Summary

This is a short summary of amendments to the *Criminal Procedure Act 2009* (Vic) ('*CPA*') that allow some criminal trials to proceed without a jury and an assessment of case-law from other jurisdictions identifying the considerations that are relevant in determining whether to grant an application for such a trial.

It consists of the following sections:

1. Legislation
2. Precedents
3. Consent
4. Interests of justice
5. Legislative indicators
6. Timing

Legislation

New provisions have recently been added to the *CPA*, that for a year[1] will allow a Victorian court to make an order directing that certain criminal trials be held before a judge alone without a jury.

There is no presumption in favour of a jury trial nor any burden of proof on an applicant to rebut such a presumption.[2] However, the default position in Victoria is that there will be a jury trial unless the court's discretion to order one is enlivened by the establishment of four legislative criteria, which the applicant for judge alone trial has the evidential onus of satisfying.[3]

A trial by judge alone may be ordered on one or more charges at any time, except during trial, if:

- each charge is for a Victorian offence;[4] and
- each accused has consented to making the order; and
- the court is satisfied that each accused has obtained legal advice on whether to give consent, including advice on the effect of a judge alone trial order being made; and

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[1] *Criminal Procedure Act 2009* (Vic) s 420ZL ('*CPA*'), as inserted by *Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Act 2022* (Vic) s 3.

[2] *DPP (Vic) v Combo* [2020] VCC 726, [45]–[46] ('*Combo*'); *DPP (Vic) v Truong* [2020] VCC 806, [26] ('*Truong*'); *DPP (Vic) v Ritchie (a pseudonym)* [2020] VCC 1111, [36] ('*Ritchie*'); *Hooper v Oxymed Australia Pty Ltd* [2021] VSCA 68, [37], [39] ('*Hooper*').

[3] *Ritchie* [36]; *DPP (Vic) v Verduci* [2020] VCC 1166, [34] ('*Verduci*'); *Hooper* [37], [39].

[4] There can be no such trial for Commonwealth offences tried on indictment. *Truong* [24].

- the court considers that it is in the interest of justice to make the order.[5]

Once these 'essential preconditions … are met, the Court's discretion to make an order for trial by judge alone is enlivened'.[6]

The court may make a judge alone trial order on its own motion while a pandemic declaration is in force, or on the motion of the accused or the defence.[7] In determining whether to make a judge alone trial order the court must consider the submissions of the prosecution, but its consent is not required for the order to be made.[8] A party dissatisfied with the decision to grant or refuse an application for trial by judge alone may seek leave to appeal.[9]

Precedents

Although the Victorian legislation is new, the ACT, South Australia, New South Wales, Queensland, and Western Australia have similar provisions allowing for trial by judge alone.[10] They have been in place for varying periods of time and have been subject to consideration by the courts of those jurisdictions. These authorities, and the different Acts, help identify the considerations likely to be relevant to a Victorian court in deciding whether to grant an application for judge alone trial.[11]

Consent

It is important to note at the outset that with the exception of the ACT, the legislation in each jurisdiction requires the accused to consent before a judge alone trial may be ordered.[12] Recent decisions from the ACT Supreme Court are therefore not of any precedential value when considering whether to order a

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[5] *CPA* s 420E(1). See also *Combo* [39]; *Truong* [24]. Part 11 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) *('CMIA')* also creates a process for judge-alone special hearings. The test for such special hearings is more limited than the test for a trial by judge alone, as it only requires the judge to be satisfied that each charge is for a Victorian offence and it is in the interests of justice to make the order: at s 94(1).

[6] *Combo* [41]; *Truong* [25].

[7] *CPA* s 420E(2).

[8] Ibid ss 420E(3)–(4); *Combo* [40]; *Ritchie* [37].

[9] *CPA* s 420I. This is not an interlocutory decision, see ibid s 420R, but in order to obtain such leave the applicant must demonstrate that it is reasonably arguable the judge erred in granting or declining the request to proceed by judge alone. See *Hooper* [25].

