**Guidance Note**

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| To | VLA Staff Practice |
| Subject | **Judge Alone Trials – Issues for Practitioners** |
| From | James Fitzgerald – Senior Public Defender | Date | 6 May 2020 |

## Introduction

1. The Victorian Parliament has passed legislation[[1]](#footnote-1) permitting the trial of indictable Victorian offences in the Supreme and County courts by judge alone. This measure was introduced, together with a wide variety of other novel changes to the legal landscape in Victoria, as part of the response of the Victorian government to the unusual circumstances prevailing since the outbreak of the COVID-19 pandemic. In particular, the measure has clearly been driven by the fact that, as a response to the pandemic, the Supreme and County Courts have indefinitely postponed all jury trials.
2. The provisions introducing judge alone trials will be repealed on the day that is 6 months after their commencement.[[2]](#footnote-2) They commenced on 25 April 2020. The provisions do not apply to a trial of commonwealth charges. Such charges must be tried by a jury by operation of section 80 of the Commonwealth constitution.
3. In the second reading speech, delivered on 23 April 2020, the premier referred to the rationale for judge alone trials in the following terms:

*“Currently, criminal trials in Victoria must be heard by a jury, reflecting the long standing 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 interests 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 the courts the discretion and flexibility to continue hearing indictable charges during the COVID-19 pandemic.”*

## Purpose of this Guidance Note

1. This guidance note provides an overview of the legislation and offer some guidance on what considerations are relevant to the advice that should be given to clients who are in a position to apply for a judge alone trial. Clearly any such advice must be formulated on a case by case basis. Like any forensic decision made during the preparation for and running of a criminal trial, there may be pros and cons to making an application for a judge alone trial. Ultimately it will be a decision your client should make. Where your client wishes to adopt a position contrary to your advice, it would be prudent to obtain those instructions in writing.
2. In offering this guidance, consideration will be given to the operation of judge alone trials in NSW and other jurisdictions. While these comparisons are helpful to some extent, it must be borne in mind that the Victorian system has been brought into being for the specific purpose of avoiding delays to criminal trials brought about by virtue of the pandemic. The legislation that applies in other jurisdictions has no such context.

