24 February 2021

Director
Department of Justice
Office of Strategic Legislation and Policy
GPO Box 825
Hobart Tas 7001

Attention: Ms Brooke Craven

By Email: HaveYourSay@justice.tas.gov.au

Dear Brooke

Re: Criminal Code Amendment (Judge Alone Trials) Bill 2020

Generally the Tasmanian Bar applauds this policy and legislative initiative as it will provide greater flexibility for trials of indictable criminal matters. The Bar Council is pleased that the representations made by its members to introduce this reform has been favourably received.

While overall the Bill is supported, there are some issues that we regard as problematic and need attention and revision of the drafting of the Bill. These issues are addressed below.

1. ***That any party may apply for an order for trial by judge alone within 2 months of the date the accused was committed to stand trial. An application may be considered outside of this expiry period if exceptional circumstances exist.***[1]

   There are four aspects warranting comment.

   a) **That any party may apply for an order for trial by judge alone ('the application')**[2]**;**

      - It is noted that the Bill does not expressly provide for the court to make an order of their own motion (*cf* 420D(2)(a) *Criminal Procedure Act 2009* (Vic));
      - There was not unanimous support for the prosecution to make application for judge alone trials;

[1] S. 361AA(2) & (3) & (5)
[2] S. 361AA(1)

- In regard to the hearing and determination of an application the Bill remains silent on the issues of whether it is envisaged that the same judge would (i) determine the application for judge alone trial; and (ii) any pre-trial issues arising subsequent to the application being granted; and (iii) the judge alone trial itself.

b) That any such application must be filed within 2 months of the date the accused was committed to stand trial;[3]

- The stated time limit is overly proscriptive;

- Our suggestion is that the 2 months should be from after the date of service of Crown Papers. This would also mean that the decision apply for a judge alone trial is made at a time when the crimes stated in the indictment and the evidence are fully known to defence, therefore informed legal advice can be given.

- At certain times of year, particularly the end of the year, an accused may be waiting over two months to have their matter first heard in the Supreme Court from the time they are committed to stand trial in the Magistrates Court. That could mean that pleading not guilty before a Magistrate in November, and not appearing until February, automatically precludes them from having the option to apply for a judge alone trial.

- The 2 month period also does not properly consider or incorporate any application or completion of Preliminary Proceedings.

Members have proposed that a preferable alternate drafting is that application for a judge alone trial should be 2 months from service of Crown Papers, and not any sooner. It is noted that 'front line' experience of the indictable crime process includes that disclosure of evidence remains delayed, and incomplete - the currently proposed 2 month period would result in the relevant decision being made before (i) the investigation and disclosure are finalised (a common problem observed in many newly committed matters), (ii) before an indictment is settled or filed.

c) That consideration of an application filed 'out of time' can only occur where there are 'exceptional circumstances';[4]

- it is noted that the term 'exceptional circumstances' is not defined within the legislation.

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[3] S.361AA(1) and S.361(2)(a)
[4] S.361AA(3)

- Members felt that the exceptional circumstances test is too high a threshold. A lower threshold like "in the interests of justice" would be more appropriate.
- It is noted that a similar threshold test does not appear in regard to filing other types of applications out of time within the criminal jurisdiction. In regard to appeals -
  - The filing of a Lower Court Appeal requires. – per s 107(6) *Justices Act 1959* - A judge in his discretion may, on an affidavit setting forth reasonable grounds, extend the time mentioned in subsection (3) at any time within that time or after it has expired.
  - The filing for the Court of Criminal Appeal. – per s 407(5) *Criminal Code Act 1924* - The time within which notice of appeal, or notice of an application for leave to appeal, may be given, may be extended at any time by the Court.

d) In circumstances where the prosecution are seeking a judge alone trial - there is the requirement that such (prosecution) application requires the consent of the accused;[5]

- The consent of the accused is seen as a fundamental safeguard to any application;

- Regarding the provision of legal advices (as contemplated by s 361AA (5)(a) and (6)(b)(i) and (6)(c))– it is submitted that clarification should be provided that Counsel only needs to hand up a certificate to the effect that the required advice has been given but is not required to disclose the substance of the written advice provided; and

- that the Court is not to inquire into the precise and detailed terms of advice that was given.

2. That an order for trial by judge alone cannot be made unless the court is satisfied of the following factors:[6]

a) The accused person has given informed consent. The court needs to be satisfied that the accused person understands the nature of the proposed order and the implications of an order, if made
b) That the making of an order is in the interests of justice;
c) Where an accused is charged with two or more charges that are to be tried together the order is to be made for all charges and if there is more than one accused, each accused must have made an application and given their consent.

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[5] S.361AA(2)(b)
[6] S. 361AA(5)

- **As to the accused person having to give informed consent. The court needs to be satisfied that the accused person understands the nature of the proposed order and the implications of an order, if made**

  Refer above.

- **That the making of an order is in the interests of justice.**

  Such requirement is also found within the (recently enacted) equivalent Victorian provisions - see s 420D(1)(d) Criminal Procedure Act 2009. This section has been considered now in a range of cases in the Supreme Court and in the County Court: see *DPP v Combo* [2020] VCC 726; *DPP v Verduci* [2020] VCC 1166; *DPP v Carlton* [202] VCC 1272; *DPP v Hobson* [2020] VCC 1557; *DPP v* Tiba [2020] VSC 600.

  Relevantly Her Honour Justice Hollingworth has stated in *DPP v Tiba*, at [9]:

  > *The fourth requirement in s.420D is that the court must consider that it is in the 'interests of justice' to make the order for trial by judge alone. As Chief Judge Kidd discussed in Combo, the expression 'interests of justice' is broad, and includes not only the interests of the parties, but also larger questions of public interest and policy considerations. The public interest includes 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.*

- **Where an accused is charged with two or more charges that are to be tried together the order is to be made for all charges and if there is more than one accused, each accused must have made an application and given their consent.**

  With reference to the phrase *'charges that are to be tried together'* it is unclear at what stage of the proceedings the application for judge alone trial must be determined (i.e. - should the judge alone aspect be determined before other pre-trial issues. For example where defence counsel seek to sever charges on an indictment (ref s 311(2) and s 326(3) Criminal Code, but see also - re sexual assault indictments - s 326A Criminal Code)

I acknowledge assistance from Patrick O'Halloran and Jessica Sawyer, members of the Bar Council for this feedback and comment.

Yours faithfully

SANDRA TAGLIERI SC

PRESIDENT