Judge Alone Trials

This paper examines the current position in relation to Judge Alone trials in Victoria. It is intended to provide some guidance for practitioners.

The Legislation was enacted on 25 April as part of the *COVID-19 Omnibus (Emergency Measures Act) 2020.* Unless extended (which is looking like a possibility) it will be repealed on 25 October 2020.

The relevant section is in these terms:

> ***420D Court may order trial by judge alone***
>
> *(1) At any time except during trial, the court may order that one or more charges in an indictment be tried by the trial judge alone, without a jury, if—*
>
> *(a) each charge is for an offence under the law of Victoria; and*
>
> *(b) each accused consents to the making of the order; and*
>
> *(c) the court is satisfied that each accused has obtained legal advice on whether to give that consent, including legal advice on the effect of the order; and*
>
> *(d) the court considers that it is in the interests of justice to make the order.*
>
> *(2) The court may make an order under subsection (1)—*
>
> *(a) on its own motion; or*
>
> *(b) on application by the prosecution or an accused.*
>
> *(3) In determining whether to make an order under subsection (1), the court must have regard to the submissions, if any, of the prosecution.*
>
> *(4) However, the court may make an order under subsection (1) whether or not the prosecution consents to the making of the order.*

Parliament has enacted the legislation in response to the COVID-19 pandemic. The Attorney-General in the Second Reading Speech made clear the reasons for the alteration in the trial landscape:

> *Second Reading Speech*
>
> "Currently, criminal trials in Victoria must be heard by a jury, reflecting the longstanding and fundamental role of juries in the criminal justice system. However, both the Supreme and County Courts have suspended new jury trials due to the COVID-19 pandemic. This raises significant issues for the justice system, particularly for accused persons facing indictable charges who are on remand, and victims of crime, who may experience further trauma due to delays.

> As a temporary measure, the Bill will allow **judge alone trials for any Victorian indictable offence, if the court considers it in the interest of justice to do so and the accused person has obtained legal advice and provided consent**. While the prosecution's consent will not be required, the court must consider any prosecution submissions before deciding whether to hear a matter by judge alone. **This model is broadly based on the NSW provisions, and will give courts the discretion and flexibility to continue hearing indictable charges during the COVID-19 pandemic**." (emphasis added)

County Court Practice Note

On 1 May 2020 Chief Judge Kidd authorised the Judge Alone Emergency Protocol. It sets out the procedure for the making of the application, which involves:

a) notifying the court of the intention to make the application, and
b) no later than seven days after that notification, the application itself.

If there are no co-accused, the prosecution has a maximum of 7 days to respond to the application.

The judge can make the order without any application, as long as the accused has had legal advice, and consents.

In some jurisdictions (set out below) there is a legislative presumption that where the fact-finding should involve an assessment of community standards there should not be a judge alone trial.

No such specific provision is enacted in Victoria, however it may still be a relevant factor; and most importantly, our legislation was enacted for an emergency purpose, which may reduce the weight given to the 'community standards' objection.

There are four principle pre-conditions about which the Court must be positively satisfied in Victoria, before the discretion to make an order for judge alone trials in enlivened:

- The trial must involve only Victorian offences (not Commonwealth ones);
- Each accused must has given their consent to the making of an order for trial by judge alone;
- Each accused must has received legal advice about giving that consent;
- That it is in the interests of justice to make the order.

The Interests of Justice

The central question, and the focus of most applications, will be whether or not the Court 'considers' it to be in 'the interests of justice'. If there were to be opposition to the application it is assumed this factor would be the focus of submissions.

The attitude of the DPP will be important. It is assumed that there will be consent to applications for judge alone trials most of the time, because the DPP will want to get trials on, and the system moving.

Granting the application is discretionary. The guidance the legislation provides is the accused's informed consent, and the Court's consideration that it is in the 'interests of justice'. That is a similar test in all states except South Australia.

The Court will be expecting detailed written submissions, with some regard to the practice and experience of other jurisdictions. Those submissions should address the 'interests of justice'. But what are the 'interests of justice' under this legislation, enacted for an emergency purpose? And what reasons can be given, or submissions made, in support of the application?

The expression was recently considered by Chief Judge Kidd in *DPP v Combo* [2020] VCC 726, the first decision under the legislation. His Honour's reasons are detailed and carefully consider the relevant principles.

As to 'the interests of justice' His Honour said at [48] and [49]:

> "The expression 'the interests of justice' is 'broad and derives substance from the context in which it is used.'[18] The interests of justice will, of course, 'include the interests of the parties, [but] the concept will invariably be wider than that and include larger questions of legal principle, the public interest and policy considerations.'[19] The public interest concerns ensuring the integrity and proper functioning of the criminal justice system within the courts, as well as ensuring that the accused receives a fair trial according to law. Just where the interests of justice lie will be ascertained by reference to the facts and circumstances of the particular case.
>
> A determination about where the interests of justice lie involves a balancing of these various and sometimes competing interests, as they arise in an individual case. No single factor will be determinative."

There are many factors then, which may inform the concept of 'interests of justice. Some of these considerations are discussed below.

COVID-19

The COVID-19 situation, both for its impacts on the criminal justice system broadly, and on accused people in particular, must be very high among them – after all, this

was the impetus for the introduction of the legislation. Granting applications for judge alone trials will allow the administration of justice to continue, and reduce delays, both for the courts generally, and for accused people in particular. Most trials have been pushed out by at least a year, and some probably for longer.

