forrester, SC, Director of Public Prosecutions of Western Australia, Office of the Director of Public Prosecutions of Western Australia, *Transcript of evidence*, 14 February 2020, pp 2–3.

¹⁴⁴ Hon Peter Quinlan, SC, Chief Justice of Western Australia, *Transcript of evidence*, 14 February 2020, p 10.

¹⁴⁵ Amanda Forrester, SC, Director of Public Prosecutions of Western Australia, Office of the Director of Public Prosecutions of Western Australia, *Transcript of evidence*, 14 February 2020, p 3.

- 6.14 She noted that dispensing with formalities such as the need for closing addresses and judicial warnings that are given in open court could mean that a member of the public attending court would not be aware of these important aspects of the case:

there is one thing about the criminal justice system—in certainly this country and particularly in Western Australia, noting that other states have some suppression order issues—it is our open court system and the ability for anybody to walk into a court and hear how a trial proceeds and how it ends. If we had more trials by judge alone, the closing addresses might not be made in open court; they might be done in writing. Certainly, some of the arguments would be made in writing. The judge's charge would never be stated in open court; it would be written in a judgement, and the reasons would never be published, except in very rare circumstances.¹⁴⁶

- 6.15 The Committee notes that reducing transparency in the conduct of criminal trials in this way would need to be managed. Failing to do so would risk damaging the credibility of the criminal justice system in the eyes of the public. This risk is discussed further in chapter 7.
- 6.16 In addition, the Committee notes this evidence contradicts the second policy goal of the Bill as set out in the Explanatory Memorandum, which is to increase transparency of trials given the requirement of judges to prepare reasons.¹⁴⁷
- 6.17 Hon Wayne Martin, AC, QC disagreed with the DPP's position, arguing that the risk of a reduction in transparency in court processes would be outweighed by a significant improvement in transparency from the preparation of reasons:

I do not think it reduces transparency at all; in fact, with respect to the DPP, I think it significantly enhances transparency, because the most important part of the process is the decision and, at the moment, the decision is entirely opaque and inscrutable, whereby with trial by judge alone, the reasons are published and they can be reviewed by the world at large or by those with an interest in the case. In relation to the trial itself, I do not know if you have sat at the back of a courtroom while a trial is being conducted, but it is often very hard to follow, even if the jury is present. In real terms, in terms of the public access to trials, it is usually through the media. The reality is although the courts are open to the public, only a handful of people go and sit in courtrooms. Most of the people gather their information about trials from media reports of those trials.

I mentioned the Rayney case earlier, and in the case in which hundreds of witness statements are handed up, the judge would invariably make those statements available to the media because they are part of the court record, and if there had been a jury they would have been read to the jury. The media gets access to those and can report anything that is in those statements. With respect, in practical terms I think there is a very significant improvement in transparency in trials by judge alone, and no significant detriment.¹⁴⁸

- 6.18 The availability of reasons was addressed by the DPP, who gave evidence that written reasons would not always be available to the public:

Ms FORRESTER: If we were to go to an increased number of trials by judge alone, and experience tells us that they would happen in the more sensitive or high-

¹⁴⁶ *ibid.*

¹⁴⁷ Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017, *Explanatory Memorandum*, Legislative Council, p 1.

¹⁴⁸ Hon Wayne Martin, AC, QC, *Transcript of evidence*, 24 April 2020, p 13.

profile cases, quite often the public would never know the basis for the decision at all, and to my mind that completely detracts from the criminal justice system.

Hon NICK GOIRAN: They would not be able to know the basis of the decision but they would have the judgement, the reasons.

Ms FORRESTER: No, they would not. They would not be published; in most cases, the judgement would not be published.

Hon AARON STONEHOUSE: Is that the current practice in a judge-alone trial?

Ms FORRESTER: In many cases, yes, but certainly the District Court.¹⁴⁹

6.19 The Committee notes the following information appears on the District Court's website:

In some criminal cases the trial of an accused person is conducted before a judge alone in the absence of a jury. In the majority of these cases the judge who hears the case will publish written reasons for decision. Unless a suppression order is made, the written reasons for decision will be available online.

In some criminal cases a judge is required to make a decision on an application brought by one of the parties under the Criminal Procedure Act 2004 (WA) or the Evidence Act 1906 (WA) before the accused person's trial takes place. In many of these applications the judge will deliver oral reasons for decision and will not publish written reasons.

However, on occasion the judge will publish written reasons for decision. Unless a suppression order is made, the written reasons will be available online via the eCourts Portal. It is usual for a judge to make an order suppressing the publication of written reasons on an application made prior to trial until the trial has taken place.¹⁵⁰

6.20 This information is consistent with evidence received from the Office of the Commissioner for Victims of Crime:

Mr SAMUELS: Judge-alone trials reasons for decisions are ordinarily published on the District Court website through the eCourts Portal. The same applies to the Supreme Court.

The CHAIR: They are publicly available?

Mr SAMUELS: Yes, unless they are subject to a suppression order.¹⁵¹

Committee comment

6.21 The Committee notes that there is a need to balance the efficiencies that may be achieved by dispensing with the formalities of a jury trial against the risk of reducing transparency in the criminal justice system. Transparency of the criminal justice system can take many forms including the availability of written reasons, the conduct of trials in open court and the explanation of evidence in laypersons terms in jury trials.

¹⁴⁹ Amanda Forrester, SC, Director of Public Prosecutions of Western Australia, Office of the Director of Public Prosecutions of Western Australia, *Transcript of evidence*, 14 February 2020, p 3.

¹⁵⁰ Department of Justice of Western Australia, 29 April 2020, Datacom Systems. See: https://www.districtcourt.wa.gov.au/C/criminal_decisions.aspx. Viewed 29 April 2020.

¹⁵¹ Thomas Samuels, Legal Policy Officer, Office of the Commissioner for Victims of Crime, *Transcript of evidence*, 5 March 2020, p 10.

No hung juries

- 6.22 Some stakeholders made the point that conducting a trial by judge alone avoids the possibility of a hung jury.¹⁵² Hung juries arise when jurors cannot agree on the verdict in the case. When this occurs the judge will discharge the jury and the DPP can decide whether to seek another trial at a later date. Such an outcome is likely to be time consuming and add expense.

The view that hung juries are undesirable

- 6.23 One problem associated with hung juries is the cost of holding a retrial.¹⁵³ While the Committee received evidence that hung juries are not a common occurrence in Western Australia,¹⁵⁴ the cost of running a trial by jury is significant with the average cost being around \$67500.¹⁵⁵
- 6.24 In his evidence Hon Malcolm McCusker, AC, CVO, QC referred to an accused person who was charged with murder whose case went to trial three times because the jury returned a hung verdict on each occasion.¹⁵⁶ In that case the State would have incurred the full the cost of a trial three times without obtaining a decision. Mr McCusker was critical of hung juries for this reason, stating that 'it does not prove the system is working'.¹⁵⁷
- 6.25 Mr McCusker also gave evidence that the need to go through the trial process multiple times following a hung verdict can take an emotional toll on an accused:
- thinking of the position personally of the accused, going through any trial is a heart-wrenching kind of experience. To do it three times must be seriously damaging to the person's psyche.¹⁵⁸
- 6.26 The need to go through multiple trials would also impact victims. The Committee received evidence that most victims who are required to give evidence find the experience of cross-examination 'really difficult and confronting' and that it can cause 'considerable trauma'.¹⁵⁹

The view that hung juries are not undesirable

- 6.27 The Committee heard contrasting evidence from the DPP, who argued that hung juries should not be viewed as a problem. Instead, in the right circumstances, they show that juries are properly undertaking the task of inquiring into the guilt of an accused. She noted:
- hung juries show that the juries are doing their job. The 12 people have not been able to agree and they do not just cave in and accept the view of the majority. They stand firm and say they are not satisfied and they hang the jury, and that means you have to do it again and see if the deadlock can be broken. When you

¹⁵² Submission 1 from Hon Malcolm McCusker, AC, CVO, QC, 28 October 2019, p 1; Submission 7 from Australian Lawyers Alliance, 21 November 2019, p 8.

