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THE LAW SOCIETY OF NEW SOUTH WALES
youngLAWYERS

29 June 2010

Ms Rachel Callinan
Director
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Callinan,

Inquiry into Judge alone trials under s 132 of the Criminal Procedure Act 1986

NSW Young Lawyers is made up of legal practitioners and law students who are under the age of 36 or in their first 5 years of practice. The Young Lawyers Criminal Law Committee provides education to the legal profession and wider community on current and future developments in the criminal law, and identifies issues in need of law reform.

We refer to the inquiry into judge alone trials under s 132 of the *Criminal Procedure Act 1986* (NSW). Section 132(3) of the *Criminal Procedure Act 1986* (NSW) presently provides that an election to be tried by a judge alone requires the consent of the Director of Public Prosecutions.

In particular, we refer to the terms of reference, which set out a proposed model. **The Young Lawyers Criminal Law Committee ("the Committee") supports the proposed model, subject to what appears below.**

We have had the advantage of reading, in draft form, the submission of the Law Society Criminal Law Committee. **The Committee also supports the amendments suggested by the Law Society Committee.**

In addition, Committee respectfully makes the following suggestions:

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Primacy of jury verdicts

The Committee is concerned that the proposal has the unintended effect of undermining the community's perception of the legitimacy of a jury verdict, compared to a judge alone verdict, although at law each verdict is deemed equal. That is so because there is no presumption in favour of a jury trial.

The Committee recognises that this proposal is not a debate about the value or otherwise of trial by jury, nor a debate about the right to jury trial. However, in the context of the argument as to the right to trial by judge alone in Commonwealth trials, the High Court has commented on the right of *the community* to participate in the system of justice through juries.[1]

The verdict of a jury remains the primary means by which criminal indictable decisions are handed down in this state.

Accordingly, the Committee suggests that the proposed legislation include provision recognising (amongst other relevant considerations) the primacy of jury verdicts and the interests of the community in participating in the criminal justice process when the court determines the "interests of justice" test proposed.

Jury tampering

Point 9 of the proposed model deals with the case of a multiple co-accused trial. That point has been made subject to the jury tampering exception at Point 6. Point 6, in its present form, is mandatory – if there is a risk of jury tampering, the trial *must* proceed by judge alone (emphasis added).

The Committee supports the spirit of Point 9: that where one co-accused wishes to be tried by jury, the other co-accused must also proceed before a jury.

However, in its present form, a risk[2] that *one* co-accused may tamper with a jury would automatically cost the *other* co-accused their right to jury trial. That is contrary to the spirit of the proposal, and the Committee accordingly suggests an amendment.

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[1] See, eg *Brown* (1986) 160 CLR 171 at 197 per Brennan J, 201-202 per Deane J, 208-209, 214 per Dawson J; *Brownlee v R* (2001) 207 CLR 27 at [114] per Kirby J.

[2] Remembering that the Committee supports the amendment of the proposal to "identifiable" risk, in accordance with the Law Society's suggestion.

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That before making an order based on the risk of jury tampering, the court must consider all options available in order to mitigate against the risk of jury tampering. For example by separating the trials, remanding the relevant accused into custody or making necessary orders as to bail conditions, or in appropriate (and unusual) circumstances ordering the sequestration of the jury.[3]

The Committee would welcome the opportunity to provide evidence before any public hearing relating to any proposed amendments.

If you have any questions in relation to the matters raised in this submission, please contact Thomas Spohr, Chair of the Young Lawyers Criminal Law Committee (crimlaw.chair@younglawyers.com.au) or Pouyan Afshar, President of NSW Young Lawyers (president@younglawyers.com.au).

The Committee thanks you for the opportunity to comment.

Yours faithfully

Thomas Spohr | Chair, Criminal Law Committee; Executive Councillor
NSW Young Lawyers | The Law Society of New South Wales

[3] Jury Act 1977 (NSW) s54(1).

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