As Chief Judge Kidd noted in *Combo* at [61]:

> *In truth, the balancing exercise here does not involve merely weighing the benefits of a jury trial against those of a trial by judge alone for the case in question. Rather, it concerns weighing the advantages of a judge alone trial now against those of a significantly delayed trial by jury (with all the disadvantages this delay entails).*

The Mode of Trial Itself

Although trial by jury is the default position, it is not the *preferred* mode of trial under the Emergency legislation. There are differences between the two modes of trial, and historically the jury trial has been the only option, because of what are considered its advantages. However trial by judge alone, has other advantages, for instance the transparency which is required from a judge in making their decision. It is open to scrutiny, in a way which a jury verdict is not. And judges are trained in the reasoning processes which should inform the deliberations as to the appropriate verdict.

Factors peculiar to the particular trial

There may be trial specific factors which affect the suitability or otherwise of trial by jury, for instance:

- where there is prejudice that is difficult to cure;
- where there has been media attention and adverse publicity;
- where there is a complex factual matrix (expert evidence), not because judges are smarter than juries (mostly they are not), but because the judge has to give reasons, which permits greater scrutiny of complex decision making;
- trials where the judge may be in a better position to crystallise the issues and sort the wheat from the chaff;
- long trials;
- trials where there is not much issue about credibility and reliability of witnesses (usually a jury question);
- fairness of the trial for both sides (prosecution not prejudiced);
- an accused person may feel that they won't get a fair trial for religious or cultural reasons, see: *Arthurs v The State of Western Australia* [2007] WASC 182

Community Standards?

Are there factors which would mean the prosecution would receive an unfair trial if it was by judge alone? There are those concepts that are generally for the community – to borrow from the NSW, WA and QLD legislation, concepts 'that involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness.'

Although such considerations may still be relevant, it must be that in these emergency times, Parliament has deliberately chosen *not* to implement that criteria. The concern of the legislation is to get trials on without juries, not to find reasons for not doing so.

Conduct of the Trials

There are practical reasons which may affect these considerations because of the way these trials will be conducted, online and remotely at least to some extent.

Guidance from other States

The guidance from other States, as to the interests of justice, may be of limited value.

Victoria's judge alone trials are permitted temporarily, in the COVID-19 Emergency situation. Our legislation is enacted in that context, and differs from that in almost all other states. SA permits judge alone trials if the accused elects. QLD, NSW and WA all have similar provisions to each other which include the consideration for community standards.

NSW has, however, enacted a new COVID-19 section to their *Criminal Procedure Act* (s 365) which provides that judge alone trials can be ordered despite the community standards provisions.

And although the case law is not settled, in other jurisdictions there is a persuasive burden on the accused to provide reasons and evidence in support of the application (especially if the prosecution opposes the course). It may be that in Victoria's situation now, the extent of that persuasive burden is very much reduced, because of the reasons for the legislation's enactment.

That persuasive burden may be because in QLD, NSW and WA, the starting point is trial by jury, and if an accused wants a judge alone trial, and the prosecution opposes that course, then the accused has to justify the application. In Victoria, right now, the default position is trial by jury; but there is nothing in the legislation which asserts that it is preferable, or that it will be the presumption.

The philosophical reasons to keep jury trials

This has always been Victoria's position, and at the moment it is a position to which we will return. There may be very sound reasons to keep, and to prefer trial by jury. But those philosophical, historical, traditional considerations must take a back seat to the reasons for enacting *this* legislation. Those reasons apply in a perfect world where juries can gather together without contracting COVID-19. See Lord Devlin's 5 reasons for jury trials in his text *Trial By Jury* (1966) quoted in *R v Belghar* [2012] NSWCCA 86 which you can read here (at [24]).

Other reasons for and against jury trials may exist, for instance a jury has the right to return a perverse verdict, especially an acquittal, but this is not a factor which can be predicted in any particular case.

The Legislation and Authorities from other jurisdictions

We set out below some cases and legislation from other jurisdictions as some signposts which may be useful.

New South Wales

Criminal Procedure Act

132 ORDERS FOR TRIAL BY JUDGE ALONE

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

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

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

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

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

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

> *(8) The* court *may make a* trial by judge order *despite any other provision of this section or* section 132A *if the* court *is of the opinion that--*
>
> *(a) there is a substantial risk that acts that may constitute an* offence *under Division 3 of Part 7 of the* Crimes Act 1900 *are likely to be committed in respect of any jury or juror, and*
>
> *(b) the risk of those acts occurring may not reasonably be mitigated by other means.*

That legislation is similar to Victoria's with some differences:

- ss (2): application must be granted if pros and defence agree;
- ss (5) Without limiting subsection (4), the court may refuse to make an order if it considers that the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness.

However, it appears s 132(5) is somewhat abrogated by the new s 365:

> **365 JUDGE ALONE TRIALS**
>
> (1) A court may, on its own motion, order that an accused person be tried by a Judge alone.
> (2) A court may make an order under subsection (1) only if--
> (a) the accused person consents to be tried by a Judge alone or, for a joint trial, all the accused persons consent to be tried by a Judge alone, and
> (b) if the prosecutor does not agree to the accused person being tried by a Judge alone, the court considers it is in the interests of justice for the accused person to be tried by a Judge alone, and
> (c) the court is satisfied the accused person has sought and received advice from an Australian legal practitioner in relation to the effect of an order that the person be tried by a Judge alone.
> (4) This section applies despite any other provision of this Act, including sections 132 and 132A.

