PROPOSED REFORMS TO JUDGE-ALONE TRIALS IN THE AUSTRALIAN CAPITAL TERRITORY

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POSTSCRIPT: On 17 February 2011 the ACT Government introduced the Criminal Proceedings Legislation Amendment Bill 2011 (ACT) into the ACT Legislative Assembly. The Bill was passed on 23 June 2011 and notified on 6 July 2011. The ACT Greens and Labor voted against Liberal Party amendments consistent with the arguments raised in this article.[1] This article was completed before the Bill was passed and should be read in light of this.

I INTRODUCTION

The Criminal Proceedings Legislation Amendment Bill 2011 (ACT) (the Bill) proposed two changes to the criminal law trial procedure in the ACT. The first was an increase in the maximum penalty for three offences making these 'indictable offences' under ACT law.[2] The second change, and focus of this article, related to which

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[1] ACT Legislative Assembly, *Minutes of Proceedings*, No 108 (2011) 1351.
[2] 'Act of indecency without consent': *Crimes Act 1900* (ACT), s 60; 'Possessing Child Pornography' *Crimes Act 1900* (ACT), s 65; 'Using the Internet etc. to Deprave Young People' *Crimes Act 1900* (ACT), s 66; *Legislation Act 2001* (ACT), ss 190(1)(a) and 190(1)(b) provides for indictable and

matters can be heard by judge alone, and the time at which the accused can elect. In brief, a class of 'excluded offences' is created, and where a criminal act is an 'excluded offence', an accused may not elect to have their matter heard by judge alone. Further, by virtue of these proposed amendments, an accused may also not elect to have a matter heard by judge alone where the election is made after the accused knows the identity of the trial judge.[3]

This article examines the availability of judge alone trials in the ACT. It compares the ACT's legislative scheme to that in NSW, and argues that the proposed amendments will create greater systemic inefficiency and could potentially contravene the accused's right to a fair trial.[4] It is suggested that instead of rigidly preventing judge-alone trials for a class of 'excluded offence', discretion should be given to the court to allow for judge alone trials where it is in the interest of justice. This is a concept in NSW law and the ACT would do well to adopt provisions that are similar.[5]

II WHAT IS THE CURRENT LEGISLATIVE SCHEME IN THE ACT?

In the ACT, the *Supreme Court Act 1933* (ACT) deals with the mode of criminal trials. As it stands, the general presumption is that unless otherwise provided for,

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summary offences: (1) An offence is an "indictable offence" if (a) it is punishable by imprisonment for longer than 2 years; or (b) it is declared by an ACT law to be an indictable offence.

[3] Criminal Proceedings Legislation Amendment Bill 2011 (ACT), cl 10.

[4] *Human Rights Act 2004* (ACT), s 21.

[5] *Criminal Procedure Act 1986* (NSW), ss 132 and 132A implemented the recommendations of the NSW Parliament's Standing Committee on Law and Justice report on s 132 of the *Criminal Procedure Act 1986* (NSW).

'criminal proceedings shall be tried by jury'.[6] Jury trials occur in the Supreme Court of the ACT and only apply to indictable offences that have a maximum penalty of two years or greater.[7]

An accused may, however, elect to have their matter tried by a judge alone where:

a) the accused elects in writing to have the matter heard by a judge alone; and
b) the accused produces a certificate signed by a legal practitioner, stating that the legal practitioner has advised the accused and that the accused has elected freely to have the matter heard by judge alone; and
c) the accused elects to have the matter heard by judge alone before the court allocates a date for trial.[8]

With respect to the time of election, the accused may elect to have their matter tried by judge alone at any time before arraignment.[9] Further, if the accused makes an election to have the matter tried by judge alone and then withdraws that election, the accused cannot make a further election to have the matter heard by judge alone.[10]

