INSPIRING OR UNDERMINING CONFIDENCE? AMENDMENTS TO THE RIGHT TO JUDGE ALONE TRIALS IN THE ACT

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I INTRODUCTION

On 23 June 1964, a patent was granted for the Hula Hoop.[1] The same date in 2011 saw another full circle, this time by the Australian Capital Territory ('ACT') Parliament. This day marked the passage of legislation in the ACT which removed the right to trial by judge alone in the Territory for those charged with particular serious offences, returning instead to a requirement for jury trials.[2] Discussing the Criminal Proceedings Legislation Amendment Bill 2011 (ACT) ('the Bill'), the Attorney General of the ACT Simon Corbell expressed the Government's belief that 'criminal justice can only be further strengthened by reaffirming the importance of jury trials for serious criminal matters.'[3] The advantages of the jury trial in re-establishing confidence in the judicial system was explained in a submission to the Standing Committee on Justice and Community Safety, which was tasked with scrutinising the Bill. The submission noted:

> A number of cases in the ACT Supreme Court involving homicide and other serious offences have raised community concern about the prevalence of judge alone trials. While we cannot say that any of the outcomes in these cases would have been different had a jury been involved, the degree of public confidence in the courts' decision-making would arguably have been greater... The involvement of juries in the criminal justice

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[1] Mary Bellis, *June Calendar – Events in Science and Invention History and June Birthdays* (2011) About.com <http://inventors.about.com/od/todayinhistory/a/june.htm>.

[2] *The Criminal Proceedings Legislation Amendment Act 2011* (ACT).

[3] Attorney General's Department, 'Reform to Judge-alone Trials' (Media Release, 12 February 2011) <http://www.chiefminister.act.gov.au/media.php?v=10450> .

> system is ... a key platform for building community confidence in the fair administration of justice.[4]

However, this legislation, by its nature, does not compensate for the grey areas that often arise in these serious criminal matters. That is, for example, some of these cases attract substantial media attention. Such attention could include prejudicial material that may influence jurors, affecting their ability to act impartially. Nevertheless, these matters must proceed before a jury. As such, the legislation may be subject to challenge in the future on the basis that it is incompatible with human rights. Such a concern was raised by Chief Justice Higgins, among others, prior to the passage of the amending legislation,[5] and may be in danger of being borne out, especially if the experience of relevant foreign jurisdictions is instructive.

This article considers the development of the law surrounding judge alone trials in the ACT, which culminated in the passage of the *Criminal Proceedings Legislation Amendment Act 2011* (ACT). It proposes that the amended legislation, despite assertions to the contrary in the compatibility and explanatory statements,[6] is incompatible with the right to a fair trial by an independent, impartial tribunal articulated in the *Human Rights Act 2004* (ACT) (‘*HRA’*).[7] In doing so it canvasses judicial pronouncements in Canada, where the requirement to proceed with a jury trial in the face of significant publicity was contested against the *Canadian Charter of Rights and Freedoms*[8] and, on at least one occasion, found to be contrary to the right to an independent and impartial tribunal.[9] It also considers the approach taken in the United Kingdom, where a similar provision in the *European Convention on Human Rights*[10] incorporating an impartiality requirement was explained to necessitate the exclusion of any ‘legitimate doubt’ as to possible prejudice.[11] The article argues that the possibility that a person charged with an excluded offence that has achieved notoriety may be subject to irredeemable prejudice if required to front a jury cannot be excluded. Further, it asserts that the impact of the amendments in limiting the right to a fair trial is unreasonable, as the amendments do not respond to a pressing social need and are disproportionate, as evidenced by the less restrictive approaches taken in other Australian jurisdictions. It concludes that a tempered approach must be considered by the ACT legislature to avoid running afoul of the *HRA* and moreover to inspire, rather than undermine, confidence in the legal system.