R v Belghar [2012] NSWCCA 86 is a useful case which considers the historical and legislative framework and the leading cases from most jurisdictions.

Relying upon the decision in *Arthurs v The State of Western Australia* [2007] WASC 182 at [79] his Honour accepted that it is relevant to the "interests of justice" that an accused person, because of their religious or cultural circumstances, is concerned that he or she may not get a fair trial by a jury.

See also:

> [40] In *R v Markou* [2011] NSWDC 25, Berman DCJ considered and granted an application for a judge alone trial. His Honour concluded that when considering whether it was in the interests of justice that there be a judge alone trial, the likely efficiencies in the conduct of the trial without a jury were relevant considerations. His Honour also considered it relevant that a judge was required to give reasons but a jury was not. His Honour concluded "that the interests of justice are enhanced by the giving of reasons" (at [9]).
>
> [41] His Honour accepted that the default position was that a trial should be held before a jury and acknowledged the role which the community played as members of juries in the administration of justice. However, his Honour concluded that "where the trial would be quicker, more flexible, and the trial judge would be able to give reasons, I am satisfied that the interests of justice do require that I make the order that the trial be held before a judge alone" (at [11]).

More recently, and under the new legislative provisions, ***Regina v BD (No. 1)*** **[2020] NSWDC 150 (29 April 2020)** concerned an application by Accused for a judge along trials, which was opposed by the Crown. This application was granted on the basis that there was to be considerable delay if delayed until matter heard by jury; that accused had been in custody since his arrest and likely remain in custody until a trial; and the intention of Parliament that "the business of the court is to continue":

> [32] With unfeigned respect to Elkaim J [of the ACTSC], I echo his Honour by saying it is the clear intention of the New South Wales Parliament by the Emergency Measures legislation that “the business of the court is to continue”.
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> […]
>
> [39] As Hamill J observed in *Rakielbakhour v DPP*, “The existence of the COVID-19 pandemic creates a challenge for the criminal justice and penal systems of a kind not experienced in recent decades”. These are not ordinary times.
>
> [40] In these extraordinary times it is incumbent that the judges of this court attend to whatever work is able to be done. That includes noting the clear intention of the Parliament as previously expressed at [19] of these reasons ordering more trials be conducted by judge alone.
>
> [41] Given the application by the accused, the very considerable delays that would be experienced if the matter were to be delayed until heard by a jury, the fact that the accused has been in custody since his arrest, will very likely remain in custody until the trial, despite the concerns of the Crown I am firmly of the opinion that the matter should proceed by judge alone.
>
> [42] I have carefully considered the submissions of the Crown. I am firmly of the opinion that it is in the interests of justice for the trial be by judge alone. As Elkaim J observed in *R v Coleman* “the business of the court is to continue.”

In R v Johnson **[2020] NSWDC 153** **(30 April 2020)** there was another application by Accused for a judge along trials, which was again opposed by the Crown. The application was also granted, with the Court taking into account the intention of Parliament that trials continue. The Court also considered as relevant the request by and informed consent of the accused, and that the adjournment of the trial would result in unacceptable delay.

> [19] The single test governing the power to grant a trial by judge alone pursuant s365 is that of the 'interests of justice'. The Crown accepts that in the current COVID-19 pandemic, the interests of justice must incorporate the prejudice to the accused caused by a delay and the ability of the courts to continue their work. [2]
>
> [20] In *R v Coleman* [2020] ACTSC 97 Elkaim J at [41] said,
>
> > *"As I tried to convey in UD the fact that a trial can be conducted sometime in the future is not necessarily the point. The legislation intends the business of the court to continue. If that involves a judge alone trial then the proposed order should be made unless it is not "otherwise in the interests of justice" (s68BA(3)(b))."*
>
> [21] I respectfully adopt what was said by Elkaim J. It is the clear intention of the New South Wales Parliament that "the business of the court is to continue".
>
> [22] I have taken the following into account when assessing the interests of justice;
>
> (a) the intent of Parliament for trials to continue
>
> (b) the need for the complainant to give evidence in a timely and expeditious manner.
>
> (c) the request by and the informed agreement of the accused for a judge alone trial
>
> (d) to shorten the 'state of suspense' hanging over the head of a person who is presumed to be innocent.
>
> (e) the adjournment of the trial would result in an unacceptable delay
>
> [23] One must be circumspect about the benefits flowing from community involvement in the trial process as advocated by the Crown in light of the intent of parliament.
>
> [24] In these extraordinary times it is incumbent upon judges of this court to attend to whatever work is able to be performed. This includes noting the clear intention of Parliament for the ordering of more trials to be conducted by judge alone.

Both of those trials were set down to commence in early June 2020.

Finally, from *Berghal*, the NSW case. Ultimately the CCA overturned the trial judge's decision to grant a judge-alone trial, because HH did not have *evidence* of the prejudice the accused asserted that he would suffer by reason of a jury trial.