¹⁵³ Submission 1 from Hon Malcolm McCusker, AC, CVO, QC, 28 October 2019, p 1.

¹⁵⁴ Hon Kevin Sleight, Chief Judge, District Court of Western Australia, *Transcript of evidence*, 14 February 2020, p 8.

¹⁵⁵ Mark Street, Sherriff of Western Australia, Department of Justice, *Transcript of evidence*, 11 December 2019, p 7.

¹⁵⁶ Hon Malcolm McCusker, AC, CVO, QC, *Transcript of evidence*, 14 February 2020, p 2.

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.*, p 3.

¹⁵⁹ Teresa Tagliaferri, Director of Court Counselling and Support Services, Department of Justice, *Transcript of evidence*, 14 February 2020, p 16; Katalin Kraszlan, Acting Commissioner for Victims of Crime, Office of the Commissioner for Victims of Crime, *Transcript of evidence*, 5 March 2020, p 2.

have one person, they have to decide. That has its merits and disadvantages, I think.¹⁶⁰

6.28 The Chief Justice shared this view, noting that:

every time there is a hung jury it demonstrates jurors are performing their task diligently and not going along with a result for the sake of it but exercising their independence. Whilst one would prefer there never to be hung juries, at least when they occur we know that the jurors are taking their oaths seriously and that is the reason for that result.¹⁶¹

Committee comment

6.29 While the Committee notes there are discrepant views about whether hung juries are undesirable it notes the obvious point that the cost of retrials caused by hung juries is a potential cost that is avoided by trial by judge alone.

FINDING 5

The cost of retrials arising from hung juries is a potential cost avoided in judge-alone trials.

Aborted trials caused by juries

6.30 A retrial can also result if a jury is found to have searched prejudicial material on the internet during a trial. This scenario was raised by Hon Malcolm McCusker, AC, CVO, QC, where he argued that this is a weakness to which jury trials are exposed.¹⁶²

6.31 The Australian Lawyers Alliance addressed the issue of jury access to prejudicial material, noting:

The primary issue with the use of internet research/social media and its prevalence in influencing the minds of a jury, is that its use is difficult to detect.¹⁶³

6.32 The Australian Lawyers Alliance referred to a study conducted in the United Kingdom in 2010, in which 38 per cent of jurors who served on high profile trials admitted that they came across material online that was relevant to the trial they were sitting on.¹⁶⁴ Another study conducted of Australian Twitter accounts relating to a high profile Queensland murder trial,¹⁶⁵ found that of the 33067 tweets studied, 5–7 per cent contained prejudicial information.¹⁶⁶

FINDING 6

The cost of retrials arising from aborted trials is a greater risk in jury trials than in trials by judge alone.

¹⁶⁰ Amanda Forrester, SC, Director of Public Prosecutions of Western Australia, Office of the Director of Public Prosecutions of Western Australia, *Transcript of evidence*, 14 February 2020, p 8.

¹⁶¹ Hon Peter Quinlan, SC, Chief Justice of Western Australia, *Transcript of evidence*, 14 February 2020, p 8.

¹⁶² Submission 1 from Hon Malcolm McCusker, AC, CVO, QC, 28 October 2019, p 1.

¹⁶³ Submission 14 from Australian Lawyers Alliance, 4 December 2019, p 5.

¹⁶⁴ *ibid.*, pp 6–7, citing Cheryl Thomas, ‘Are Juries Fair?’ (Research Paper No 1/10), Ministry of Justice, February 2010.

¹⁶⁵ *R v Baden–Clay* [2014] QSC 154.

¹⁶⁶ Submission 14 from Australian Lawyers Alliance, 4 December 2019, pp 7–8, citing R Hews and N Suzor, ‘Scum of the Earth: An Analysis of Prejudicial Twitter Conversations During the Baden–Clay Murder Trial’, (2017) 40(4) *University of New South Wales Law Journal* 1604.

Requirement for judges to prepare written reasons

- 6.33 While the stakeholders generally agreed that trial by judge alone can achieve some of the efficiencies mentioned above, they were divided on whether these efficiencies would be outweighed by the increased burden on judges to prepare written reasons.¹⁶⁷
- 6.34 Some stakeholders noted that the requirement for judges to prepare detailed written reasons in a trial by judge alone would cancel out any efficiencies that may otherwise be achieved and may actually cause delays in the administration of justice.¹⁶⁸

The view that writing reasons takes longer than a day or two

- 6.35 The second reading speech noted that one day should be more than enough time for a judge to get his or her reasons down on paper.¹⁶⁹ This statement was put to a number of witnesses who gave mixed responses. One recent case was cited as taking 43 days between the end of the trial and the judge handing down their decision.¹⁷⁰
- 6.36 While juries are required only to declare whether they find the accused guilty or not guilty without explaining their decision, judges are required to provide reasons for their decisions, including the verdict. Although judges are permitted to give oral *ex tempore* reasons at the end of a trial, modern standards of judicial reasons often require judges to prepare written judgements outlining the relevant principles of law and findings of fact.¹⁷¹
- 6.37 The Committee received evidence from the Chief Judge, Hon Kevin Sleight, that in the eight judge-alone trials conducted in the District Court of Western Australia over the last five years, the average time from the conclusion of the trial to the handing down of a decision was approximately 14 days (the shortest period being two days and the longest 43 days).¹⁷² The Chief Justice gave evidence that:
- The median number of days from trial end to judgement delivery for trials by judge alone in the Supreme Court from 2014–15 and 2018–19, varied between 8 and 22 days. In the District Court, over the same period, the median varied between 4 and 40 days.¹⁷³
- 6.38 While it was explained to the Committee that judges would spend some of this time hearing other cases or working on different judgements, the Chief Justice and the Chief Judge submitted that the time required for judges to prepare written reasons would outweigh the projected time savings of conducting a trial by judge alone thereby increasing the workload of judges and causing delays to the administration of justice.¹⁷⁴ This position was supported by the DPP.¹⁷⁵

¹⁶⁷ See for example: Submission 1 from Hon Malcolm McCusker, AC, CVO, QC, 28 October 2019, p 1; Submission 6 from Hon Wayne Martin, AC, QC, 16 November 2019, p 6;

¹⁶⁸ See for example: Submission 11 from Hon Kevin Sleight, Chief Judge, District Court of Western Australia, 29 November 2019, p 3; Submission 13 from Hon Peter Quinlan, SC, Chief Justice of Western Australia, 2 December 2019, p 4.