[10] See, eg, *Supreme Court Act 1933* (ACT) ss 68B–68C ('ACT Act'); *Juries Act 1927* (SA) s 7 ('SA Act'); *Criminal Procedure Act 1986* (NSW) ss 132–133, 365 ('NSW Act'); *Criminal Code Act 1899* (Qld) ss 614–615E ('Qld Act'); *Criminal Procedure Act 2004* (WA) ss 117–120 ('WA Act').

[11] *Combo* [42]–[44]; *Hooper* [36].

[12] Cf ACT Act s 68BA; *CPA* s 420E(1)(b); SA Act s 7(1); NSW Act ss 132(3), 132A(2)(a), 365(2)(a); Qld Act ss 614(1), 615(2); WA Act ss 118(1), (4).

judge alone trial in the absence of the accused's consent.[13] That is not permissible under the Victorian legislation.[14] But these decisions may be significant in deciding whether ordering a judge alone trial is in the interests of justice during the extraordinary times in which the courts must now operate.[15]

Interests of justice

A court's jurisdiction to order trial by judge alone is not enlivened unless it is affirmatively satisfied that it is "in the interests of justice" to do so.[16] This applies irrespective of whether the parties have agreed to the making of an order for a judge alone trial; it remains for the court to determine if it is in the interests of justice to do so.[17] That phrase has broad connotations and includes both the interests of the accused and the public.[18] The public interest is concerned both with the integrity and proper functioning of the criminal justice system, and with ensuring that the accused receives a fair trial according to law.[19]

Accordingly, what is in the interests of justice should not be narrowly defined and will vary from case to case. The courts have discussed a number of factors in considering where the interests of justice lie in a given case. Unfortunately, general statements of principle are few — some courts have found certain factors indicative of the interest, where others have been less convinced and no single factor itself is dispositive.[20] With those caveats noted, the considerations most frequently discussed include:

- The subjective views of the accused. Do they believe they will receive a fair trial, or do they think a jury will be unable to set aside prejudice for some reason? However, there must be a real and substantial doubt whether the accused will receive a fair trial before a jury, not just a remote concern, and some evidence of this must be adduced.[21]

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[13] See, eg, *R v UD* [2020] ACTSC 88; *R v UD (No 2)* [2020] ACTSC 90 ('*UD (No 2)*'); *R v Coleman* [2020] ACTSC 97.

[14] There is no obligation on an accused to accept a trial process they do not find acceptable, even if it will shorten the time until their trial. *Re Goldsworthy* [2020] VSC 500, [73].

[15] *See, eg, R v BD (No 1)* [2020] NSWDC 150 ('*BD*').

[16] ACT Act s 65BA(3)(b); *CPA* ss 420E(1)(d); NSW Act ss 132(4), 365(2)(b); Qld Act ss 615(1)–(2); WA Act s 118(4); *Marotta v Western Australia* [2018] WASC 141, [14] ('*Marotta*').

[17] *Combo* [8]; *Truong* [6]; *DPP (Vic) v Wang (Ruling No 1)* [2020] VSC 438, [2] ('*Wang*'). Or for a fitness investigation and special hearing pursuant to the *CMIA* pt 11. See *DPP (Vic) v Reese (a pseudonym)* [2020] VCC 1670, [1]–[2] ('*Reese*'); *Hooper* [37], [41].

[18] *R v Simmons (No 4)* [2015] NSWSC 259, [54] ('*Simmons*'); *Combo* [48]; *Reese* [28]–[29]; *Hooper* [37], [41].

[19] *Western Australia v Edwards* [2018] WASC 419, [9] ('*Edwards*'); *UD* [12]; *Wang* [5].

[20] *Western Australia v Raney* [2011] WASC 326, [11], [18] ('*Raney*'); *Marotta* [16]; *Combo* [48]–[49]; *Truong* [28].

[21] *Arthurs v Western Australia* [2007] WASC 182, [79]–[80] ('*Arthurs*'); *Raney* [26], [35]; *R v Belghar* [2012] NSWCCA 86, [99]–[102] ('*Belghar*'); *R v Stanley* [2013] NSWCCA 124, [42] ('*Stanley*'); *Simmons* [60], [113]; *R v Quami (No 14)* [2016] NSWSC 274, [22]–[23] ('*Quami*'); *R v Homann* [2018] NSWSC 198, [33] ('*Homann*'); *Marotta* [15], [17]; *Edwards* [9]; *Ritchie* [43]; *Hooper* [37], [44].