But leaving that issue aside, these comments by the McLellan CJ at CL are relevant and apposite:

> [96] This appeal raises questions of fundamental importance which the divergence of views in previous decisions confirms are not readily resolved. Although s 131 provides for trial by jury "except as otherwise provided", I do not think that the section has the effect of creating a "presumption" that the trial should be with a jury, thereby casting a burden of proof on an accused person. Although the accused person carries an evidentiary onus the court does not determine where the interests of justice lie by requiring the evidence to rise to a level by which a "presumption" of trial by jury is displaced. Each mode of trial has its particular characteristics and, accordingly, depending on all of the circumstances relating to the particular case, the court may conclude that the interests of justice are best served by a judge-alone trial rather than trial by a jury. Of course, absent an application by an accused person, the default position will be that the trial must take place with a jury. And, no doubt, when considering where the interests of justice lie, it will be relevant that where the trial involves an issue which may be informed by community standards or expectations the interests of justice may be best served by utilising a jury of laypeople. Subsection (5) acknowledges this consideration. However, I see no reason why the legislation otherwise requires particular weight to be given to the fact that, absent an application for a judge-alone trial, the trial will be with a jury as opposed to by a judge alone. The question for the court is whether it considers it is in the interests of justice to make the order.
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> […]
>
> [99] In so far as the origin of a trial by jury was to provide a protection for the accused, in that he or she would be tried by their peers, where the accused applies in accordance with s 132 for a judge-alone trial, it is plain that the accused has, with proper advice, determined that the protection is not required. For this reason the subjective views of an accused and his or her belief that a jury trial may not be fair, as reflected in his or her desire to dispense with a jury, must be a relevant factor: *Arthurs* at [79]. The protection which trial by jury is assumed to provide to an accused person by requiring a unanimous verdict of lay judges is no longer of relevance.
>
> […]
>
> [102] … The fact that an accused person desires a trial by judge alone, although relevant, is not as significant as the reasons for that preference and whether those reasons are rationally justified and bear upon whether he or she will receive a fair trial.

[…]

[110] In some cases the decision of a judge to order trial by judge alone has been influenced by consideration of the efficiencies available from a judge-alone trial and the advantage available to an accused person and the community if reasons for the verdict are available from the trial judge: *Markou* at [6]-[8]; *Arthurs* at [76], [92]; see also *Rayney* at [29], [37]. For my part I would accept that as part of the mix of issues which must be considered the likely length of the trial in a particular case, if conducted with a jury, compared with the likely length of trial by a judge alone, is relevant. The likely length of a trial may have to do with the complexity of the issues involved, the number of accused to be tried, or the number of witnesses to be called. The obligation on prospective jurors to spend many months away from their normal activities, including their employment with extremely modest monetary recompense, may be a significant matter in a particular case when determining where the interests of justice lie. Trial judges are familiar with the problems which can arise with jurors who become frustrated at their continuing involvement in a trial weeks or months after the original estimate has passed with the obvious diminishing contribution they make to understanding the evidence and the issues which require resolution.

[…]

[112] As the reasons of Martin CJ in *Arthurs* make plain, the Chief Justice considered the requirement for a judge to give reasons to be a significant factor when considering where the interests of justice lie. To my mind the opportunity which a reasoned judgment affords to the accused and to the public to understand the steps in the reasoning process of the decision-maker, compared with the inscrutability of the jury's decision, will depending upon all the circumstances, be a factor which is relevant to the decision as to whether to order a judge-alone trial. However, it is but one factor and the weight to be given to it will depend upon the nature of the issues to be determined in the trial. If the trial will involve complex engineering, scientific or medical issues it may be more readily concluded that a verdict accompanied by the reasons of the trial judge will enhance the interests of justice, both in relation to the accused and the maintenance of confidence in the criminal justice system. It would inevitably facilitate an appeal if the trial judge has erred.

[113] As Martin CJ remarked in *Arthurs*, the recent trend in many areas has been to require a decision-maker to provide reasons for his or her decision. The giving of reasons requires the decision maker to consider the evidence, follow accepted methods of reasoning, and express the reasons for the decision in a manner which can be understood and analysed by others. If accepted to be sound, published reasons must serve to enhance confidence in the process of the law. If not sound, they can be challenged and, where relevant error is identified, the decision can be corrected.

> [114] Whether a jury has correctly understood the facts and correctly applied the law can never be authoritatively determined. However, it must be remembered that the jury's verdict is a "community decision." The jury has a right to bring in a perverse verdict and acquit an accused: *Bushell's Case* [1823] EngR 38; (1670) 124 ER 1006; *R v Shipley* (1784) 4 Doug 73, 170; *Chandler v DPP* [1964] AC 763 at 804. Whether that right is compatible with contemporary notions of justice, balancing the interests of an accused and the State, and whether it is still generally accepted by the community, is of course unknown. However, any accused person who believes that right of a jury may be to their advantage is unlikely to apply for a judge-alone trial. Notwithstanding the significance of these issues, as I have discussed, the decision in this case does not turn upon them.

Ultimately as stated above, our legislation is enacted for an emergency purpose, the central 'interest of justice' must be to get trials on without juries.

To that extent the persuasive burden imposed in other jurisdictions, of having *reasons,* and *evidence* to justify the application must be far more limited by the circumstances that justice demands in these unprecedented times.

Queensland

Section 604 of the *Criminal Code Act* 1899 (Qld) provides that in the relevant circumstances that if an accused enters a plea, other than a plea of guilty, *autrofois acquit*, *autrofois convict* or a plea to jurisdiction, the person is "deemed to have demanded that the issues raised by such plea or pleas shall be tried by a jury, and is entitled to have them tried accordingly.

The accused can then make an application under s 614 for a 'no jury' order. The making of a no jury order is subject to the discretionary decision at s 615, as to whether it is in the interests of justice to make the order (taking into account the community standards concept similar to NSW and Queensland).

If the identity of the trial judge is known, there must also be special reasons for the making of a 'no jury' order, over and above considerations of the interests of justice.