¹⁶⁹ Hon Aaron Stonehouse, MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 7 December 2017, p 6669.

¹⁷⁰ Submission 11 from Hon Kevin Sleight, Chief Judge, District Court of Western Australia, 29 November 2019, p 2.

¹⁷¹ *Criminal Procedure Act 2004*, s 120(2); *Fleming v The Queen* [1998] HCA 68; 197 CLR 250, 262–63 (Gleeson CJ, McHugh, Gummow and Kirby JJ); *AK v The State of Western Australia* [2008] HCA 8; 232 CLR 438.

¹⁷² Submission 11 from Hon Kevin Sleight, Chief Judge, District Court of Western Australia, 29 November 2019, p 2.

¹⁷³ Submission 12 from Hon Peter Quinlan, SC, Chief Justice of Western Australia, 2 December 2019, p 4.

¹⁷⁴ Submission 11 from Hon Kevin Sleight, Chief Judge, District Court of Western Australia, 29 November 2019, p 2; Submission 12 from Hon Peter Quinlan, SC, Chief Justice of Western Australia, 2 December 2019, p 3.

¹⁷⁵ Amanda Forrester, SC, Director of Public Prosecutions of Western Australia, Office of the Director of Public Prosecutions of Western Australia, *Transcript of evidence*, 14 February 2020, p 3.

- 6.39 The Chief Judge submitted that the increased workload on judges would mean the District Court would not be able to operate effectively and process their caseload in a timely manner. He estimated that an additional five judges are already required to deal with the Court's existing workload,¹⁷⁶ and a further additional 10 judges would be required should the amendments proposed by the Bill be enacted.¹⁷⁷

The view that writing reasons does not take longer than a day or two

- 6.40 Hon Philip McCann gave evidence to the Committee that judges' workloads would increase as a result of the proposed amendments, but he challenged the assumption that judges would be required to give more written reserved decisions. He noted that:

Judges sum up to juries orally. Most cases are pretty clear cut. You could formulate a few bullet points and address them on the spot. Indeed, judges do this all the time in complicated sentencing hearings—the remarks are given orally off bullet points on a piece of paper.¹⁷⁸

- 6.41 Hons Wayne Martin, AC, QC and Malcolm McCusker, AC, CVO, QC were also of the view that judges should be able to prepare reasons quickly.¹⁷⁹ They both gave evidence that a judge who has been progressively preparing to give directions to the jury while presiding over a jury trial 'would be close to being prepared to deliver a decision'.¹⁸⁰ Mr Martin explained:

I do not think that a minimum of four days would be my estimate because judges have to give directions to juries at the end of any trial, and that means when you are a trial judge, and I have conducted many trials as a judge, each night I would—and I think most judges do this—carry out an evidence summary. In my case, I would do it by dictating something that I would send to my PA from wherever I was around Western Australia and she would type that up the next day and I would have it by lunchtime. So, you have the evidence summary, which you then use for your directions to the jury. Now, the directions to the jury, which you give at the end of the case, are, in effect, a review of all the issues of fact and law in the case. Now, often with judges they will not be so detailed about the facts in their address to the jury, but the facts will be there because they will have the transcript and they will have their evidence summaries which they usually produce. So it is then a question of converting what would otherwise have been the task of directing the jury with respect to the legal issues, taking the factual summaries that you have produced and then converting them into reasons for decisions. I would have thought that for a short trial—two or three days—that is not going to take four days. I would have thought that could be done in a day or two, at most. In a longer trial, obviously, it is going to take longer, but in a longer trial, the time savings are also likely to be much greater.¹⁸¹

FINDING 7

The Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 is likely to increase the workload of judges.

¹⁷⁶ Noting the District Court recently took over a greater share of the criminal jurisdiction in Western Australia by enactment of the *Court Jurisdiction Legislation Amendment Act 2017*.

¹⁷⁷ Hon Kevin Sleight, Chief Judge, District Court of Western Australia, Answer to question on notice C1 asked at hearing held 14 February 2020, dated 3 March 2020, p 2.

¹⁷⁸ Hon Philip McCann, *Transcript of evidence*, 14 February 2020, p 3.

¹⁷⁹ Hon Malcolm McCusker, AC, CVO, QC, *Transcript of evidence*, 14 February 2020, p 5.

¹⁸⁰ Submission 1 from Hon Malcolm McCusker, AC, CVO, QC, 28 October 2019, p 9.

¹⁸¹ Hon Wayne Martin, AC, QC, *Transcript of evidence*, 23 April 2020, pp 6–7.

FINDING 8

The extra burden on judges caused by the requirement to provide reasons for their decisions in judge-alone trials would be offset, at least in part, by a reduction in retrials associated with jury trials and the dispensing of formalities associated with jury trials.

Requirement for more judges

6.42 The Chief Judge noted that the District Court is in a 'workload crisis' and that more trials by judge alone are likely to have a significant impact on its capacity to manage its workload.¹⁸² His Honour estimated that 10 additional judges would be required by the proposed changes.¹⁸³ Public information from the Salaries and Allowances Tribunal indicates that superior court judges are currently paid between \$396951 and \$508591 per annum (not taking into account the salaries of their personal staff).¹⁸⁴

6.43 The DPP was concerned about the ability to appoint the number of judges that would be required should there be an increase in the number of trials by judge alone. She noted:

I do not think that you could find sufficient judges who are willing, let alone pay, for the number of judges that would be required to accommodate a substantial increase in trials by judge alone. Experience has shown that in the ACT it very quickly blew completely out of control. It blows the lists out. Our lists are already struggling under the weight of criminal trials themselves.¹⁸⁵

6.44 Should the workload of judges increase, but additional judges not be appointed, it follows that there would be delays in the processing of criminal trials and the administration of justice.

FINDING 9

The Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 is likely to require additional judicial resources to enable judges to prepare adequate reasons for their decisions.

¹⁸² Submission 11 from Hon Kevin Sleight, Chief Judge, District Court of Western Australia, 29 November 2019, p 3.

¹⁸³ Hon Kevin Sleight, Chief Judge, District Court of Western Australia, Answer to question on notice C1 asked at hearing held 14 February 2020, dated 3 March 2020, p 2.

¹⁸⁴ Salaries and Allowances Tribunal of Western Australia, 16 March 2020, Digital Transformation Agency – WA. See: <https://www.sat.wa.gov.au/JudgesMastersAndMagistrates/Pages/Judicial-Report-30-July-2018.aspx>. Viewed 16 March 2020.

¹⁸⁵ Amanda Forrester, SC, Director of Public Prosecutions of Western Australia, Office of the Director of Public Prosecutions of Western Australia, *Transcript of evidence*, 14 February 2020, p 6.

CHAPTER 7

Other consequences of the Bill

Introduction

- 7.1 Several stakeholders noted that an increase in trials by judge alone may have other, unintended, consequences in relation to:
- other participants in the criminal justice system
 - public confidence in the criminal justice system.
- 7.2 These consequences included:
- whether the Bill would result in less public confidence in the criminal justice system if there were fewer trials by jury
 - issues arising from the greater delay in judge-alone trials between the conclusion of a trial and the handing down of a decision
 - the impact on witnesses and victims of the availability of written reasons for decision in judge-alone trials.
- 7.3 While the Committee did not make findings on these issues this chapter sets out, for information purposes, the evidence it received.