## The Legislation

1. The C19 Omnibus Act introduces a new Part 9 into the *Criminal Procedure Act 2009* (the CPA). The new section 420D provides:
2. *At any time except during trial, the court may order that one or more charges in an indictment be tried by the judge alone, without a jury, if –*
3. *Each charge is for an offence under the law of Victoria; and*
4. *Each accused consents to the making of the order; and*
5. *The court is satisfied that each accused has obtained legal advice on whether to give consent, including legal advice on the effect of the order; and*
6. *The court considers that it is in the interests of justice to make the order.*
7. *The court may make an order under subsection (1) –*
8. *On its own motion; or*
9. *On an application by the prosecution or an accused.*
10. *In determining whether to make an order under subsection (1), the court must have regard to the submissions, if any, of the prosecution.*
11. *However, the court may make an order under subsection (1) whether or not the prosecution consents to the making of the order.*
12. The trial judge may make any decision that could have been made by the jury. The decision has the same effect as a verdict of a jury. (s.420E)
13. The judgment must include the principles of law applied by the trial judge and the facts on which the trial judge relied. (s.420F)
14. There is provision for appeal against a decision regarding trial by judge alone (that is, to make such and order or to refuse to make such an order). This process is set out in sections 420G to 420M. With some differences the process there set out is similar to the process applying to interlocutory appeals. Having said that, section 420R states explicitly that such a decision is not an interlocutory decision for the purposes of the CPA.
15. Interestingly, section 420K provides that if the Court of Appeal gives leave to appeal against a decision regarding trial by judge alone after the trial has commenced, the trial judge must adjourn the trial until the appeal has been determined. Section 420K(2) provides that if, in these circumstances, a jury has been empanelled, and it is reasonably practicable for the trial judge adjourn the trial without discharging the jury, the trial judge must do so. Neither the explanatory memorandum nor the second reading speech afford any assistance or guidance whatsoever as to the operation of this section or the rationale for it.
16. It is clear, first of all, that it is contemplated that the legislation may well be in operation at a time when jury trials have resumed. The circumstances in which this section may apply must only be where the trial judge has refused an application, made by or with the consent of the accused, for a judge alone trial and proceeded to empanel a jury and commence the trial.
17. Sections 420N to 420Q relate to the application of the *Appeals Costs Act 1998* to appeals against a decision regarding a judge alone trial.
18. Division 6 (Sections 420R to 420ZA) provides for the application of the CPA generally to judge alone trials. The trial commences when the accused pleads not guilty on arraignment before the trial judge (s. 420S). The opening address of the prosecution, the defence response, any opening address on behalf of an accused and all closing addresses are to be presented to the judge alone (s.420T).
19. The judge does not have to give directions to the jury (s.420U).
20. Where the judge exercises a power under section 241 (1) or (2) (involving discharging the jury from delivering a verdict where the accused pleads guilty or where the prosecution leads no evidence) there is no requirement that a jury be discharged.
21. Section 420W provides that when the trial judge delivers a verdict of guilty then at that moment the accused is found guilty of the offence.
22. Section 420X concerns appeals against conviction from trials by judge alone. It essentially mirrors the effect of sections 277(1)(c), (f), 326E(1)(c) and (f).
23. Section 420Y provides that in a trial by judge alone section 349(b) does not apply. Section 349(b) provides that in determining an application for leave to cross-examine under section 342 (as to the complainant’s sexual activities) the court must have regard to *“the risk that the evidence may arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility”*.
24. Section 420Z provides that in trial by judge alone the trial judge must have regard to the matters about which she would have had to direct a jury pursuant to section 358 of the CPA (involving an accused being represented for cross-examination of a protected witness).
25. Section 420ZA provides that in making a direction under s.370 (1A) (as to whether a special hearing should be conducted before or during the trial) the judge is not required to have regard to the matter set out in section 370 (1B) (f) (the likelihood that the evidence given by the complainant will include inadmissible evidence that may result in the discharge of the jury).
26. Section 420ZB provides that alternative verdicts which are available to a jury pursuant to certain sections of the *Crimes Act 1958* are available to the trial judge.
27. Section 420ZF stipulates that section 4A of the *Jury Directions Act 2015* applies to judge alone trials. That section provides that the court’s reasoning must be consistent with that Act.
28. Section 420ZH provides that a judge may order a judge alone trial irrespective of when the offence charged is alleged to have been committed and irrespective of when the criminal proceeding to which the indictment relates was commenced.

## Court Protocols for Judge Alone Trials

1. Both the Supreme and County Courts have published protocols as to applications and procedures for judge alone trials. They are available on the respective websites.

## The Interests of Justice

1. As noted above, the decision to make an order that a trial of Victorian charges be by judge alone depends on the satisfaction of the judge that the accused has received legal advice about and consents to a trial by judge alone and that it is in the interests of justice to make such an order.
2. There is no statutory guidance as to what matters can be taken into account in determining whether such an order is in the interests of justice.
3. Generally speaking, it may be assumed that matters concerning notoriety (or infamy) of the accused or the case in question may go to the interests of justice in that it might be argued that despite proper judicial direction, the accused may not receive a fair trial. Similarly, where trials involve necessarily receiving into evidence highly prejudicial material this provision may be engaged.
4. Of course, as noted, the primary purpose of the Victorian legislation is to avoid delay occasioned by the pandemic and it is to be assumed that it will be in the interests of justice, therefore, that, where possible, such delay be avoided.
5. In NSW the equivalent legislation[[3]](#footnote-3) provides that *“the court may refuse to make an order if it considers that a 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.”*
6. This provision has proved somewhat controversial. The question has arisen whether determining an accused’s intention would require the application of any community standards.
7. The starting point of this was obiter comments by Heydon J in *AK v State of Western Australia* [2008] HCA 8 at {95} where His Honour was discussing precisely the same wording in the Western Australian legislation:

*“Other examples of factual issues requiring the application of “objective community standards” include whether behaviour was “threatening, abusive or insulting:; whether conduct was “dishonest”, a matter to be decided by the jury “according to the ordinary standards of reasonable and honest people”; whether an assault is “indecent”; and whether an accused person had a particular intention.”*

1. In support of that last matter, HH cited an article as follows:

*[86] Buxton, ‘Some Simple Thoughts on Intention’, [1988] Criminal Law Review 484 at 495: ‘Recourse to shared values and assumptions about the implications of actions and the circumstances in which those actions occur maybe a safer guide to culpability than analytical deductions from a generalised verbal definition.”*

1. Courts in NSW have since arrived at different conclusions about whether, in the particular circumstances of the case, determining the intention of the accused involved the application of community standards.[[4]](#footnote-4) It seems that it is accepted that determining intention (for example, to kill or cause grievous bodily harm or to sexually penetrate) can in the particular factual setting of a case involve the application of community standards. It is worth noting that very often in the cases cited, the applications for judge alone trials have not proceeded on the “community standards” ground alone but on numerous bases including the prejudicial nature of the material or the adverse publicity pertaining to it.
2. This controversy as to intention is not yet part of the Victorian legal landscape. As a starting point it seems reasonable to assume that in a case that turns on questions like whether conduct is reasonable, indecent, dangerous or negligent, it is in the interests of justice that the trial be heard before a jury as a “superior tribunal of fact”[[5]](#footnote-5). Juries, as randomly selected members of the community, are far better qualified to weigh questions of community standards than judges alone (with respect). So, for example, in a case involving self-defence, where the jury must consider the reasonableness of the conduct of the accused, there is no doubt that the trial will involve the application of community standards.
3. Whether Victorian courts regard intention (for example to cause injury or to sexually penetrate) as matters that fall into this category remains to be seen. No doubt (as in NSW) the matter will be determined on a case by case basis. It is apt to simply observe that intention is an element of almost every Victorian offence (though it is not always an issue in dispute) and that to remove from consideration for a judge alone trial all trials in which intention is at issue would make it highly unlikely that the provisions would ever be used.

## Reasons to Apply For a Judge Alone Trial

1. From various public pronouncements it seems unlikely that there will be another jury trial in Victoria until the latter part of this year. It is more likely that jury trials will not recommence in Victoria until 2021. At the time of writing there is simply no better information available than this. We can have no way of knowing what course the COVID-19 virus will take or what the final timetable for the lifting of restrictions might be. In light of this, our clients awaiting trial have longer to wait. The availability of judge alone trials means that, in circumstances where such an application is made and granted, the delay can be avoided.
2. If our client is in custody, of course, the extra delay is a highly distressing matter. There is no doubt that this will be a matter of relevance to our clients.
3. This document does not purport to expressly cover the relevance of COVID-19 to bail applications. However, whereas delay occasioned by the decision not to conduct jury trials is relevant in any application for bail, it might be argued that the availability of the judge alone trial makes the delay potentially avoidable. The prosecution might mount such an argument to resist an application for bail.
4. In response, it could be observed that such an argument presupposes that any application for judge alone trial would be granted; that is, that a judge would exercise her discretion in a particular way. Further, such an argument would tend to have the effect of coercing an accused to consent to the making of an order for a judge alone trial and this would be contrary to the plain meaning of the legislation which is surely that a judge alone trial cannot be ordered in the absence of the consent of the accused.
5. In a case involving considerable pre-trial publicity which is highly negative to and prejudicial against your client, it may well be that a judge alone trial is a good option. It is certainly to be hoped that a judge is better able to put aside such matters from their deliberations.
6. It is the nature of publicity these days that it is indelible. It will be available on search engines throughout the world. The fact that your client received publicity back at the time of the alleged offence or at the time of the committal does not mean that it has not been freely accessible to all since then. An application under the *Open Courts Act 2013* may not cure this. Your client’s case may be the subject of blogs or facebook commentary or the like. Such considerations may be heightened where it is alleged that the offending took place in a relatively smaller community on circuit. In such cases, applications for a change of venue might be replaced by an application for a judge alone trial.
7. Similarly, in trials which will necessarily involve the reception into evidence of highly prejudicial material, it may be preferable that the matter proceed by judge alone. It should be borne in mind, however, that judges are not machines. They are as vulnerable to human emotions and frailty as any other member of the community.[[6]](#footnote-6)
8. Following on from this, where there is a technical or otherwise difficult or subtle line of defence that may be overshadowed by the prejudicial or generally distasteful nature of the evidence, you may consider that a judge alone trial would be apt.
9. It has been suggested that in trials involving voluminous and complex evidence (such as some fraud or drug matters) it is preferable that the matter proceed before a judge alone. While in all likelihood such a matter would proceed more smoothly and economically before a judge alone, this may not be to your client’s advantage. The clumsy, laborious or incomplete presentation of the evidence may reflect badly on the prosecution before a jury. This consideration depends very much on what the case theory for the defence is.