In *R v Pentland* [2020] QSC 78, the Court considered trial by judge alone in the context of COVID-19, where the charge was murder. The Crown did not oppose the application made by the Accused. After outlining the broad propositions stemming from the Queensland case law (at [9]), the Court noted:

> [11] *First*, there has been some debate throughout the decisions regarding whether there is a "starting assumption" to the effect that there should be a trial by jury in the absence of a no jury order based on a finding that it is in the interests of justice to do so, or whether the court should regard the provisions as expressing a "neutral position" as to the preferred mode of trial. To my mind, the discretion falls to be exercised without any preconceptions as to the mode of trial; either it is in the

interests of justice that the case proceeds without a jury or it is not. Of course, it is indisputable that, absent an order, the "default position" under our system of criminal justice is trial by jury, but that should not be permitted to skew the exercise of the discretion one way or the other. It follows that if the applicant satisfies the court that it is in the interests of justice that the case proceed without a jury (and, where the identity of the trial judge is known, that there are special reasons for facilitating that), a no jury order should be made.

[12] *Second*, as his Honour Judge Rafter SC held in *Hanna & McAllum*, just because the trial will require an assessment of the credibility of one or more witnesses does not mean that trial by jury is the preferable mode. Very few trials will not involve such an issue and the assessment of the truthfulness and reliability of witnesses is a basic function of a trial judge in relation to which he or she will not be under any relevant disadvantage compared with the jury. To the contrary, a "trial judge has considerable advantages over a jury as a result of his or her training and experience"

[…]

[18] As stated at the outset, when the no jury order was made in this case (1 April), jury trials had been suspended for the immediate future and that of course remains the position to this day. Given that circumstance, the Crown rightly did not oppose the making of the order. Indeed, it is difficult to imagine a more compelling ground for concluding that it is in the interests of justice that a no jury order be made than that trial by jury is not presently available as a mode of trial.

[19] As such, cases like this one are fundamentally different to most (if not all) previous decisions on applications for no jury orders. That is because they do not ask in terms whether a fair trial according to law may be secured before a jury; they confront the reality that no trial by jury can presently be had. If the only mode of trial is by judge alone, and the fairness of the trial is not otherwise compromised, the only way in which the interests of the parties as well as the public interest in the due administration of justice can be advanced is through a trial without a jury provided, of course, the accused consents.

[…]

[22] The accused was first interviewed by police in relation to the matter 23 years ago (April 1997) but was not charged until 27 June 2017. The indictment was presented in April last year. He is now 71 years old and, although he was admitted to bail, he was diagnosed in 2018 with a serious illness, described as "Advanced HIV". If his application for a no jury order was dismissed, it would have been almost inevitable that his trial would be de-listed and, if that was to occur, he would be left in a state of uncertainty (to say the least) regarding the final disposition of the charge against him. These features, taken together, amount to special reasons over and above the interests of justice.

In *R v Terare*, the District Court considered and ultimately made a 'no jury' order following the decision in *Pentland*.

> [17] I agree that the fact of the COVID-19 pandemic and its accompanying risks to public health is a crucial factor of this case. The suspension of all new jury trials is a very relevant factor indeed.
>
> [18] I find that the interests of justice will be served by the making of a no jury order as the order will ensure the trial can go ahead without delay. It is in the interests of the defendant that his trial be completed swiftly. It is also in the interests of the community that the administration of justice continue and trials be heard for as long as is reasonably possible (without risk to health of any of the participants).
>
> [19] Also, the defendant is a 70 year old indigenous man with significant health issues who should have an early trial.
>
> [20] A judge only trial, I am told, will also be considerably shorter than a trial by jury and indeed it could be expected to be concluded within a day. Also, I take into account, the Crown's attitude towards the application.

Of the four most recent (post-COVID) District Court judge only trials, there have been three acquittals (*R v OJH*; *R v MMH*; *R v Sandy*) and one conviction (*R v McGeady*).

South Australia

South Australia has had judge alone trials since 1984.

Section 7, *Juries Act 1927*

> (1) Subject to this section, where, in a criminal trial before the Supreme Court or the District Court—
>
> (a) the accused elects, in accordance with the rules of court, to be tried by the judge alone; and
>
> (b) 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,
>
> the trial will proceed without a jury.
>
> (2) No election may be made under subsection (1) where the accused is charged with a minor indictable offence and has elected to be tried in the District Court.
>
> (3) Where two or more persons are jointly charged, no election may be made under subsection (1) unless all of those persons concur in the election.
>
> (3a) Where an information is presented to the District Court or the Supreme Court under section 103 of the *Criminal Procedure Act 1921* and the information

includes a charge of a serious and organised crime offence (within the meaning of the *Criminal Law Consolidation Act 1935*), the Director of Public Prosecutions may apply to the court for an order that the accused be tried by judge alone.

(3b) The court may make an order on an application under subsection (3a) if it considers it is in the interests of justice to do so (and may do so at any time before commencement of the trial of the matter, regardless of whether a jury has been constituted in accordance with this Act to try the issues on the trial).

(3c) Without limiting subsection (3b), the court may make an order on an application under subsection (3a) if it considers that there is a real possibility that acts that may constitute an offence under section 245 or 248 of the *Criminal Law Consolidation Act 1935* would be committed in relation to a member of a jury.

(3d) An order of a court on an application under subsection (3a) may be appealed against in the same manner as a decision on an issue antecedent to trial.