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[6] *Supreme Court Act 1933* (ACT), s 22 entitled 'No Trial by Jury in Civil Proceedings' provides that 'in every suit in the court, the trial must be by the court without a jury'; *Supreme Court Act 1933* (ACT), ss 68A and 68B.
[7] *Legislation Act 2001* (ACT), ss 190(1)(a) and 190(1)(b).
[8] *Supreme Court Act 1933* (ACT) s 68B(1); *Supreme Court Act 1933* (ACT), s 68B(d)(i) and 68B(d)(ii) provides that if there is more than 1 accused person in the proceedings— (i) each other accused person also elects to be tried by the judge alone; and (ii) each accused person's election is made in relation to all offences with which he or she is charged.
[9] *Supreme Court Act 1933* (ACT), s 68B(2).
[10] Ibid, s 68B(3).

III CRIMINAL PROCEEDINGS LEGISLATION AMENDMENT BILL 2011 (ACT)

On 17 February 2011, the Bill was introduced into the Legislative Assembly of the ACT. The ACT Government is receiving further consultation from stakeholders on its provisions.

A The creation of a class of 'excluded offences'

As noted above, the most significant reform included in the Bill is the creation of a class of 'excluded offence' that restricts offences falling in this class from being heard by judge alone. The explanatory memorandum of the Bill states:

> The Bill amends the Supreme Court Act by limiting the types of offences for which an election for trial by judge alone can be made. The Bill does this by specifying a class of offences where an election to be tried by judge alone cannot be made. The excluded offences include charges involving the death of a person and charges of a sexual nature.[11]

The proposed section of the *Supreme Court Act 1933* (ACT) s 68B will read 'a criminal proceeding against an accused person for an offence other than an excluded offence must be tried by judge alone …'[12] This mandate is a significant change to the criminal trial procedure. The current procedural provisions within the *Supreme Court Act 1933* (ACT) relating to the process of electing a judge alone trial will remain largely the same, but for the alteration of s 68B(1)(c), which is discussed later in this article.

At the very heart of the concerns surrounding the reforms is this notion of what would constitute an 'excluded offence'. In the Criminal Proceedings Legislation Amendment Bill 2011 (ACT), 'excluded offences' are listed in Schedule 2 and include:

- any offences that involve the death of a person;
- any offences of a sexual nature (including bestiality and child pornography); and
- two offences provided for in the *Prostitution Act 1992* (ACT), soliciting and causing a child to provide commercial sexual services.[13]

B Changes to the time of election

Before the proposed amendments, an accused could elect to have a judge alone trial 'before the court first allocates a date for the person's trial'.[14] The Bill adds a further criterion to this timing requirement. It provides that the solicitor's certificate, and intention to elect to have the matter heard by judge alone, must be filed with the court before the accused, or the accused's legal representative, knows the identity of the trial judge.[15]

C Reasons for introducing the amendments

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[11] Explanatory Statement, Criminal Proceedings Legislation Amendment Bill 2011 (ACT), cl 2.
[12] Criminal Proceedings Legislation Amendment Bill 2011 (ACT), s 68B(1).
[13] *Prostitution Act 1992* (ACT), s 20: 'Causing Child to Provide Commercial Sexual Services etc'; *Prostitution Act 1992* (ACT), s 21: 'Receiving Proceeds of Child Prostitution'.
[14] *Supreme Court Act 1933* (ACT), s 61B(1)(c).

The ACT Attorney-General, Mr Simon Corbell MLA, has outlined the ACT Government's justification for legislative change. At face value, these justifications are not only seemingly contradictory, but also heavily reliant on a report completed by the ACT Department of Justice and Community Safety (JACS). The report reviewed and compared all Australian Supreme Court criminal matters over four years. The study concluded in 2008.[16]

Mr Corbell gave the following reasons for the proposed amendments:

- In the ACT Supreme Court, the accused elects to have the trial heard by judge alone 56% of the time. The next closest jurisdiction statistically, South Australia, is at 15%. He noted that this was particularly interesting as the ACT provisions are modelled on South Australian law. [17]
- The highest rate of election for judge alone trials in the ACT Supreme Court occurs for offences involving the death of a person, and for offences of a sexual nature.[18]
- During the study period, the ACT Supreme Court had a conviction rate for murder (0%), sexual offences (9%) and for all judge alone trials (47%).