## Reasons To Avoid A Judge Alone Trial

1. At the time you make your application for a judge alone trial, you will not know who your judge will be.
2. Up until the COVID-19 crisis, judge alone trials have been happening in Victoria every day in the Magistrates Court. It is no disrespect to observe that the results of such contests depend very much on the experience and attitude of the magistrate assigned to hear the case. This is common experience. There is no reason to expect that the variability of the outcome will be any less pronounced in the County or Supreme Courts. Though it may not be decisive, this factor alone should weigh heavily against the decision in any case to apply for a judge alone trial. You and your client will be rolling the dice.
3. In his excellent paper, “Judge Alone Trials in NSW, Practical Considerations” (25/8/2015) NSW public defender, Peter Krisenthal, attached an appendix listing the percentage of acquittals in jury trials and judge alone trials in the District and Supreme Courts of NSW from 1993 to September 2014. While in the earlier years the percentage rates of acquittals in judge alone trials exceeded the acquittal rate in jury trials, in more recent times the opposite has been true. So, for example in 2009, the rate of acquittal in jury trials was 43.8% compared with 17.3% for judge alone trials. In 2013 the rate of acquittal in jury trials was 35.3% compared with 25% for judge alone trials. The total acquittal rates for trials conducted over the whole period were 49.5% for judge alone and 46.1% for jury trials. An important caveat on these statistics is that they include judge alone trials of mental health matters where no defence was run, in other words the equivalent of our special hearing process. The point is, while looking at moderately out of date NSW data is probably not a terribly helpful guide, you should not think it more likely that a judge alone trial is more likely to result in an acquittal. In fact, the opposite may be true.
4. In any case where there is pre-trial argument about the admissibility of prejudicial evidence (for example an argument about the relevance as tendency evidence of uncharged acts) the trial judge would have to know about and fully understand the evidence you are trying to exclude. In a trial before a jury there is no problem with this because the argument happens in the absence of the jury. The tribunal of fact is uncontaminated with knowledge of the prejudicial material (unless, after legal argument, the judge rules that it is admissible). In a trial before a judge alone the judge is the tribunal of fact. If the judge rules the evidence inadmissible, she will still be fully aware of it. While it is expected that judges can and do put aside from their deliberations irrelevant or inadmissible material, it is no doubt preferable that the exposure to such material be avoided if possible. As noted above, Judges are human after all. In such a case, therefore, depending on how prejudicial the material really is, it may be prudent to avoid a judge alone trial.
5. As noted in paragraph 29 above, the NSW legislation provides as a reason for an application for judge alone trial to be refused, matters where considerations of community standards are at issue. In any case where those sorts of matters are obviously at issue (such as dangerousness or negligence in a driving case or self-defence or whether someone reasonably believed that a person was consenting) you might consider that a jury is best placed to determine that issue.