(4) If a criminal trial proceeds without a jury under this section, the judge may make any decision that could have been made by a jury and such a decision will, for all purposes, have the same effect as a verdict of a jury.

If the accused elects, and they have had proper legal advice, the trial will proceed without a jury.

The DPP can ask for judge alone if it's serious organised crime, and the judge considers it to be in the interests of justice.

Western Australia

CRIMINAL PROCEDURE ACT 2004 - SECT 118

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.

(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.

Either party can apply, but the application must be made before the identity of the trial judge is known to the parties.

Once the application is made, the Court can inform itself any way it sees fit.

An order can be made if the Court considers it's in the interests of justice, but only if the accused consents

An order may be made if the Court believes the complexity or length is likely to make the trial unreasonably burdensome to a jury

However, the Court may refuse if 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.

Once an order has been made, the Court cannot cancel the order once the identity of the trial judge becomes known.

In *State of Western Australia v Rayney* [2011] WASC 326, the Commissioner[1] granted the application. In the course of his reasons he determined that the

[1] A judicial role in the WA Supreme Court

discretion in the relevant section should be exercised in accordance with the following principles:

- when considering what is in the interests of justice, a judge does not start from a notion that trial by jury is generally preferable to trial by judge alone (at [17]); (note however that there is some controversy on this point in WA – the fact that one has to apply for a judge alone trial means that the presumption is for trial by jury)

- the applicant has (as does any applicant) the burden of convincing the court that it is in the interests of justice that an order be made for a trial by judge alone and that the discretion should be exercised in favour of such a trial (at [17]);

- the relevant factors are not capable of exhaustive definition (at [18]);

- the weight of individual factors will vary from case to case (at [18]);

- weight should be given to the subjective view of an accused (at [26]);

- the interests of justice include providing a trial that is likely to be perceived by the wider community as fair and independent (at [26]);

- there will be cases where the giving of reasons may favour a judge alone trial (the Commissioner instanced a trial where the verdict depended on a correct comprehension of complex or technical evidence) (at [29]);

- adverse pre-trial publicity may be relevant to whether an accused will receive a fair trial, which is a fundamental consideration of the interests of justice (at [34]); and

- the length of the trial and the potential burden on jurors (at [37]).

The Australian Capital Territory

Prior to the COVID-19 pandemic, the ACT allowed judge-only trials on the election of the accused, unless the charge was an 'excluded offence' (which included the offences of murder, manslaughter, culpable drive, and a variety of sex offences).[2]

[2] See Part 2.2 of Sch 2, *Supreme Court Act 1933* (ACT)

The ACT added a new section – s 68BA – to the *Supreme Court Act 1933*, which gives the Court the power to order a judge alone trial on its own motion, including for previously excluded offences and, more outrageously, even in circumstances where the accused does not consent.

68BA Trial by judge alone in criminal proceedings—COVID-19 emergency period

(1) This section applies to a criminal proceeding against an accused person for an offence against a territory law if the trial is to be conducted, in whole or in part, during the COVID-19 emergency period.

(2)To remove any doubt, this section applies—

(a) to a criminal proceeding—

(i) that begins before, on or after the commencement day; and

(ii) for an excluded offence within the meaning of section 68B (4); and

(b) whether or not an election has been made by the accused person under section 68B, including before the commencement day.

(3) The court may order that the proceeding will be tried by judge alone if satisfied the order—

(a) will ensure the orderly and expeditious discharge of the business of the court; and

(b) is otherwise in the interests of justice.

(4) Before making an order under subsection (3), the court must—

(a) give the parties to the proceeding written notice of the proposed order; and

(b) in the notice, invite the parties to make submissions about the proposed order within 7 days after receiving the notice.

(5) In this section:

commencement day means the day the *COVID-19 Emergency Response Act 2020*, section 4 commences.

COVID-19 emergency period means the period beginning on 16 March 2020 and ending on—

(a) 31 December 2020; or

(b) if another day is prescribed by regulation—the prescribed day.

(6) This section expires 12 months after the commencement day.

Given the very different framework the ACT is now operating under, their case law may be of little help in this jurisdiction. The following cases, however, provide some useful commentary on the history

In *R v IB (No 3)* [2020] ACTSC 103, the accused had previously stood trial before a jury where he was acquitted of one charge, but with the jury failing to reach verdicts on the remaining three charges. (It has to be noted that the accused fled the jurisdiction on day 3 of his original trial, was subsequently located and extradited from the UK two years later, and has been in custody since July last year). The accused faced charges that would, prior to the amended legislation, have been 'excluded offences'.

The Court focused on giving effect to the legislative requirement to "ensure the orderly and expeditious discharge of the business of the court". The Court determined that the despite the accused's opposition to a judge alone trial, and that the charges previously could not have been heard by judge-alone, the considerations favouring the making of an order are far more cogent than those that tell against the making of an order (at [122]).

In *R v UD (No 2)* [2020] ACTSC 90, the Court broadly considered:

a) What consideration should be given to the attitudes of the parties ([15] – [31]);
b) Whether a judge alone trial could be as fair to an accused as a jury trial ([32] – [42]); and if yes
c) Is there anything particular to the case or the accused that would render a judge alone trial unfair ([43] – [54]).

In *UD*, the Crown also argued that:

> [I]mposing a judge alone trial on an unwilling accused could only ever be justifiable, and thus in the interests of justice, where it is the *only* means of ensuring that justice can be done. Put differently, a judge alone trial should only be ordered where a refusal to do so would inevitably lead to serious injustice.