- The legislative obligation imposed on the judge to provide reasons for their decision.[22]

- The length of the trial and specifically, whether one of great length will prove burdensome to jurors or risk their being discharged without reaching a verdict.[23] It should be emphasised that this does not refer to any efficiency and savings of time that purportedly exist in a judge alone trial.[24]
- Is the prosecution case based on circumstantial evidence?[25] It is an open question whether a judge or a jury is the better trier of fact.[26]

- The nature of the evidence to be submitted at trial. For example, is it of a disturbing and graphic nature, or is it intricate, expert and disputed? Will it be difficult to apply in complicated factual situations? Does it involve uncharged acts and/or other purported criminal conduct, or does it overlap and intertwine between co-accused?[27]

    - By virtue of training and experience, judges are deemed more capable of putting aside prejudicial material and determining a matter on its merits.[28] However, this does not automatically call for a judge alone trial. A significant question is whether safeguards can be put in place, typically by means of jury directions, to mitigate any possible prejudice.[29]

    - Complex evidence in trials, particularly where there are disputes between experts may favour a trial by judge alone in some circumstances,[30] however juries may also be assumed to understand complex evidence.[31]

    - Jurors are also presumed to follow directions they are given by the court,[32] but there may be exceptions, as where the evidence is so abhorrent that prejudice becomes a

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[22] *Arthurs* [75]–[76], [89]–[92]; *Belghar* [112]–[113]; *Simmons* [70]; *Quami* [28]; *R v Droudis (No 13)* [2016] NSWSC 1350, [91]–[94] ('*Droudis*'); *Adams* [38]; *Homann* [26]; *Marotta* [18].

[23] *Raney* [37]; *Belghar* [110]–[111]; *Simmons* [67]–[69]; *Quami* [24]–[25]; *Edwards* [22]–[25]; *Marotta* [19]. Limits are also imposed by legislation in this regard. See, eg, *Qld Act* s 615(4)(a); *WA Act* s 118(5)(a).

[24] *Verduci* [67]–[80].

[25] *Marotta* [20].

[26] *Quami* [38]–[42].

[27] *Simmons* [71]–[72]; *Quami* [26]–[27], [29]–[30], [88]–[98]; *Adams* [37], [46]–[58]; *Spiteri-Ahern* [68]–[73]; *Homann* [24]; *Marotta* [21], [35]; *Edwards* [26]–[30]; *Ritchie* [55]–[57].

[28] *Droudis* [83]–[91]; *Truong* [38]; *DPP (Vic) v Jacobs (a pseudonym)* [2020] VCC 1251, [46] ('*Jacobs No 1*'); *DPP (Vic) v Jacobs (a pseudonym)* [2020] VCC 1262, [35] ('*Jacobs No 2*').

[29] *Belghar* [106]–[108]; *Quami* [43]–[49].

[30] *DPP (NSW) v Farrugia* [2017] NSWCCA 197, [11]; *Wang* [13].

[31] *Gittany,* [20]; *Adams,* [43]; *Quami* [29]-[30].

[32] *Simmons* [86], [114].

certainty.[33] It is a question of degree and turns on an analysis of the nature and extent of the prejudicial material, and the manner it will be introduced at trial.[34]

- The nature and extent of any pre-trial publicity and whether it can be ameliorated by detailed warnings to an empanelled jury,[35] and/or the passage of time between publication and trial.[36]
- Whether the mental capacity or physical health of the accused is at issue.[37]
- The impecuniosity of the accused and the possibility of them being left unrepresented.[38]
- Whether the case depends on assessing witness credibility. Many previous cases have treated this as a neutral factor,[39] though some have treated it as weighing in favour of a trial by jury.[40]
- The fact the accused has been advised to forego the protections normally afforded by a jury trial and has accepted that advice and decided to proceed nonetheless.[41]
- Whether the trial is a re-trial (either following a successful appeal, or previous jury trials). So far, the desirability of having proceedings determined before the same kind of tribunal of fact has been treated as irrelevant or deserving little weight.[42]

Recently, courts have stated that determining what is in the interests of justice requires consideration of the COVID-19 pandemic and the situation prevailing within the community.[43] The New South Wales District Court has said it is fairly plain that the provisions enacted by emergency legislation in that state were passed in order to enable a court to more easily make an order for a judge alone trial.[44]

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[33] *Belghar* [55]–[58].