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[4] Gregor Urbas and Robyn Holder, Australian National University, Submission to the Standing Committee on Justice and Community Safety, Legislative Assembly for the ACT, *Criminal Proceedings Legislation Amendment Bill 2011 (ACT)*, 8 April 2011, 5-6.
[5] Chief Justice Higgins, ‘Reform to Judge-Alone Trials’ (March 2011) *Bar Bulletin: Newsletter of the Australian Capital Territory Bar Association* 5.
[6] Compatibility Statement, Criminal Proceedings Legislation Amendment Bill 2011 (ACT); Revised Explanatory Statement, Criminal Proceedings Legislation Amendment Bill 2011 (ACT) 3.
[7] *Human Rights Act 2004* (ACT) s 21.
[8] *Canada Act 1982* (UK) c 11, sch B pt I (‘*Canadian Charter of Rights and Freedoms’*).
[9] *R v McGregor* [1999] 43 OR (3d).
[10] Specifically the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 6 (‘*European Convention on Human Rights*’).
[11] *Pullar v United Kingdom* [1996] III Eur Court HR [30].

II DEVELOPING THE JUDGE ALONE LEGISLATION

The ACT was the third Australian jurisdiction to introduce the possibility of judge alone trials for indictable criminal matters.[12] As of 1993, section 68B of the *Supreme Court Act 1933* (ACT) allowed an accused person charged with an indictable offence to elect a trial by judge alone as of right.[13] Provided an accused person fulfilled a number of procedural requirements they could choose to be tried without a jury and this choice was generally not reviewable by the courts or the prosecution.[14] When introducing the Supreme Court (Amendment) Bill 1993 (ACT) into Parliament, with the option for an accused to elect a judge alone trial, the then-Attorney General recognised there would be cases for which an accused person might prefer to be tried by a judge alone. Those included matters subject to extensive pre-trial publicity and those involving a mass of technical evidence that may prove difficult for jurors to comprehend.[15] The model chosen reflected the South Australian approach, endowing the accused with complete discretion to make a judge alone trial election without any requirement to disclose the reason/s for that choice. This differed from the New South Wales approach which initially required prosecution consent before a judge alone trial could eventuate.[16]

Subsequent to the introduction of these legislative provisions in the ACT, other Australian jurisdictions legislated for the use of judge alone trials for indictable matters. Western Australia initially required Crown consent,[17] but, following a review by the Law Reform Commission of Western Australia, provided the court with a gate keeping role. Upon the application of the accused or the prosecution (provided the accused consents) for a judge alone trial, the court has to be satisfied that this mode of trial is appropriate in the 'interests of justice.'[18] Examples of matters that may and may not be appropriate for judge alone trial were included in the legislation. The main category of cases considered suitable would be long or complex matters, likely to unreasonably burden the jury.[19] Unsuitable cases would be those requiring the 'application of objective community standards' to the facts.[20] This format has

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[12] It followed South Australia in 1984: see *Juries Act 1927* (SA), and New South Wales in 1991: See *Criminal Law and Procedure Act 1986* (NSW) s 132; this was recently amended by the *Courts and Criminal Legislation Further Amendment Act 2010* (NSW) sch 12.2.
[13] The amendments to the *Supreme Court Act 1933* (ACT) introducing s 68B were by virtue of the *Supreme Court (Amendment) Act 1993* (ACT).
[14] The procedural requirements included that the election is to be made in writing and the accused must have sought and received advice from a legal practitioner as to the election. An exception as to when a trial by judge alone would not be permitted was if the trial involved co-accused who did not make a corresponding election.
[15] Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 17 June 1993, 2216 (Terry Connolly, Attorney General).
[16] *Criminal Law and Procedure Act 1986* (NSW) s 132(3) as amended by the *Courts and Criminal Legislation Further Amendment Act 2010* (NSW) sch 12.2.
[17] *Criminal Code 1913* (WA) s 651A(5).
[18] *Criminal Procedure Act 2004* (WA) s 118(4).
[19] *Criminal Procedure Act 2004* (WA) s 118(5)(a).
[20] *Criminal Procedure Act 2004* (WA) s 118(6).