The impact on public confidence in the criminal justice system

- 7.4 The evidence on this issue is summarised below and largely centred on the following factors:
- Whether community participation in jury trials facilitates public confidence.
 - Whether judges or juries are perceived to be more reliable decision makers.

Community participation in the criminal justice system

- 7.5 Community participation in trial by jury was considered by some stakeholders, including the DPP, Amanda Forrester, SC, to facilitate public confidence to the criminal justice system:

I very strongly support the view that jury trials are necessary to maintain public confidence. That has only been enhanced, having regard to the way that the media landscape has changed particularly in the last decade and the way that people get their news—the faux outrage; the ill-informed outrage about the results of criminal trials. We know that people do not routinely go and watch criminal trials and there are completely understandable reasons for that. When a court only sits between 10.00 and 4.00 on a weekday and that is when most people work, you can understand why people do not use their time to go and watch a criminal trial. The newspapers report in a couple of inches what can be a very complex sentencing process. We know from other jurisdictions that when jurors are actually asked to assess what sentence they would give when they are properly informed as opposed to informed by half the facts, they routinely come out with sentences that are less severe than judicial officers. In short, there is no other way.¹⁸⁶

- 7.6 The Chief Judge, Hon Kevin Sleight, noted that one benefit of having a system where the community is 'actively involved in the decision-making' process is that it protects against the

¹⁸⁶ Amanda Forrester, SC, Director of Public Prosecutions of Western Australia, Office of the Director of Public Prosecutions of Western Australia, *Transcript of evidence*, 14 February 2020, p 11.

perception that decisions are being made by judges who are 'out of touch and not reflecting community values'.¹⁸⁷

- 7.7 The DPP argued that jury trials enabled the public to have a greater understanding of the criminal justice system:

It is the only way nowadays that the public are informed properly about how the criminal justice system works.¹⁸⁸

- 7.8 Similarly, the Chief Justice, Hon Peter Quinlan, SC, noted the roughly 6000 individuals who participate in juries in Western Australia each year play an important role in educating their friends and family as 'directly informed ambassadors of the criminal justice system'.¹⁸⁹

- 7.9 In support of the importance of community participation in criminal cases the Chief Justice also cited the figure provided to the Committee by the Department of Justice¹⁹⁰ that 52 per cent of jurors leave the process with a more favourable view of the justice system than when they came in.¹⁹¹

- 7.10 Hon Philip McCann made the contrary submission that 'the public demand accountability from their decision-makers' in a way that cannot be satisfied by jurors who are not required to give reasons.¹⁹²

- 7.11 Hon Wayne Martin, AC, QC was also of this view. While he was the chief justice of Western Australia he wrote:

the proposition that the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgement of a judge appears to be an assessment of a sociological nature unsustained by any empirical evidence.¹⁹³

- 7.12 Further, Mr Martin submitted to the Committee that 'community standards have evolved to a point at which there is a general expectation that reasons will be provided in respect of all decisions of significance'.¹⁹⁴ He noted the trial of Cardinal Pell in support of his position, and argued that even though that decision was made by members of the community, the verdict was 'followed by significant criticism in the media'.¹⁹⁵

- 7.13 Similarly, Hon Malcolm McCusker, AC, CVO, QC noted:

One only has to consider the howls of public outrage when the jury acquitted the McLeods of assaulting Constable Butcher, and the public demonstration before Parliament House; or the publicly aired claims that the jury which acquitted 'the well known Northbridge businessman' John Kizon and his co-accused Mr Mercanti must have been intimidated or 'got at', to appreciate that the mere fact that the

¹⁸⁷ Hon Kevin Sleight, Chief Judge, District Court of Western Australia, *Transcript of evidence*, 14 February 2020, p 5.

¹⁸⁸ Amanda Forrester, SC, Director of Public Prosecutions of Western Australia, Office of the Director of Public Prosecutions of Western Australia, *Transcript of evidence*, 14 February 2020, p 11.

¹⁸⁹ Hon Peter Quinlan, SC, Chief Justice of Western Australia, *Transcript of evidence*, 14 February 2020, p 5.

¹⁹⁰ Dr Adam Tomison, Director General, Department of Justice, Answer to question on notice A1 asked at hearing held 11 December 2019, dated 31 January 2020, p 2.

¹⁹¹ Hon Peter Quinlan, SC, Chief Justice of Western Australia, *Transcript of evidence*, 14 February 2020, p 5.

¹⁹² Hon Philip McCann, *Transcript of evidence*, 14 February 2020, p 4.

¹⁹³ *Arthurs v The State of Western Australia* [2007] WASC 182.

¹⁹⁴ Submission 6 from Hon Wayne Martin, AC, QC, 16 November 2019, p 5.

¹⁹⁵ *ibid.*

decision is by a jury does not mean that there is likely to be public acceptance of or confidence in a jury verdict.¹⁹⁶

Perceptions of juries and judges as decision-makers

7.14 Hon Malcolm McCusker, AC, CVO, QC criticised the jury system because jurors do not necessarily have any experience in making objective judgements or in applying the criminal standard of proof. In his submission he questioned the advantage of having potentially inexperienced people adjudicate a case instead of a trained and experienced judge.¹⁹⁷

7.15 The lack of experience that jurors have as decision makers has also been acknowledged by the High Court in *AK v State of Western Australia*:

Jurors are expected to understand, remember – on occasions for months – and weigh evidence, which is sometimes not given clearly or is complicated in character, often without ever having done this before. They are expected to grasp and apply sometimes complex propositions of law, almost always without any prior experience of or training in this activity. Many jurors were and are ‘unaccustomed to severe intellectual exercise or to protracted thought’.¹⁹⁸

7.16 The DPP challenged this view, giving the following evidence in favour of juries as decision-makers:

A number of the submissions suggest — I am not quite sure why — that somehow juries are inferior. I am not quite sure why that is. We have a Parliament that takes people from all walks of life and allows them to make decisions as to what laws this state should follow. We select jurors from that same pool of people and ask them to judge their fellow citizens, and I do not see them as being any less qualified to do so than anyone else when it comes to matters that are not of law but are of credit.¹⁹⁹

7.17 In *Coates v The State of Western Australia*, Owen J made the following observation of judges as decision-makers:

Judges make decisions for a living and they often arise in complex circumstances and involve the expenditure of considerable intellectual effort. Assessments of credibility fall into this category. 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 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.

I am not suggesting that juries are incapable of making objective and dispassionate decisions. A judge's charge to a jury will almost always include directions to that effect and I have no reason to believe that jury members do other than pay due and faithful regard to the instruction. But the day to day working life of a judge will often involve dealing with evidence in ways that are outside the normal experience of members of the public. For example, a judge will often be required to put to one side inadmissible evidence (of which he or she is cognisant) in assessing credibility or deciding other disputed issues. Another example is having regard to an item of evidence for one purpose and yet

¹⁹⁶ Submission 1 from Hon Malcolm McCusker, AC, CVO, QC, 28 October 2019, p 6.

¹⁹⁷ *ibid.*, p 10.