## Giving Advice And Taking Instructions

1. As stated above, ultimately the decision whether to make an application for a judge alone trial must be made by your client. It is as central to the trial as the decision as to whether your client would give evidence. Your client will need clear advice about what to do.
2. To that end you will need to know as much about the process as you can. You will need to weigh up the matters discussed in this document in so far as they are relevant to your client’s case. Of course, there may be other matters not mentioned here that are relevant to the advice you give your client.
3. A trial before judge alone may have a direct impact on the relevance or strength of other arguments in your trial. For example, it may be that your client has co-accused and you may seek to sever your client’s trial. The prosecution may oppose this. Obviously all accused must receive advice and consent to a trial by judge alone if they are to be tried together. If all co-accused opt for a judge alone trial then it may be that the severance application, if it was based, for example, on the fact that evidence relevant and admissible against a co-accused is not admissible against your client, has less strength. A judge may consider that she is able to put aside any prejudicial consideration. It would then be in the interests of justice to order a trial by judge alone, in order to avoid delay, witnesses giving evidence twice or more and the prejudicial effect of inadmissible evidence going before a jury. Such a situation arose in *R v Spiteri-Ahern; R v Barber; R v Zraita[[7]](#footnote-7)*, where there is good discussion of the issues and overview of the NSW approach.
4. There is not a right or wrong answer to the question of whether to make the application for a judge alone trial. Like all forensic decisions in the conduct of a trial, you can only make the best judgment you can with what you know at the time.
5. As always, trial advocates in VLA Chambers are here to discuss your matters and provide what assistance and resources we can.

##  Making the Application and a Note to the Future

1. A considerable number of impressive pronouncements have been made over the years in support of the institution of trial by jury. Such as:

*“Trial by jury is more than an instrument of justice and more than a wheel of the constitution, it is the lamp that shows that freedom lives”[[8]](#footnote-8)*

1. It may well be that many judges of our Supreme and County Courts feel personally disinclined to hear trials without a jury because they hold with sentiments such as these, or because they simply do not want the burden of having to make the final determination of fact. Unlike a jury, a judge has to provide reasons which will be subject to careful scrutiny.
2. As noted in paragraphs 10 and 11 above, the legislation contemplates appeals against a decision made to refuse an application for a judge alone trial in a situation where the trial judge has proceeded to empanel a jury. There is, no doubt, a prospect that judge alone trials in Victoria will outlast the temporary ban on jury trials. It remains an open question whether they also outlive COVID-19 and become a permanent feature of our system of criminal justice.

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1. The *COVID-19 Omnibus (Emergency Measures) Act 2020* (the C19 Omnibus Act) [↑](#footnote-ref-1)
2. Section 420ZN of the C19 Omnibus Act [↑](#footnote-ref-2)
3. Section 132(5) of the *Criminal Procedure Act 1986* (the NSW Act) [↑](#footnote-ref-3)
4. See for example *Belghar* (2012) 217 A Crim R 1; *King* [2013] NSWSC 448; *R v Dean* [2013] NSWSC 661; *R v Stanley* [2013] NSWCCA 124; *R v Abrahams* [2013] NSWSC 729; *R v Simmons, R v Moore (no.4)* [2015]NSWSC 259 and *R v McNeil* [2015] NSWSC 357; *R v Qaumi (&Ors)* [2016] NSWSC 274 [↑](#footnote-ref-4)
5. *R v Stanley at [59]* [↑](#footnote-ref-5)
6. *Arthurs v Western Australia* [2007] WASC 182 at [89] [↑](#footnote-ref-6)
7. (2017) NSWSC 1275 [↑](#footnote-ref-7)
8. Lord Devlin, “Trial by Jury” 1956 page 164 [↑](#footnote-ref-8)