[34] *Simmons* [88].

[35] *Quami* [26]–[27], [61]–[87]; *Edwards* [12]–[21]; *Marotta* [22]–[24].

[36] *R v McNeil* [2015] NSWSC 357, [72]–[77] ('*McNeil*'). See also *R v Obeid* [2015] NSWSC 897.

[37] *Marotta* [25]–[28]; *Ritchie* [109].

[38] *Gittany* [41]–[44]; *Adams* [36].

[39] *Quami* [38]–[39]; *Simmons* [73]–[82]; *Redman v The Queen* [2015] NSWCCA 110, [14]–[15]; *Ritchie* [88]–[98].

[40] *McNeil* [102]–[104].

[41] *Belghar* [99]; *Stanley* [42]; *Simmons* [60]; *Adams* [39]; *R v Johnson* [2020] NSWDC 153, [22] ('*Johnson*'); *Combo* [65]; *Truong* [35], [45]; *Ritchie* [43], [81]; *Verduci* [41], [65]. In Victoria, New South Wales, Western Australia and South Australia judge alone trials can only be ordered with the accused's consent or election. See *CPA* s 420E(1)(c); NSW Act ss 132 (6), 365(2)(c); WA Act s 118(4); SA Act s 7(1)(b). But in Queensland and the ACT the accused's consent is not required. See, eg, Qld Act s 615(3); ACT Act ss 68BA(2)–(3).

[42] *Ritchie* [100]–[106].

[43] *BD* [3]; *Combo* [54].

[44] *BD* [17]–[18]; *Johnson* [9]; *Swain* [24].

There is an assumption in the emergency legislation that the business of the courts should continue during the emergency period.[45] As Judge Gamble has said:

> In enacting the relevant provisions as and when they did, Parliament must have intended that justice was to continue to be administered by the courts even during the current public health emergency created by COVID-19. The purpose of s 420D was to provide the courts with the option to conduct trials by judge alone, in appropriate cases.[46]

Given the COVID-19 pandemic, the interests of justice must incorporate prejudice to an accused from delay and the ability of the courts to continue working,[47] and be seen to be working.[48] As a result of the suspension of jury trials in Victoria, it is not surprising that delay is the consideration most often submitted to be relevant in determining judge alone trial applications.[49] It is not in the interests of justice if an accused person, particularly a young person,[50] in custody, has to wait an excessively long period for trial.[51] Delay may also impact on the quality of evidence given[52] and such a forensic disadvantage might prejudice the accused.[53]

If it is in the interests of justice that trials continue during the pandemic, then they must do so within the constraints it imposes and if that requires judge alone trials, then those trials must be ordered, subject to unique factors in a given case and the ability of the accused to have a fair trial.[54] Logistical factors posed by having a trial proceed during lockdown, such as the availability of appropriate supports for vulnerable witnesses, are not relevant to the question of whether a judge alone trial would be in the interests of justice, they are case management issues to be addressed by the trial judge.[55]

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[45] *UD (No 2)* [18]; *Combo* [54] ('albeit in a modified way'); *Ritchie* [40].

[46] *Ritchie* [40], [78]. See also *BD* [40]; *Johnson* [3], [7]; *Swain* [24]; *Verduci* [38]; *Hooper* [37]. See also *Reese* [29] (this also applies for special hearings to be conducted for those found to be unfit for trial).

[47] *Johnson* [19]–[22]; *Combo* [55]–[62]; *Truong* [32]–[33], [42]–[43]; *Ritchie* [41], [76]; *Verduci* [40], [57]–[63]; *Hooper* [37], [45], [52]–[55], [93]–[94], [96].