¹⁹⁸ *AK v State of Western Australia* [2008] HCA 8; 232 CLR 438 [91] per Heydon J.

¹⁹⁹ Amanda Forrester, SC, Director of Public Prosecutions of Western Australia, Office of the Director of Public Prosecutions of Western Australia, *Transcript of evidence*, 14 February 2020, p 7.

disregarding it in relation to another contentious issue within the same case. When matters of that nature arise in a jury trial there is a need for careful direction to guide the jury in relation to them. The experience gained by a trial judge over time in relation to a wide range of fact-finding methods can be a peculiar advantage.²⁰⁰

7.18 Hon Malcom McCusker, AC, CVO, QC also gave evidence that the requirement for judges to prepare written reasons is likely to result in better decision making. He noted that preparing reasons 'is an important mental discipline, focussing the mind on truly relevant issues'.²⁰¹

7.19 This view was also advanced in Hon Philip McCann's submission²⁰² who referred the Committee to the following passage of the Supreme Court's decision in *A Child v State of Western Australia*:

It is also the case that the requirement to give reasons for decision focuses the mind. A decision supported by reasons is much more likely to be soundly based on the evidence than if no reasons, or inadequate reasons are given.²⁰³

Delay in decisions in judge-alone trials

7.20 The Committee heard evidence regarding the potential consequences of the delay in a judge-alone trial between the conclusion of the trial and the handing down of a decision. In her submission, the DPP noted:

There is also the question of the accused's liberty pending verdict. Prior to conviction, bail for an accused is at the discretion of the court. During a trial, severely limiting conditions are placed on an accused. If a verdict were reserved for more than a short period, it would be impracticable for these conditions to continue. Accordingly, after all witnesses in a case in which personal relationships are inherently involved (which is the majority of cases) have given evidence, and been cross-examined, and addresses have been given, an accused will generally be released on bail pending verdict. There will then be the need to ensure the prevention of personal violence against the accused, complainant, or witnesses, by way of retribution, attempts to coerce retraction or vigilantism. Domestic violence victims, in particular, may be at increased risk. This does not currently often arise in judge alone trials, due to the type of trial in which such an order is generally made.²⁰⁴

7.21 The following evidence on this issue was provided by the Office of the Commissioner for Victims of Crime, regarding the steps that can be taken to protect victims while an accused is on bail pending the outcome of a decision:

We know that victims, in particular, family violence victims, are at an increased risk of further violence following an incident, whether that is the separation of a relationship, or a charge being laid or bail being granted. It is important that their safety is at the forefront of bail decisions. There are a few ways in which protections can arise for witnesses and victims. The WA Police Force has a witness protection unit, which can provide assistance for witnesses, victims and their family members under threat. It is largely for serious crimes. The police also provide

²⁰⁰ *Coates v The State of Western Australia* [2009] WASCA 142.

²⁰¹ Submission 1 from Hon Malcolm McCusker, AC, CVO, QC, 28 October 2019, p 1.

²⁰² Submission 8 from Hon Philip McCann, 21 November 2019, p 3.

²⁰³ *A Child v State of Western Australia* [2005] WASCA 91; 153 A Crim R 406 [112].

²⁰⁴ Submission 3 from Amanda Forrester, SC, Director of Public Prosecutions of Western Australia, Office of the Director of Public Prosecutions, 8 November 2019, p 4.

general advice to witnesses about how to ensure their own personal safety and improve the security of their home. In terms of bail, they would be subject to the ordinary provisions of the Bail Act, which enables the court to look at applying protective bail conditions to ensure the safety of any person, including the victim or witnesses. The court can impose home detention conditions on bail, which require the person to remain in a specified place for a period. The court can also issue a family violence restraining order or a violence restraining order, as the case may be, at the time of granting bail to add another overlay of protection. It is also worth noting that the family violence legislation reform bill that is currently before the Legislative Assembly proposes enabling electronic location monitoring by GPS for home detention bail conditions, which is an additional level of oversight that could occur for the accused at that point in time.²⁰⁵

Impact on witnesses and victims of the availability of written reasons

- 7.22 One of the policy aims of the Bill is to increase transparency by the availability of written reasons in a trial by judge alone. Hon Wayne Martin, AC, QC gave evidence that written reasons would increase transparency for victims:

I think many victims would like reasons. Obviously, it is the case where there is an acquittal or a conviction of a lesser charge that causes the victims concern. In those circumstances, I think it would be enormously helpful for victims to understand just why that decision was arrived at.²⁰⁶

- 7.23 The DPP noted the following negative impact that the preparation of written reasons may have on witnesses or victims:

Another impact on victims and witnesses is that the written reasons of the judge will be required to state whether their evidence is accepted or not, and why. While there are good reasons for this, the impact on victims in having their evidence openly critiqued is likely, at least in some cases, to compound their trauma and create further conflict. It may also have the longer-term impact of dissuading victims from reporting crime or proceeding to trial.²⁰⁷

- 7.24 The impact of a victim's evidence being analysed in a written judgement was also commented on by Teresa Tagliaferri, Director of Court Counselling and Support Services, who noted:

If evidence of the victim was being questioned and that was highlighted in the reasons that were given, there could not be a response to that from the victim, and that would need some further support and some questions.²⁰⁸

- 7.25 Katalin Kraszlan, the Acting Commissioner for Victims of Crime, gave the following evidence regarding the availability of written reasons:

There is the potential for both great harm and good to the victim in having that information. Importantly, with children as witnesses, I am not sure that information, if the child's credibility has been questioned, should be provided to the child. I spend a lot of time in the National Redress Scheme at the moment, and

²⁰⁵ Thomas Samuels, Legal Policy Officer, Office of the Commissioner for Victims of Crime, *Transcript of evidence*, 5 March 2020, pp 14–15.

²⁰⁶ Hon Wayne Martin, AC, QC, *Transcript of evidence*, 23 April 2020, p 11.

²⁰⁷ Submission 3 from Amanda Forrester, SC, Director of Public Prosecutions of Western Australia, 8 November 2019, p 4.

²⁰⁸ Teresa Tagliaferri, Director of Court Counselling and Support Services, Department of Justice, *Transcript of evidence*, 14 February 2020, pp 18–19.

the number one issue that comes through from all the children, who are now adult survivors, is that they were not believed when they told someone and that is what has stayed with them—with the memories of the abuse are the memories of not being believed. I am not sure if those reasons would assist a child. There are lots of reasons why children do not get guilty verdicts. There is the potential for harm if they feel they were unbelievable, that they did not appear credible. This would confirm all the stereotypes, particularly around sex assault. It may reduce the likelihood that victims will come forward in the future. But there is also the capacity for positive outcomes for the victim as well in that we would be able to answer the questions posed by the victim about why the trial ended the way it did. And then, in the therapeutic environment discuss credibility and believability and process. I think there are both sides of the argument here. There is the capacity for harm and there is also significant capacity to assist in a therapeutic outcome. The difficulty is the information provided in the context of a therapeutic environment or is someone reading this at home at two o'clock in the morning and there could be two very different outcomes based on where and how they got that information.²⁰⁹

²⁰⁹ Katalin Kraszlan, Acting Commissioner for Victims of Crime, Office of the Commissioner for Victims of Crime, *Transcript of evidence*, 5 March 2020, pp 11–12.

