actlawsociety

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Legislation, Policy and Programs
Justice and Community Safety Directorate
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RE: JUDGE ALONE TRIALS AND JURY ISSUES DISCUSSION PAPER

The ACT Law Society (the Society) welcomes the opportunity to comment on the "Discussion Paper: Judge Alone Trials and Jury Issues" (the Discussion Paper). On 22 March 2021, the Society was represented by Michael Kukulies-Smith at the roundtable chaired by the Attorney General, Shane Rattenbury, regarding this matter.

The Society is the peak professional association that supports and represents the interests of the members of the legal profession in the ACT. The Society maintains professional standards and ethics as well as providing public comment and promoting discussion regarding law reform and issues affecting the legal profession. The Society currently represents over 2,800 legal practitioners within the ACT.

We make the following comments in regard to the Discussion Paper.

JUDGE ALONE TRIALS

Background

Section 68B of the *Supreme Court Act 1933* (ACT) (the Act) allows defendants in criminal proceedings for an offence other than an excluded offence, to elect for judge alone trials (excluded offences model). Excluded offences include (among other things) offences involving sexual assault and the death of another person.[1]

The excluded offences model attracted criticism when it was first implemented in 2011 under the *Criminal Proceeding Legislation Amendment Act 2011*. Chief Justice Higgins commented that the excluded offences are arguably offences likely to raise issues, which may justify the option of a judge alone trial.[2] Offenders charged with sex offences and offences involving death are more likely to seek to proceed via judge alone trials due to the notoriety and community prejudice often associated with these types of offences.[3] The categories for the excluded offences have also been criticised as being random and arbitrary. For example, other offences that rely on

[1] *Supreme Court Act 1933* (ACT) sch 2.
[2] Higgins CJ, 'Reform to Judge-Alone Trials', *Bar Bulletin* (March 2011) 5; see also Fiona Hanlon, 'Trying Serious offences by Judge alone: towards an understanding of its impact on judicial administration in Australia' [2014] 23 *Journal of Judicial Administration* 137, 139–140.
[3] Jodie O'Leary, 'Inspiring or Undermining Confidence? Amendments to the Right to Judge Alone Trials in the ACT' (2011) 10(3) *Canberra Law Review* 30, 39.

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community standards, such as dishonesty, are not excluded.[4] Further, it is anomalous that an offence of an act of indecency can proceed on a summary basis before a Magistrate, yet if the same charge is referred to the Supreme Court, it must proceed before a jury. It seems inconsistent that a judge alone cannot decide a matter otherwise entrusted to a Magistrate.

Whether the excluded offences model has a positive impact on public confidence in the justice system has also been questioned. There appears to be insufficient evidence to suggest that the rate of conviction is higher in jury trials.[5] A higher conviction rate can also be a cause for concern considering that offenders often elect for judge alone trials to avoid jurors' prejudice and unfair convictions.[6]

Recommendation

The following options are raised in the Discussion Paper:

- Option 1: retaining the excluded offences model;
- Option 2: removing the excluded offences; and
- Option 3: introducing a new model.

In our view, the defendant's consent is paramount and we would oppose any model that allows for trial by judge alone without the consent of the defendant. This is consistent with our previous opposition to the changes introduced during the COVID-19 emergency period to allow the court to order a judge alone trial in prescribed circumstances.

The Society supports option 3 in introducing a new model that is similar to the New South Wales (NSW) model, which is to remove the excluded offences and to allow for judge alone trials if both parties consent; or when only the defendant agrees, for the court to consider whether a judge alone trial would be in the interests of justice.

The Society considers the *interests of justice* test to be sufficient and does not think that it is necessary for the test to be informed by specific matters as this may restrict the court's discretion, and render the test more complex than necessary. It is suggested that judges are best placed to make this determination on a case-by-case basis. We note that the DPP would have the opportunity to be heard against a judge alone trial if the office felt there were reasons the matter ought to be determined by a jury.

JURY CHALLENGES

Background

Section 34 of the *Juries Act 1967* (ACT) provides that each party is entitled to eight peremptory challenges and an unlimited number of challenges for cause. A peremptory challenge can be made by the parties and does not require any reason to be provided. A challenge for cause requires justifiable reasons for the challenge.

Recommendation

The Society is of the view that there is no issue with the current system and does not support a reduction in peremptory challenges. We note that the Discussion Paper does not provide evidence to suggest excessive use of peremptory challenges in the ACT. The Discussion paper

[4] Higgins, above n 2, 5; see also Anne Wallace, Lorana Bartels and Anthony Hopkins, University of Canberra, Submission to the Standing Committee on Justice and Community Safety, Legislative Assembly for the ACT, Criminal Proceedings Legislation Amendment Bill 2011 (ACT), 8 April 2011, 2.
[5] O'Leary, above n 3, 43; see also Gregor Urbas and Robyn Holder, Australia National University, Submission to the Standing Committee on Justice and Community Safety, Legislative Assembly for the ACT, *Criminal Proceedings Legislation Amendment Bill 2011 (ACT)* 8 April 2011, 5–6.
[6] O'Leary, above n 3, 43.

reveals that on average, less than four peremptory challenges are used and that it is exceptionally rare for all eight challenges to be used in any given trial.

There is also insufficient evidence to suggest that ACT juries are less representative of the broader community than elsewhere. Further, as a small jurisdiction, issues with "degree of separation" are more likely to arise in the ACT than in a more diverse jurisdiction like NSW, such that a high number of peremptory challenges is justified.

The Society supports the provision of additional statutory guidance for challenges for cause. We note that challenges for cause are not often used in practice as legal practitioners usually have little if any prior knowledge about potential jurors with which to mount such a challenge.

MAJORITY VERDICT

We understand that the ACT is the only jurisdiction in Australia that does not permit the return of a majority verdict in a jury trial. We note that the ACT does not experience the same resources issues as NSW, having the appropriate court facilities and not as many trials. Thus, the Society is of the view that the current model (of unanimous verdict) should remain.

However, if a majority verdict model were to be adopted, this should only be considered after a *Black* direction[7] has been given, and the majority verdict allows for no more than one dissenting vote (11 out of 12 jurors or 10 out of 11 jurors). Additionally, a flexible timeframe should be given for jury deliberations to avoid the undesirable situation where judges feel obliged to give the direction. The Society suggests that the minimum timeframe be unspecified and relative to the number of charges.

We would welcome the opportunity to comment further, if that would be of assistance.

Yours sincerely,

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Chief Executive Officer

[7] As outlined in *Black v The Queen* (1993) 179 CLR 44, 51.