

Your Ref: The Hon Christine Robertson MLC

Quote in reply: Criminal Law Committee:21000339/117

7 July 2010

The Hon Christine Robertson MLC  
Committee Chair  
Standing Committee of Law and Justice  
NSW Legislative Council  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

By Email: [lawandjustice@parliament.nsw.gov.au](mailto:lawandjustice@parliament.nsw.gov.au)

Dear Ms Robertson

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

Thank you for your letter dated 20 May 2010, inviting the Queensland Law Society to make submission to the New South Wales Legislative Council Standing Committee of Law and Justice's Inquiry into judge alone trials.

We note the rarity of judge alone trials in the Queensland jurisdiction. In the two years such provisions have been operating in Queensland, there have only been couple of judge alone trials conducted. Therefore, the comments made in response to your inquiry are made largely from a theoretical perspective. In response to your terms of reference, we comment as follows.

**1. Either party may apply for a judge alone trial.**

The Society supports this proposal. The current position in Queensland, which we consider appropriate, is that either party can apply for a judge alone trial, but such a trial can only be ordered with the consent of the defence.

**2. Applications to be made not less than 28 days before the commencement of the trial.**

The Society supports this proposal, subject to the matters raised in point 3 below.

**3. Applications may be made later than 28 days before the trial, but only with the leave of the court.**

The Society is generally supportive of this proposal. We understand that there may be several policy reasons behind this proposal. For example, this provision would benefit a Legal Aid case where counsel has not yet been briefed and an election for a judge alone has not yet been considered. This provision may also benefit an accused who is involved in a high profile trial. In this instance, the accused may have the option of electing to have a judge alone trial after careful assessment of the media response closer to the trial date. We understand that this proposal may have a negative impact on both party and court costs, however, we consider that this provision is essential to preserve the accused's right to a fair trial.

**4. If the parties are in agreement, the court must order that the trial proceeds before a judge sitting alone.**

The Society supports this proposal.

**5. If the prosecution applies and the accused does not consent, then the matter must proceed to trial with a jury, subject to the jury tampering exception as set out at 6.**

The Society supports this proposal, but does not support the jury tampering exception as set out at point 6.

**6. If one of the parties applies and the court finds that there is a risk of jury tampering, then the court must order that the matter proceed before a judge sitting alone.**

The Society does not support this proposal. We consider that for an accused to lose their right to a jury trial, there must be more than a 'mere risk' of jury tampering. The Society's position remains that such trials should be unable to proceed absent the consent of the defence. If a contrary view is taken, then as a minimum, we consider that such an order should not be made on this basis unless the court was satisfied that jury tampering had occurred, or was a real likelihood. It seems to us that the better approach is to ensure sufficient safeguards can be implemented, in appropriate cases, to ensure the security of the jury and its deliberations.

**7. If the accused applies and the prosecution does not consent, then the court must determine whether or not the matter should proceed without a jury based on an 'interest of justice' test.**

The Society supports this proposal.

**8. When considering the 'interests of justice', the court may refuse to make an order where the trial will involve a factual issue that requires the application of objective community standards such as issue of reasonableness, negligence, indecent, obscenity or dangerousness.**

The Society is supportive of the inclusion of an 'interests of justice' test. However, we do not consider that is necessary to define what issues will be considered in the interests of justice. The interests of justice is a broad and dynamic concept which is flexible enough to take into account a wide range of factual scenarios.

**9. If there are multiple accused and not all agree to a trial by judge alone, the trials must proceed before a jury, again subject to the jury tampering exception as set out at 6.**

The Society supports this proposal, subject to the comments made in point 6 above re jury tampering exceptions.

**10. Once consent to a judge alone trial is given, it may not be withdrawn without leave of the court.**

The Society supports this proposal. For the sake of certainty, it would be advisable if the court has the discretion to permit the withdrawal of an application for trial by judge alone. We suggest that this withdrawal also be subject to an 'interests of justice' test.

Thank you for the invitation to provide submissions to your Inquiry. We look forward to receiving your report.

If you have any questions regarding the issues raised in this letter, please do not hesitate to contact Ms Binny De Saram, a Policy Solicitor with our office on (07) 3842 5885 or [b.desaram@qls.com.au](mailto:b.desaram@qls.com.au).

Yours faithfully

Peter Eardley  
**President**