The Court disagreed, and ordered and judge alone trial. The Court particularly noted:

> [71] I initially thought the strongest point made by the Crown was this: The accused is in custody. He is likely to remain in custody for some time, the evidence against him does not rely on the well-being of any particular witness and the evidence will

not degrade over time. Therefore, remembering that he does not wish to have a judge alone trial, what harm is there in waiting for even a year for him to come to trial. On reflection, and with respect, **I think the submission ignores the primary intent of the legislation. The business of the court must proceed and is constrained only by the interests of justice. If there is no reason why a judge alone trial is not fair to the accused, then the trial should proceed**.

[72] The accused made this submission about s 68BA(3)(a). Ms Morrisroe said that the word "ensure" meant "to make certain of something or to guarantee something". She continued: "Ultimately, in my submission, in the COVID-19 world that we find ourselves in, the ability to make certain of something, to guarantee something, or indeed to ensure something, is near impossible". I entirely agree but am at a loss to understand why the uncertainty of the world should prevent a court from pursuing its primary business. **The new legislation is an attempt to defeat the uncertainty. The Court should not impede this quest by refusing to act in what it considers are the interests of justice**. (emphasis added)

The case of *R v Coleman* [2020] ACTSC 97 followed on from *R v UD* and specifically considered argument from the Crown that interests of justice arguments cannot be confined to the expeditious hearing of matters, and consideration has to be given to the confidence of the public in the administration of justice. The Crown also argued that the 'timeframe' for jury trials not being heard is not the length of which the amended legislation runs for (i.e. until the end of 2020), but only the period of emergency currently declared in the ACT (90 days from 8 April 2020).

In summing up, the Court said:

[34] The accused tendered no evidence in support of his resistance to the proposed order, but his counsel did enumerate the reasons the accused wished to have a jury trial. He pointed out that the trial would involve an accomplice giving evidence against the accused, that there was identification evidence and also evidence of an alibi. It was submitted that these three components raised matters of credit which are more suited to a trial by jury. In addition, decisions of credibility, if decided by a jury, would better reflect community standards.

[35] I disagree that credibility issues are necessarily better suited to a jury. Almost every case involves the tribunal of fact making a decision on one or more issues of credit. Judges in civil cases frequently decide questions of credit. As to identification, as I said in *UD*, it might be thought that the necessary strict application of the law relating to identification, could be better suited to adjudication by a judge alone.

[36] As to community standards, the same might be said about every criminal trial, including all of those that have been heard by judges alone. Sentences imposed

by a judge are required to reflect community standards. It cannot be said that judges are capable of reflecting these standards in sentences but not trials.

[37] I note that besides the CCTV footage, which presumably can be preserved, the Crown case relies on the evidence of a number of witnesses, including the co-offender, whose recollections may deteriorate with time. It is not always a ready answer to the passage of time to show a witness a previously made statement in the hope that their memory will be refreshed.

[38] In addition, there are victims (the McDonald's employees) who are no doubt anxious to see the trial completed and, if appropriate, justice being done. I said in *UD* that even corporate victims have an interest in speedy justice. I suspect that in the current climate of increasing unemployment, an organisation like McDonald's would be keen to see courts dealing with cases of this type so as to discourage further robberies.

[39] The two most relevant factors against the making of the proposed order are that the accused does not consent to it and that he is on bail. I have already noted the diminished importance of the former factor in light of the new legislation. As to him being on bail, the argument is that there is no prejudice to him by having to wait a longer period before coming to trial.

[40] I agree that there is no prejudice to the accused, but there is prejudice to the administration of justice which requires accused persons to be brought to trial as soon as is reasonably possible and there is no factor in this matter that indicates that a judge alone trial will not be in the interests of justice.

[41] As I tried to convey in *UD* the fact that a trial can be conducted sometime in the future is not necessarily the point. The legislation intends the business of the court to continue. If that involves a judge alone trial then the proposed order should be made unless it is not "otherwise in the interests of justice" (s 68BA(3)(b)).

The Practicalities

County Court

If an party intends to make an application for a judge alone trial, they must inform the County Court in writing to CCVcriminal.division.administrators@courts.vic.gov.au and include:

- Name of the accused
- CR number
- Details of any co-accused including their CR number
- The court location to which the accused was committed.

The court will then assign the matter to a Criminal Division Lawyer who will become the principal point of contact for the parties.

The timeframe for making an application is as follows:

Previously allocated trial date	**Timeframe for making an application for trial by judge alone**
Trial date previously listed in the month of March, April or May 2020	May 2020
Trial date previously listed in the month of June 2020	June 2020
Trial date previously listed in the month of July 2020	July 2020
Trial date previously listed in the month of August 2020	August 2020
Trial date previously listed in the month of September 2020	September 2020
Trial date previously listed in the month of October 2020, up to and including 24 October 2020[3]	October 2020

This timeframe is subject to an exception allowing a trial by judge alone to be expedited where a party identifies that the circumstances of the matter necessitates an expeditious hearing.

Applicant is the Accused

Accused has seven (7) days to eLodge, serve on the Prosecution and any co-accused:

- Form 420 Application for Trial by Judge Alone
- Full written submissions including the reasons why it is in the interests of justice for the Court to make the order.

Where there is a co-accused, the co-accused then has seven (7) days after service to eLodge and serve:

- A notice confirming their position as to whether the matter should proceed by judge alone;
    - Whether they consent or not

[3] The provisions contained in 'Part 9.2 – Trial by judge alone' of the *COVID-19 Omnibus (Emergency Measures) Act 2020* will be repealed on 24 October 2020.