[48] *DPP v Fleming* [2021] VCC 240, [36] ('*Fleming*').

[49] *DPP (Vic) v Carlton (a pseudonym)* [2020] VCC 1272, [23] ('*Carlton*'). Or for a person with complex needs and life-long impaired cognitive function to await a special hearing. *Reese* [30].

[50] *Carlton* [26]–[30], quoting *Combo.* See also *DPP (Vic) v Williams* [2020] VCC 1235, [31]–[41] ('*Williams*'); *DPP (Vic) v Albert* [2021] VCC 177, [28].

[51] *Ritchie* [41], [79]–[80]; *Verduci* [39], [57]–[63] (noting the particular relevance of delay for cases listed on circuit which occur intermittently rather than year-round); *Hooper* [37], [45], [52]–[55], [93]–[94], [96]. Or for a special hearing under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic). See, eg, *Carson (a pseudonym) v The Queen* [2020] VSCA 202, [60].

[52] *Fleming* [39].

[53] *Jacobs No 1* [33], [44]–[46], [63]; *Jacobs No 2* [34], [53]–[54]; *Hooper* [37], [45], [52]–[55], [93]–[94], [96].

[54] *UD (No 2)* [30]. See also *CFK v The Queen* [2020] QDC 92, [7]; *RTM v The Queen* [2020] QDC 93, [6].

[55] *Carlton* [42]–[45].

Community standards and factual disputes

Cases involving a factual issue that requires the application of objective community standards such as negligence, reasonableness, indecency, obscenity, or dangerousness are more likely to be suitable for a trial by jury.[56]

These examples are not exhaustive,[57] and neither does the possibility of a factual dispute mean a judge alone trial may not be ordered. They are merely issues to be weighed in the balance of whether the interests of justice favour a judge alone trial. This must be assessed in the context of the particular case before the court.[58]

Moreover, it is disputed as to whether a question about the accused's intention raises a factual issue that requires an application of objective community standards.[59]

In considering this question, Judge Dawes recently ruled that a judge alone trial may be ordered even in cases where it would ordinarily be preferable for a jury to consider the application of community standards. Her Honour noted that if Parliament had intended for any such offence to have been excluded from the operation of s 420D it might simply have incorporated an exclusionary clause in the emergency legislation. Particularly if the offence is triable summarily, as this indicates Parliament has already concluded that a single judge is capable of appropriately applying community standards to determine whether a charge is proven.[60]

Timing

Although not present in the Victorian legislation, the timing requirements found elsewhere are instructive in two respects.[61] First, they exist to avoid the appearance (or reality) of judge shopping by negating the possibility of the judge hearing the application also being the trial judge. Second, for this same reason, an application for a judge alone trial should be made before other pre-trial issues are considered.[62]

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[56] The *CPA* does not identify this as a factor that points one way or the other, but the New South Wales and Queensland legislation does. See NSW Act s 132(5); Qld Act s 615(5). Cf *Ritchie* [44] where 'assessment of objective community standards is best undertaken by a group of members of the community' and is a factor pointing in favour of a jury trial. See also *Combo* [63]–[64]; *Homann* [36]–[37]; *Stanley* [4]; *R v Obeid* [2015]; *Hooper* [37], [46].

[57] *Raney* [12]; *McNeil* [35].

[58] *McNeil* [35]–[37]; *Quami* [32]; *Edwards* [10]. See, eg, *Ritchie* [84]–[87]; *Carlton* [38].

[59] *Simmons* [63]–[65], [109]; *Quami* [34]–[37]; *Adams* [35]; *Williams* [22]–[29].

[60] *DPP v Mason (a pseudonym)* [2021] VCC 163, [46]–[47].

[61] See ACT Act s 68B(1)(c); NSW Act s 132A(1); Qld Act ss 614(2)–(3); WA Act s 118(2).

[62] *Simmons* [19]–[41]. See also *Arthurs* [51]–[52]; *McNeil* [7]–[11].