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[15] Criminal Proceedings Legislation Amendment Bill 2011 (ACT), s 68B(10)(c)(ii).
[16] ACT, *Parliamentary Debates*, ACT Legislative Assembly, 17 February 2011, 256 (Simon Corbell, Attorney General).
[17] Ibid.
[18] Offences involving the death of a person, and offences of a sexual nature are now contained in Schedule 2 of the Criminal Proceedings Legislation Amendment Bill 2011 (ACT) 'excluded offences'; Criminal Proceedings Legislation Amendment Bill 2011 (ACT) cl 13.

Mr Corbell also added that by requiring that an accused elect to have a trial by judge alone prior to knowing which judge would be presiding, it would minimise what is commonly referred to as judge or forum shopping.[19]

Mr Corbell concluded that 'there is strong community support for these amendments. Territorians expect that those charged with the most serious offences are assessed and judged by a jury of their peers.'[20]

IV THE NSW LEGISLATIVE SCHEME

The NSW legislative scheme, in contrast to the proposed scheme in the ACT, exhibits much less rigidity. Criminal proceedings for indictable offences in the New South Wales Supreme Court or District Court are tried by jury, unless there is an election to the contrary.[21]

An accused person may elect to be tried by a judge alone where: [22]

- An accused so elects, and if the judge is satisfied that the accused has sought and received legal advice before making the election;[23] and
- An election is made with the consent of the Director of Public Prosecutions (DPP).[24]

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[19] ACT, *Parliamentary Debates*, ACT Legislative Assembly, 17 February 2011, 257 (Simon Corbell, Attorney General).
[20] Ibid, 256.
[21] *Criminal Procedure Act 1986* (NSW), s 131.
[22] Ibid, s 132.
[23] Ibid, s 132(6).

One provision within the NSW scheme, which gives it a character of flexibility, arises where the DPP does not provide consent for a judge alone trial. Where consent is not provided, a judge alone trial is not entirely prevented. The court may still order that a judge alone trial occur based on whether it is in the 'interests of justice'.[25]

Other important aspects of the NSW legislative scheme include the fact that:

- an election must be made prior to the date fixed for the person's trial;[26] and
- an accused person who has elected to be tried by judge alone may subsequently elect to be tried by a jury any time before the date fixed for their trial.[27]

The apparent difference between ACT and NSW legislation in this area is the requirement in NSW that the DPP provides consent to the election. This is not the case in the ACT.

V WHAT WILL THE LIKELY PRACTICAL EFFECT BE IN THE ACT?

According to the Australian Bureau of Statistics, *Criminal Courts, Australia, 2009–10*, in the Australian Capital Territory Supreme Court, between the 2005 and 2010,

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[24] Ibid, s 132(2).
[25] Ibid, s 132(4).
[26] Ibid, s 132A(1).
[27] Ibid, s 132A(3).

there were twenty-five trials dealing with crimes involving the death of a person and 104 sexual offences. In 2009–2010, there were four trials involving the death of a person and 32 trials involving crimes of a sexual nature.[28]

As stated earlier, the Bill creates a class of 'excluded offences'. The relevant provisions are listed in Schedule 2 of the Bill. The practical effect of the amendments, based on 2009–2010 statistics would see 32 instances where an 'excluded offence' proceeded to trial. On this basis, it can be estimated that there is the potential for thirty-two more jury trials in the ACT per year.