- Whether they have obtained legal advice
- An accurate and up-to-date trial estimate for a trial by judge alone if different from that given by the applicant

The Prosecution must eLodge and serve their response within a further seven (7) days. The Prosecutions submissions must include:

- Their position in relation to a trial by judge alone, including whether they consent
- The reasons for the position they have adopted

Applicant is the Prosecution
Similarly, once notifying the Court of an intention to apply for trial by judge alone, the Prosecution have seven (7) days to eLodge and serve the Form 420 and written submissions.

Each accused then has a further 7 days in which to eLodge their response to the application.

The written response must address the matters raised in the Prosecution's application, as well as:

- The accused's position in relation to a trial by judge alone, including whether they consent to a trial by judge alone without a jury;
- Whether the accused has obtained legal advice on whether to give that consent, including the legal effect if an order is made for trial by judge alone;
- The reason(s) for the position adopted by the accused regarding a trial by judge alone without a jury, including any reason(s) why it is in the interests of justice for the Court to order a trial by judge alone in the matter.

If any party requires an extension of time for eLodging/serving any of the above, the party must seek leave of the Court two days prior to the due date.

The extension of time application is made in writing via email to the Criminal Division Lawyer, and must include:

- Date the submissions are due
- An indication of the length of extension sought
- The reasons for seeking an extension

The application will be determined by a Criminal Division Judicial Registrar, on the papers and electronically.

All judge alone applications will be heard by the Judge Alone Trial Applications List, presided over by the Chief Judge, and the Head of the Criminal Division.

It is the court's intention that the hearings will be conducted as much as possible on the papers. The Court may seek further written submissions and/or information, and will contact the parties to advise if this is the position.

If you want an oral hearing of the application, you must notify the Court and the other party as soon as possible, and set out the reasons for an oral hearing. If the oral hearing is granted, the default position will be that this occurs via Webex.

If the application is granted, the Court will, within seven dates, allocate a new trial start date (which will not be the previously allocated trial date), and as soon as possible thereafter allocate a trial judge.

Supreme Court

As with the County Court, if an party intends to make an application for a judge alone trial, they must inform the Court in writing to criminaldivision@supcourt.vic.gov.au and include:

- Name of the accused
- S CR or S ECR number
- Details of any co-accused including their CR number
- The court location to which the accused was committed.

The Court will then assign the matter to a Criminal Division Lawyer who will become the principal point of contact for the parties.

The Court's timeframe for the making of an application is the same as the table (above) for the County Court. There is also the requisite exception for 'urgent' matters where the reason for the urgency is identified.

Applicant is the Accused

The Accused has seven (7) days to file via RedCrest and serve on the Prosecution and any co-accused:

- The 'Application for Trial by Judge Alone' Form
- Full written submissions including the reasons why it is in the interests of justice for the Court to make the order.

Where there is a co-accused, the co-accused then has seven (7) days after service to file via RedCrest and serve:

- A notice confirming their position as to whether the matter should proceed by judge alone;
    - Whether they consent or not
    - Whether they have obtained legal advice
    - An accurate and up-to-date trial estimate for a trial by judge alone <u>if different from that given by the applicant</u>

The Prosecution must file via RedCrest and serve their response within a further seven (7) days. The Prosecutions submissions must include:

- Their position in relation to a trial by judge alone, including whether they consent
- The reasons for the position they have adopted

<u>Applicant is the Prosecution</u>
Similarly, once notifying the Court of an intention to apply for trial by judge alone, the Prosecution have seven (7) days to file via RedCrest and serve the Application Form and written submissions.

Each accused then has a further seven (7) days in which to file and serve their response to the application.

The written response must address the matters raised in the Prosecution's application, as well as:

- The accused's position in relation to a trial by judge alone, including whether they consent to a trial by judge alone without a jury;
- Whether the accused has obtained legal advice on whether to give that consent, including the legal effect if an order is made for trial by judge alone;
- The reason(s) for the position adopted by the accused regarding a trial by judge alone without a jury, including any reason(s) why it is in the interests of justice for the Court to order a trial by judge alone in the matter.

If any party requires an extension of time for filing/serving any of the above, the party must seek leave of the Court two days prior to the due date.

The extension of time application is made in writing via email to the Criminal Division Lawyer, and must include:

- Date the submissions are due
- An indication of the length of extension sought
- The reasons for seeking an extension

The application will be determined by a Criminal Division Judicial Registrar, on the papers and electronically.

If any party proposes to provide further written submissions, they must notify the Court in writing (via the Criminal Division Lawyer), and then file via RedCrest and serve on the other party/ies as soon as practicable unless otherwise directed by the Court.

All judge alone applications will be heard by the Judge Alone Trial Applications List, presided over by the Chief Judge, and the Head of the Criminal Division.

It is the court's intention that the hearings will be conducted as much as possible on the papers. The Court may seek further written submissions and/or information, and will contact the parties to advise if this is the position.

If you want an oral hearing of the application, you must notify the Court and the other party as soon as possible, and set out the reasons for an oral hearing. If the oral hearing is granted, the default position will be that this occurs via Webex.

If the application is granted, the Court will allocate a new trial start date (which will not be the previously allocated trial date), and as soon as possible thereafter allocate a trial judge.

Colin Mandy SC
Ffyona Livingstone Clark
Foley's List