become the preferred choice for the majority of Australian jurisdictions that permit judge alone trials (with the addition in Queensland of matters subjected to significant pre-trial publicity as being potentially apposite for this mode of trial),[21] leaving South Australia and the ACT in the minority. This distinction perhaps goes someway to explaining why the percentage of judge alone trials in the ACT and South Australia exceed those in the other Australian jurisdictions.[22]

The fact that the ACT had the 'highest proportion of matters proceeding by judge alone trials in Australia at 56 percent'[23] provided much of the impetus for the presentation of the Bill to the Legislative Assembly in February this year. In his second reading speech, the Attorney General also noted that the rates of election were particularly high for accused persons charged with sex offences and offences involving death of a person.[24] Further, he alluded to the rates of conviction in judge alone trials for those offences being low, noting that judges presiding over judge alone trials had failed to convict anyone of murder in the four years preceding 30 June 2008 and only nine percent of judge alone trials for sex offences had resulted in conviction.[25] However, he did not provide any comparison statistics of convictions for those offences heard before juries in the same period.

The Bill proposed to exclude certain offences (specifically murder, manslaughter and culpable driving occasioning death, as well as sexual offences outlined in the *Crimes Act 1900* (ACT))[26] from the purview of judge alone trials. An offender charged with these excluded offences would no longer have the option of electing a judge alone trial. To further justify targeting these offences for exclusion, the Attorney General stressed their seriousness and stated that they often required 'decisions and findings of fact to be made involving the application and assessment of community standards.'[27] On 23 June 2011, the Legislative Assembly for the ACT voted in favour of the Bill,

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[21] In addition to Western Australia, this format has been adopted by Queensland: *Criminal Code 1899* (Qld) s 615 and has recently been introduced in New South Wales following a review by the Standing Committee on Law and Justice, Parliament of New South Wales, *Inquiry into Judge Alone Trials under s 132 of the Criminal Procedure Act 1986,* Report No 44 (November 2010) resulting in amendments to the *Criminal Law and Procedure Act 1986* (NSW) s 132 that commenced in January 2011. Note however the significant difference in NSW that this process is not mandatory if both the prosecution and the accused consent to this mode of trial.

[22] In Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 17 February 2011, 256 (Simon Corbell, Attorney General) it was noted that the next closest jurisdiction to the ACT is 'the South Australian Supreme Court, at 15 per cent and then Western Australia at 2.7 per cent.'

[23] Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 17 February 2011, 256 (Simon Corbell, Attorney General).

[24] Ibid.

[25] Ibid. Note that these comments should be considered in light of the low numbers of murder trials (and it can be assumed even lower number of judge alone trials) in that period, see Manu Jaireth, 'Proposed Reforms to Judge-Alone Trials in the Australian Capital Territory' (2010) 10 *Canberra Law Review* 251, 259.

[26] For the full list of now excluded offences see *Supreme Court Act 1933* (ACT) sch 2 pt 2.2.

[27] ACT, above n 22, 257.

although not without controversy.[28] For example, the selection of offences for exclusion was labelled as random and the effect as arbitrary.[29] The amended provisions took effect in July.[30]

III COMPATABILITY WITH HUMAN RIGHTS

Mirroring part of Article 14 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[31] the *HRA* s 21(1) enshrines the right to a fair trial in the ACT, specifically the right to have criminal charges 'decided by a competent, independent and impartial court or tribunal after a fair and public hearing.' This right can be subject to reasonable limits.[32]

The *HRA* scaffolds a number of protections, broadly reflecting separation of powers values, to ensure that human rights are afforded to Territorians. First, the Attorney General is required to provide a statement as to whether, in his/her opinion, any proposed legislation is consistent or inconsistent with human rights.[33] Secondly, the proposed legislation must be scrutinised by the relevant standing committee, which is required to report to the Legislative Assembly on any human rights issues raised.[34] Thirdly, the judiciary is required to interpret, as far as it is possible to do so consistently with its purpose, legislation consistently with human rights,[35] and where a law cannot be interpreted in such a manner the Supreme Court may declare the law incompatible with human rights.[36] However, the court does not have the power to

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[28] The Assembly voted Ayes 11 and Noes 6, Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 23 June 2011, 2529.