Table 1: Defendants Adjudicated, States and Territories and principal offence, 2004–05 to 2009–10 in the ACT

Type of offence	2004–05	2005–06	2006–07	2007–08	2008–09	2009–10
Homicide and related offences						
Murder	3	3	0	3	3	0
Attempted murder	0	0	0	0	0	0
Manslaughter and driving causing death	0	3	0	3	3	4
Total	3	6	0	6	6	4
Sexual assault and related offences						
Aggravated sexual assault	9	11	6	11	12	13
Non-aggravated sexual assault	4	3	3	3	4	6
Non-assaultive sexual offences against a child	0	0	0	0	0	9
Child pornography offences					6	4
Total	13	14	9	14	22	32

[28] Australian Bureau of Statistics, *4513.0 - Criminal Courts, Australia, 2009-10* (27 January 2011) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4513.0>.

VI WHY ARE THE AMENDMENTS NOT A GOOD IDEA?

In essence, there are two broad arguments against the amendments contained within the Bill. These main criticisms touch on the potential human rights implications for the accused as well as systemic issues such as cost, delay and inefficiency.

A Potential human rights implications

In presenting the Bill to the ACT Legislative Assembly, Mr Corbell highlighted the overarching purposes for allowing an accused to elect to have a matter heard by judge alone:

> The intention of the provision was that it would apply to matters involving complex and lengthy legal issues or explanations of a matter where large amounts of pre-trial publicity could be said to adversely affect an accused's right to receive a fair trial.[29]

With all due respect to Mr Corbell, this has not changed. Crimes involving the death of a person, or crimes of a sexual nature, especially those involving children, are still the most controversial. These crimes are more than likely to receive adverse publicity.

The Standing Committee on Law and Justice in NSW outlined a further argument to this point. In a submission to the Standing Committee, the Attorney-General of NSW, through the Department of Justice and Attorney-General, said:

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[29] ACT, *Parliamentary Debates*, ACT Legislative Assembly, 17 February 2011, 255 (Simon Corbell, Attorney General).

> Cases which may be better suited to trial by judge alone include where the evidence is of a technical nature, there are concerns that directions from the judge or other measures will be insufficient to overcome jury prejudice resulting from pre-trial publicity …[30]

In another submission, the Deputy President of the Victims of Crime Assistance League (VOCAL), Mr Howard Brown, said in relation to offences involving the sexual assault of underage persons:

> Our view, especially in sexual assault matters involving children under the age of 14, is that a judge-alone trial is by far and away the best way to proceed …[31]

An accused's right to a fair trial is provided for by s 21 of the *Human Rights Act 2004* (ACT). Subsection (1) says:

> Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Section 21(1) of the *Human Rights Act 2004* (ACT) is based on Article 14 of the *International Covenant on Civil and Political Rights*.[32] Examining the possible human rights implications is important in the context of this discussion.

As discussed, the Bill creates a class of 'excluded offences' that are prevented from being heard by a judge alone. The ACT Government's view is that this is consistent

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[30] Standing Committee on Law and Justice, NSW Parliament, *Judge alone trials under s. 132 of the Criminal Procedure Act 1986* (2010) 61.
[31] Ibid, 62.
[32] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 2200A (XXI) (entered into force 23 March 1976).

with the *Human Rights Act 2004* (ACT).[33] These excluded offences are highly controversial and are likely to generate adverse publicity.

The ICCPR's Human Rights Committee said in a 'General Comment' in 1984, on the right to a fair trial that 'the publicity of hearings is an important safeguard in the interest of the individual and of society at large'.[34] Notwithstanding this positive notion of public scrutiny, where an abhorrent criminal act is allegedly committed, and adverse media attention and an inflamed public exist, the likelihood of an impartial jury is heavily compromised. The High Court has also recognised this.[35] It is arguable today that in times of increased mass media and trial publicity, these OHCHR 'general comments' on the scope of the protection do not go far enough to protect the rights of the accused.[36]

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[33] Explanatory Memorandum, Criminal Proceedings Legislation Amendment Bill 2011 (ACT) cl 2.

[34] Human Rights Committee, *General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)*, 21st sess, Un Doc CCPR (13 April 1984); Office for the United nations High Commissioner for Human Rights, *Human Rights Committee - General Comments* (6 July 2011) <http://www2.ohchr.org/english/bodies/hrc/comments.htm>. 'The Human Rights Committee publishes its interpretation of the content of human rights provisions, in the form of General Comments on thematic issues'.