CHAPTER 8

Other incidental issues

Introduction

- 8.1 This chapter will discuss some incidental issues that were raised during the inquiry but do not fall squarely within the inquiry's terms of reference.
- 8.2 In the Committee's view, these issues require further research that may be properly dealt with by a broader review of the criminal justice system in Western Australia.

Juries preparing reasons

- 8.3 Hon Philip McCann's written submissions to the Committee largely centred on a proposal that juries be required to prepare written reasons for their decision.²¹⁰ Mr McCann also prepared examples of what jurors' reasons might look like, which were provided as an addendum to his submission.²¹¹
- 8.4 The reasons for this proposal largely overlapped with the benefits of judges preparing written reasons. These include the improvements to the appeal system noted by Hon Wayne Martin, AC, QC and the effect that the requirement to give reasons focuses the mind. Mr McCann also noted:

The judge's burden will be eased in other areas — for example, sentencing. We have an extremely anomalous system at the moment where judges are required to sentence based on the implications of the jury's verdict... Now, this leads to a very unedifying situation where the judge is trying to guess what the jury's decision was.²¹²

- 8.5 Other witnesses thought this proposal would be unworkable.²¹³

Special verdicts

- 8.6 When asked about the benefits of juries providing reasons as a way to avoid judges being required to speculate the basis for a jury's decision when sentencing, the DPP, Amanda Forrester, SC, noted that this can be addressed by a 'special verdict'. This refers to the ability of the court to request the jury make specific factual findings in addition to determining the guilt of the accused:

I have done a trial myself where there was an issue about whether the person had stomped on the head of their victim or whether they had just hit the victim with their fist, and it made a significant difference to sentence, which the jury decided, and it was a very contentious issue in the trial; so we got a special verdict. The jury were asked to deliver a special verdict: did they find that the person had had their head stomped on or was it just a punch? They were asked, "Do you find this?", and they said, 'Yes', and then the sentencing proceeded. That is a capacity that is already available under the Criminal Procedure Act. In murder trials, for example, the judge could ask, if it made a significant difference, 'Do you find that there was

²¹⁰ Submission 8 from Hon Philip McCann, 21 November 2019.

²¹¹ Addendum to Submission 8 from Hon Philip McCann, 7 February 2020.

²¹² Hon Philip McCann, *Transcript of evidence*, 14 February 2020, p 5.

²¹³ Hon Wayne Martin, AC, QC, *Transcript of evidence*, 23 April 2020, p 11; Hon Malcolm McCusker, AC, CVO, QC, *Transcript of evidence*, 14 February 2020, p 7.

an intention to kill?’ There are ways of doing that. I am not sure that that is always taken up as often as it might be, but I also think that it is not taken up by defence counsel sometimes because they might prefer to take their chances on the fact that the judge might say, ‘Well, you’ve been convicted but I can’t choose between these two so I am going to take the lesser option and sentence you on that basis’.²¹⁴

8.7 The Chief Justice, Hon Peter Quinlan, SC, noted the benefits of requesting a special verdict:

It is also very common that jurors are provided with aids for the purposes of their deliberation by the judge and to explain that, for example, it is quite common—I have certainly done it—to provide a decision tree to assist a jury that will take them through the issues that arise on the elements of the offence. So that it has a question: ‘If yes, go to question 2. If no, not guilty.’ Next question: ‘If yes, go to question ...’ et cetera. One finds that, for example, in a self-defence case where there are a number of elements that you provide and I would expect they would be almost universally applied in homicide cases involving self-defence. It is not something that I would wish to, as it were, say should be introduced straightaway or without further consideration but my own personal view, and I do not speak for any of the other judges in this respect, is that there might be room for a greater use of special verdicts in jury trials. There is already provision for it in the Criminal Procedure Act. For example, the decision tree example I gave, you might have the jury return with the answer, ‘Yes to question 1; no to question 2’ et cetera. I say that because one experience I have had with juries which I am the only judge who is currently sitting who has the experience. I sat with a jury in a civil matter last year—six jurors—and I gave them a list of questions and at the end of the trial, they answered the questions yes or no, so it was possible to see in that process the reasoning process that led to the particular outcome. That is something worth contemplating. I do not present it as something that should be immediately adopted because I think it would require careful consideration.²¹⁵

8.8 Hon Wayne Martin, AC, QC also addressed special verdicts in his evidence. He did not consider it would address the difficulties associated with the lack of reasons in jury trials:

They are very rare. I think I sought a special verdict once in 12 years, and I do not think they would alleviate the difficulty with jury trials. It is very common now for judges to give juries what we call decision trees, which helps the process of decision-making. For example, in a complex homicide where you have got a number of alternative counts, you have got manslaughter, sometimes dangerous driving causing death, and if you have got self-defence as an issue—self-defence is a complex legal area, so you will often give a jury a decision tree in that area. So, you give the jury the structure—if you like, the logical structure—that they need to go through to reason their way to a conclusion. But in the end, all you ask from them is their conclusion, and I think that is the best way of doing it, frankly. Special verdicts are just going to complicate things. There are a limited number of cases in which they would apply because often the question is: did the accused person do it or did they not? There is no way you can split that down into special verdicts.²¹⁶

²¹⁴ Amanda Forrester, SC, Director of Public Prosecutions of Western Australia, Office of the Director of Public Prosecutions of Western Australia, *Transcript of evidence*, 14 February 2020, p 5.

²¹⁵ Hon Peter Quinlan, SC, Chief Justice of Western Australia, *Transcript of evidence*, 14 February 2020, p 9.

²¹⁶ Hon Wayne Martin, AC, QC, *Transcript of evidence*, 23 April 2020, p 12.

Alternative systems of trial

- 8.9 In his submission to the Committee, Hon Malcolm McCusker, AC, CVO, QC referred to alternative systems of trial such as collaborative systems where lay adjudicators sit with professional judges, and the use of expert jurors.²¹⁷ He also suggested it would be an improvement to the current system to arrange someone who is experienced, like a former judge, to go into the jury room to make sure that the jury is on track with its deliberations.²¹⁸
- 8.10 When questioned about the merits of these alternative systems, most witnesses noted that this is a question that would require a good deal of research.²¹⁹ The DPP argued that these concepts raise the question of whether one mode of trial is superior to another and their consideration would require a proper investigation into the merits of each system.²²⁰ Considering whether one mode of trial is superior requires a comprehensive review of the existing jury system (and any other alternatives) and does not fall within the limited terms of reference of this inquiry.²²¹

Requiring an applicant to understand legal implications

- 8.11 The Committee notes that in both the South Australian and ACT legislation, the court is required to be satisfied that an accused who has elected to be tried by judge alone has received legal advice in relation to the election and, in the ACT, has made the election freely.
- 8.12 In fact, this requirement has been recognised as a necessary safeguard in every Australian jurisdiction that allow trials by judge alone except for Western Australia:
- The SA Act and NSW Act require the court to be satisfied that the accused has obtained legal advice in relation to the effect of an order for trial by judge alone.
 - The ACT Act requires the accused to produce a certificate signed by a legal practitioner certifying that they have obtained legal advice in relation to the application.
 - The QLD Act also requires the court to be satisfied that the person properly understands the nature of their application if they are not represented by a lawyer.
- 8.13 The Committee received a submission from Hon Alison Xamon MLC that the Act should be amended to require 'the court to be satisfied that the accused both understands the effect of the order [for trial by judge alone], and freely agrees to it'.²²² She considered this protection especially appropriate for people who do not speak English as a first language (e.g. many Aboriginal people and people from culturally and linguistically diverse backgrounds) or who have mental health or cognitive issues.²²³
- 8.14 However, most witnesses who were questioned about whether the court should be satisfied that an applicant has obtained legal advice before applying for a trial by judge alone did not support such an amendment to the Act.²²⁴

²¹⁷ Submission 1 from Hon Malcolm McCusker, AC, CVO, QC, 28 October 2019.