[35] The High Court has recognised in strong dicta comment that in very extreme cases adverse pre-trial publicity might justify a permanent stay of a prosecution. In: *Dupas v The Queen* [2010] HCA 20 (16 June 2010) in a joint judgment the seven-member High Court described the approach of Mason CJ and Toohey J in *R v Glennon* (1992) 173 CLR 592 as 'as an authoritative statement of principle'. That principle was quoted as: "[A] permanent stay will only be ordered in an extreme case ... and there must be a fundamental defect 'of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences' .... And a court of criminal appeal, before it will set aside a conviction on the ground of a miscarriage of justice, requires to be satisfied that there is a serious risk that the pre-trial publicity has deprived the accused of a fair trial . It will determine that question in the light of the evidence as it stands at the time of the trial and in the light of the way in which the trial was conducted, including the steps taken by the trial judge with a view to ensuring a fair trial.'

[36] The Committee said of Article 14 of the ICCPR: 'All of these provisions are aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.': Human Rights Committee, *General Comment No. 13:*

The ACT Legislative Assembly's Standing Committee on Justice and Community Safety, *Scrutiny Report 36* refers to extra-judicial comments by the Honourable Chief Justice Higgins of the ACT Supreme Court in the ACT Bar Association Bar Bulletin, 8 March 2011.[37] Chief Justice Higgins said:

> To so limit [as proposed in the amendments in this Bill] the existing right to choose trial by judge-alone clearly creates a real risk of offending the *Human Rights Act 2004* (ACT). In particular section 21 of that Act which provides the right to a fair trial. That is, the right to have criminal charges decided by a competent, independent and impartial court after a fair and public hearing. I do not deny that juries as finders of fact are competent. However, independence and impartiality can be affected by pre-trial publicity, community prejudice and complex and lengthy legal issues.

Should the amendments to the Bill go through, and judge alone trials prohibited for 'excluded offences', the potential for the accused to have a 'fair trial' is less likely. The ACT Standing Committee noted:

> [t]he chosen categories of offences (death and sexual offences) seem somewhat random and target precisely the kind of issues which were considered to justify the option of a judge-alone trial in the first place. Namely, pre-trial publicity and community prejudice militating against an impartial and fair trial.[38]

b Cost, delay and inefficiency

Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14), 21st sess, Un Doc CCPR (13 April 1984).

[37] Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Scrutiny Report: Report 36* (2011) 4.

[38] Ibid, 5.

The practical effect of the Bill, based on 2009–2010 statistics will see a marked increase in jury trials in the ACT. In terms of an efficient public system, as argued above, this proliferation of jury trials will likely result in an increasingly inefficient system.[39]

In the March 2011 issue of the *Bar Bulletin*, a publication of the Australian Capital Bar Association, FJ Purnell SC identifies significant problems with the proposed amendments. Purnell sites comments made by the NSW Attorney General on 11 May 2011:

> Judge alone trials are significantly less expensive to run than jury trials. Jury trials impose significant cost to the taxpayer, through extra organisation and legal expenses.[40]

Further, in a submission to the Standing Committee on Law and Justice, the former Director of Public Prosecutions in NSW, Mr Cowdery, gave the Office of the Director of Public Prosecutions' view on judge alone trials where there is technical or expert evidence:

> We take the view that if the principal evidence is of a technical nature and there are issues that need to be resolved about that, a judge alone is in a better position to master the evidence, to master the issues and to make the decisions that need to be made rather than having twelve laypeople coming to perhaps uncertain or conflicting views about aspects of the evidence and about the issues to be determined and ending up in a state of confusion.[41]

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[39] Australian Bureau of Statistics, *4513.0 - Criminal Courts, Australia, 2009-10* (27 January 2011) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4513.0>.
[40] Above n 10.
[41] Standing Committee on Law and Justice, NSW Parliament, *Judge Alone Trials Under s 132 of the Criminal Procedure Act 1986* (2010) 65.