²¹⁸ Hon Malcolm McCusker, AC, CVO, QC, *Transcript of evidence*, 14 February 2020, p 9.

²¹⁹ Hon Kevin Sleight, Chief Judge, District Court of Western Australia, *Transcript of evidence*, 14 February 2020, p 10.

²²⁰ Amanda Forrester, SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions of Western Australia, *Transcript of evidence*, 14 February 2020, p 7.

²²¹ *ibid.*, p 10.

²²² Submission 2 from Hon Alison Xamon, MLC, 9 October 2019, p 1.

²²³ *ibid.*

²²⁴ See for example: Hon Philip McCann, *Transcript of evidence*, 14 February 2020, p 9; Hon Kevin Sleight, Chief Judge, District Court of Western Australia, *Transcript of evidence*, 14 February 2020, p 10; Hon Peter Quinlan, SC,

FINDING 10

Various incidental issues raised during the inquiry into the Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017 fell outside the scope of the Bill (namely, the requirement for juries to prepare reasons, the use of special verdicts, alternative systems of trial and a requirement for an accused to understand the effect of an order for trial by judge alone) but could be considered in any subsequent broader review of the criminal justice system in Western Australia.

Chief Justice of Western Australia, *Transcript of evidence*, 14 February 2020, p 10;
Hon Wayne Martin, AC, QC, *Transcript of evidence*, 23 April 2020, p 15.

CHAPTER 9

Conclusion

Conclusions on policy

9.1 The policy objectives of the Bill are noted in paragraph 1.13. They are to:

- (a) Increase individual liberty by allowing the accused and his or her defence team the option of trial by judge alone;
- (b) Increase transparency, given that judges are required to set down their reasoning, whereas juries are not;
- (c) Reduce average trial times, by removing the need to empanel and instruct juries;
- (d) Reduce the impost on the public purse, given that shorter trials are generally less expensive.²²⁵

Policy objective (a)

- 9.2 The evidence and the Committee's conclusions in relation to policy objective (a) are set out in paragraphs 4.6–4.23 and Finding 2.
- 9.3 In summary, the Committee found that the effect of the Bill would be to allow an accused to elect to be tried by judge alone.
- 9.4 The Committee is satisfied that policy objective (a) would be achieved by the Bill, but notes that the drafting of the Bill could be improved to make clear that this is a statutory right of election—see Finding 2.

Policy objective (b)

- 9.5 The evidence and the Committee's conclusions in relation to policy objective (b) are set out in paragraphs 6.12–6.21.
- 9.6 The Committee noted that 'transparency' in relation to the criminal justice system takes a number of forms, including the:
- availability of reasons for decision in judge-alone trials²²⁶
 - conduct of trials in open court accessible to members of the public²²⁷
 - explanation of evidence in layperson's terms in jury trials.²²⁸
- 9.7 The Committee is satisfied that policy objective (b) would be partially achieved by the Bill for the following reasons:
- Some increased transparency would be achieved by the Bill by the provision of reasons for decision in judge-alone trials.
 - There is a risk that transparency in the conduct of criminal trials would be reduced as a result of efficiencies in the way in which judge-alone trials would be conducted.

²²⁵ Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017, *Explanatory Memorandum*, Legislative Council, p 1.

²²⁶ Paragraph 6.17.

²²⁷ Paragraphs 6.13–6.14.

²²⁸ Paragraphs 6.12.

Policy objective (c)

- 9.8 The evidence and the Committee's conclusions in relation to policy objective (c) are set out in chapter 6 (specifically paragraphs 6.7–6.10).
- 9.9 In summary, the Committee found there was some evidence that trials by judge alone are more streamlined and reduce trial times,²²⁹ but also noted evidence that this time saving would be offset by the time required for judges to write reasons.²³⁰
- 9.10 The Committee is satisfied that policy objective (c) would be achieved by the Bill, but cautions that any reduction in trial times may not offset other consequences of the Bill such as the time required for judges to prepare written reasons for their decision.

Policy objective (d)

- 9.11 The evidence and the Committee's conclusions in relation to policy objective (d) are set out in chapter 6 (specifically, Findings 6, 7 and 8).
- 9.12 In summary, the Committee heard evidence of likely cost savings in some areas, and of additional costs in other areas. Cost savings were identified in the direct costs of jury trials,²³¹ lower cost of shorter trials,²³² the avoidance of hung juries and a reduction in aborted trials.²³³ Additional costs were identified in the increased workload of judges²³⁴ and need for additional judicial resources.²³⁵
- 9.13 The Committee noted that a specialist assessment would be needed before a conclusion could be made as to whether policy objective (d) would be achieved by the Bill.

Policy issues outside the scope of the Bill

- 9.14 In addition, the Committee found that the various incidental issues outlined in chapter 8 could be considered in a subsequent broader review of the criminal justice system in Western Australia—see Finding 10.

Conclusions on the Bill

- 9.15 The Committee found that the drafting of the Bill is not sufficiently clear and precise, in that it does not directly state the right of an accused to elect to be tried by judge alone.²³⁶
- 9.16 If the reforms proposed by the Bill are to proceed, the Committee is of the view that the drafting of the Bill should reflect that the accused is, in effect, able to elect to be tried by judge alone.



Hon Dr Sally Talbot MLC
Chair

²²⁹ Paragraphs 6.7–6.10.

²³⁰ Paragraphs 6.11 and 6.33–6.41.

²³¹ Paragraphs 6.5–6.6.

²³² Paragraphs 6.7–6.11.

²³³ Paragraphs 6.22–6.32.

²³⁴ Paragraphs 6.33–6.41 and Findings 6 and 7.

²³⁵ Paragraphs 6.42–6.44 and Finding 8.

²³⁶ Paragraph 4.22 and Finding 2.

APPENDIX 1

STAKEHOLDERS, SUBMISSIONS AND PUBLIC HEARINGS

Stakeholders contacted

Number	From
1.	Department of Justice, Western Australia
2.	Chief Justice of Western Australia
3.	Chief Judge of the District Court of Western Australia
4.	Solicitor General of Western Australia
5.	Director of Public Prosecutions for Western Australia
6.	Commonwealth Director of Public Prosecutions
7.	State Solicitors Office, Western Australia
8.	Law Reform Commission of Western Australia
9.	Law Society of Western Australia
10.	Western Australian Bar Association
11.	Criminal Lawyers' Association of Western Australia
12.	Legal Aid Western Australia
13.	Office of the Commissioner for Victims of Crime
14.	Aboriginal Legal Service of Western Australia
15.	Women Lawyers of Western Australia
16.	Parliamentary Inspector of the Corruption and Crime Commissioner of Western Australia
17.	Australian Lawyers Alliance
18.	University of Western Australia, Faculty of Law
19.	Murdoch University, Faculty of Law
20.	University of Notre Dame, Faculty of Law
21.	Edith Cowan University, Faculty of Law
22.	Curtin University, Faculty of Law
23.	Hon Malcom McCusker, AC, CVO, QC
24.	Hon Wayne Martin, AC, QC, Francis Burt Chambers
25.	Thomas Percy, QC, Albert Wolff Chambers

Number	From
26.	Mark Trowell, QC, Albert Wolff Chambers
27.	Greg McIntyre, SC, John Toohey Chambers
28.	Mark Ritter, SC, Francis Burt Chambers
29.	Sam Vandongen, SC, Francis Burt Chambers
30.	Paul Yovich, SC, Francis Burt Chambers
31.	Mara Barone, SC, Francis Burt Chambers
32.	Simon Freitag, SC, Albert Wolff Chambers

Submissions received

Number	From
1.	Hon Malcolm McCusker, AC, CVO, QC
2.	Hon Alison Xamon, MLC
3.	Director of Public Prosecutions for Western Australia
4.	Legal Aid Western Australia
5.	Aboriginal Legal Service Western Australia
6.	Hon Wayne Martin, AC, QC
7.	Australian Lawyers Alliance
8.	Hon Philip McCann
9.	Women Lawyers of WA Inc
10.	Solicitor General of Western Australia
11.	Chief Judge of the District Court of Western Australia
12.	Parliamentary Inspector of the Corruption and Crime Commissioner of Western Australia
13.	Chief Justice of Western Australia
14.	Australian Lawyers Alliance, supplementary submission

Public hearings

Date	Participants
11 December 2019	<p>Department of Justice</p> <p>Joanne Stampalia, Executive Director of Court and Tribunal Services</p> <p>Teresa Tagliaferri, Director of Court Counselling and Support Services</p> <p>Mark Street, Sheriff of Western Australia</p>
14 February 2020	Hon Philip McCann
14 February 2020	Amanda Forrester, SC, Director of Public Prosecutions for Western Australia
14 February 2020	<p>Hon Peter Quinlan, SC, Chief Justice of Western Australia</p> <p>Hon Kevin Sleight, Chief Judge of the District Court of Western Australia</p>
14 February 2020	Hon Malcolm McCusker, AC, CVO, QC
5 March 2020	<p>Office of the Commissioner for Victims of Crime</p> <p>Katalin Kraszlan, Acting Commissioner for Victims of Crime</p> <p>Thomas Samuels, Legal Policy Officer</p>
23 April 2020	Hon Wayne Martin, AC, QC

APPENDIX 2

FUNDAMENTAL LEGISLATIVE PRINCIPLES

Does the Bill have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?

APPENDIX 3

PROPOSED AMENDMENTS TO *CRIMINAL PROCEDURE ACT 2004*

Division 7 — Trial by judge alone

117. Application of this Division

A reference in any written law to a person being tried or triable by or before a jury, or to the trial of a person taking place before a jury, is, unless the context otherwise requires, to be read as including a reference to a person being tried or triable by a judge alone, or to the trial of a person taking place before a judge alone, under this Division.

118. Trial by judge alone without jury may be ordered

(1) If an accused is committed on a charge to a superior court or indicted in a superior court on a charge, the prosecutor or the accused may apply to the court for an order that the trial of the charge be by a judge alone without a jury.

(2) Any such application must be made before the identity of the trial judge is known to the parties.

(3) On such an application, the court may inform itself in any way it thinks fit.

~~(4) On such an application the court may make the order if it considers it is in the interests of justice to do so but, on an application by the prosecutor, must not do so unless the accused consents.~~

~~(5) Without limiting subsection (4), the court may make the order if it considers —~~

~~(a) that the trial, due to its complexity or length or both, is likely to be unreasonably burdensome to a jury; or~~

~~(b) that it is likely that acts that may constitute an offence under The Criminal Code section 123 would be committed in respect of a member of a jury.~~

~~(6) Without limiting subsection (4), the court may refuse to make the order if it considers the trial will involve a factual issue that requires the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness.~~

(4) Except as provided in subsection (5), (7) and (8), the court must make the order unless the court is satisfied that the order is not in the interests of justice.

(5) If an application is made by the prosecutor, the court must not make the order without the consent of the accused.

(7) If an accused is charged with 2 or more charges that are to be tried together, the court must not make such an order in respect of one of the charges unless the court also makes such an order in respect of each other charge.

(8) If 2 or more accused are to be tried together, the court must not make such an order in respect of one of the accused unless the court also makes such an order in respect of each other accused.

(9) If such an order is made, the court cannot cancel the order after the identity of the trial judge is known to the parties.

119. Law and procedure to be applied

- (1) In a trial by a judge alone, the judge must apply, so far as is practicable, the same principles of law and procedure as would be applied in a trial before a jury.
- (2) In a trial by a judge alone, the judge may view a place or thing.
- (3) If any written or other law —
 - (a) requires information or a warning or instruction to be given to the jury in certain circumstances; or
 - (b) prohibits a warning from being given to a jury in certain circumstances,the judge in a trial by a judge alone must take the requirement or prohibition into account if those circumstances arise in the course of the trial.

120. Judge's verdict and judgment

- (1) In a trial by a judge alone —
 - (a) the judge may make any findings and give any verdict that a jury could have made or given if the trial had been before a jury; and
 - (b) any finding or verdict of the judge has, for all purposes, the same effect as a finding or verdict of a jury.
- (2) The judgment of the judge in a trial by a judge alone must include the principles of law that he or she has applied and the findings of fact on which he or she has relied.
- (3) The validity of a trial judge's judgment is not affected by a failure to comply with subsection (2).

GLOSSARY

Term	Definition
ACT	Australian Capital Territory
Act	<i>Criminal Procedure Act 2004</i>
ACT Act	<i>Supreme Court Act 1933 (ACT)</i>
Bill	Criminal Procedure Amendment (Trial by Judge Alone) Bill 2017
Chief Judge	Chief Judge of the District Court of Western Australia, Hon Kevin Sleight
Chief Justice	Chief Justice of Western Australia, Hon Peter Quinlan, SC
Committee	Standing Committee on Legislation
DPP	Director of Public Prosecutions Western Australia
FLPs	Fundamental legislative principles
SA Act	<i>Juries Act 1927 (SA)</i>
NSW Act	<i>Criminal Procedure Act 1986 (NSW)</i>
QLD Act	<i>Criminal Code Act 1899 (QLD)</i>
NZ Act	<i>Criminal Procedure Act 2011 (NZ)</i>

Standing Committee on Legislation


Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

'4. Legislation Committee

- 4.1 *A Legislation Committee* is established.
 - 4.2 The Committee consists of 5 Members.
 - 4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.
 - 4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of the Bill.'
- 



Parliament House,
4 Harvest Terrace, West Perth WA 6005
Telephone: +61 8 9222 7300
Email: lcco@parliament.wa.gov.au
Website: <http://www.parliament.wa.gov.au>