In a separate submission to the Standing Committee, Mr Peter Breen agreed that the jury trial is much less efficient than a trial by judge alone:

> [a] judge-alone trial will be completed more efficiently than a jury trial. It will save money and it will save time. A lot of jurors will be able to stay at home instead of coming into court and adjudicating ...[42]

With the increase in jury trials as a result of the amendments contained in the Bill, it is likely that there will be greater inefficiency and cost in an already inefficient and costly system. This is hardly in the interests of the ACT Government, or Territorians.

VII WHAT ARE POSSIBLE ALTERNATIVES FOR THE ACT GOVERNMENT?

The NSW Standing Committee report noted above proposed the following provisions which were broadly adopted into NSW law:

- Either the prosecution or the accused may elect to have a matter heard by judge alone;
- Where both parties agreed that a trial could be heard by judge alone, a trial by judge alone would occur;
- Where the prosecution elects to have the matter heard by judge alone, and the accused does not, the trial proceeds as a jury trial;
- Where the accused applies to have the matter heard by judge alone, and the prosecution does not provide consent, the court must make a determination,

> based on an 'interest of justice' test, whether the matter is to be heard by judge alone.[43]

Whether or not discretion should be exercised, and the finer details of the 'interest of justice' test, are dealt with below.

At face value, the NSW model is a preferable legislative scheme to the proposed scheme contained in the Bill. By giving the court a discretion to decide whether a matter should be heard by judge alone, the issues surrounding the possible contravention of s 21 of the *Human Rights Act 2004* (ACT) and the 'fair trial' requirement are largely circumvented. The court may intervene where there is a potential for an unfair trial. This is in stark contrast to an inflexible class of offence that is excluded, and involves the most controversial offences committed in the ACT.

A The 'interest of justice' test

The 'interest of justice' test could apply where an accused person elects to have a matter heard by jury, and the prosecution is opposed. The court would have discretion to determine whether the matter is heard as a judge alone trial or by jury, based on the 'interests of justice'. This is preferable to a system that is inflexible and contains an exhaustive list of 'excluded offences' where a judge alone trial is not allowed. The discretion could be exercised in favour of a jury trial 'where the trial will involve a

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[42] Ibid, 22.
[43] *Criminal Procedure Act 1986* (NSW), s 132.

factual issue that requires the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness'.[44]

Tests such as the 'interests of justice' are not foreign in the criminal law system. Mr Malcolm McCusker QC, a Western Australian barrister, has said:

> The "interests of justice" test is used in other aspects of the criminal justice system. As but one example, a judge may decide, "in the interests of justice", to allow an accused to reopen his or her defence after it has been closed, because there is a particularly important piece of evidence which has been discovered or overlooked.[45]

On this basis, the inclusion of another discretionary provision will not have a profound or negative affect on the criminal justice system, especially in the ACT where the number of offences is quite low.

VIII CONCLUSION

The proposed amendments contained in the Criminal Proceedings Legislation Amendment Bill 2011 (ACT) seek to create a class of 'excluded offence'. Excluded offences are not permitted to be heard by judge alone. These excluded offences are offences that involve the death of a person, or offences of a sexual nature. The controversial nature of these offences leads to an increase in pre-trial publicity, and a higher likelihood of an unfair trial. It is for these offences, and for offences that

[44] Standing Committee on Law and Justice, NSW Parliament, *Judge alone trials under s. 132 of the Criminal Procedure Act 1986* (2010).

involve expert and technical evidence, that judge alone trials are preferable, not only in guaranteeing procedural fairness, but also in ensuring that the system is an efficient one. The NSW approach proposed by the Standing Committee on Law and Justice in 2010, as adopted by the NSW Parliament, incorporates both an 'interests of justice' test as well as a system whereby the prosecution and the accused could elect to have the matter heard before a judge alone. In the ACT, this may be a much better system.

[45] Ibid, 69.