[29] See, eg, Anne Wallace, Lorana Bartels and Anthony Hopkins, University of Canberra, Submission to the Standing Committee on Justice and Community Safety, Legislative Assembly for the ACT, *Criminal Proceedings Legislation Amendment Bill 2011 (ACT)*, 8 April 2011, 2; Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 23 June 2011, 2505 (Mrs Dunne) and 2514 and 2517 (Mr Seselja); Chief Justice Higgins, above n 5, 5. Note also reference to comments by the Human Rights Commissioner that '[t]he bill may be arbitrary' in Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 23 June 2011, 2522 (Mrs Dunne). Concerns have also been raised about the resource implications of the amendments: see Manu Jaireth, above n 25. However these criticisms of efficiency are outside the scope of this article.

[30] See *Supreme Court Act 1933* (ACT) s 68B, as amended by *Criminal Proceedings Legislation 2011* (ACT) pt 3.

[31] Specifically *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(1).

[32] *Human Rights Act 2004* (ACT) s 28.

[33] *Human Rights Act 2004* (ACT) s 37. It was reported last year that as yet the Attorney General has not made a statement acknowledging that an Bill is incompatible with human rights: Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia' (2010) 33(1) *UNSW Law Journal* 136, 142.

[34] *Human Rights Act 2004* (ACT) s 38.

[35] *Human Rights Act 2004* (ACT) s 30. Although this provision is not limited to the judiciary, it also encompasses other decision makers.

[36] *Human Rights Act 2004* (ACT) s 32. For further discussion of these and two other protective mechanisms, the role of the Human Rights Commissioner and the duty on public authorities, see Watchirs and McKinnon, above n 33, 139-140.

invalidate legislation; instead the approach in the ACT, similar to that in Victoria and in the United Kingdom,[37] retains 'parliamentary supremacy, placing the responsibility for amending the law upon the legislature.'[38] Further, these provisions do not create legally enforceable rights.[39] In the recent High Court decision of *Momcilovic v The Queen,*[40]which considered similar provisions of the Victorian *Charter of Human Rights and Responsibilities Act 2006*, French CJ confirmed this approach, stating that '[t]he declaration ... has no legal effect upon the validity of the statutory provision which is its subject. It has statutory consequences of a procedural character.'[41]

The Bill amending the right to judge alone trials in the ACT did follow the procedure outlined in the first and second steps. The Attorney General's compatibility statement suggested that the Bill was consistent with the *HRA*.[42] The reasons were articulated in the Bill's explanatory statement, stipulating that the right to a fair trial is not limited as 'a person indicted on an excluded offence will have a fair trial provided for by existing jury trial provisions and further supported by appeal provisions.'[43]

Nevertheless, the Standing Committee on Justice and Community Safety scrutinised the Bill and discussed its possible implications, especially on the right to a fair trial. The Committee referred to the possibility articulated by Chief Justice Higgins that removing the right to a judge alone trial may result in prejudice, occasioned by publicity and/or the nature of the offence, infringing an accused's ability to be heard by an independent and impartial court.[44] Further, the Committee questioned whether a less restrictive approach was available.[45]

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[37] Although parliamentary supremacy is arguably less valued in the United Kingdom where the interpretive approach taken in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 found Parliament's intent can be departed from in achieving consistency with human rights, giving the Human Rights Act 'quasi-constitutional status': Jeremy Gans, Terese Henning, Jill Hunter and Kate Warner, *Criminal Process and Human Rights* (The Federation Press, 2011) 14.

[38] Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 3rd ed, 2010) 126. Specifically, the Attorney General, upon receiving a declaration of incompatibility, must present it to the Legislative Assembly: *Human Rights Act 2004* (ACT) s 30.

[39] *R v Fearnside* (2009) 193 A Crim R 128, [77] and [80]. Note specifically that failure to comply with the process outlined in ss 37-38 'does not affect the validity, operation or enforcement of any Territory law': *Human Rights Act 2004* (ACT) s 39. However, cf *Human Rights Act 2004* (ACT) Pt 5A, which does create a direct right of action against public authorities who fail to consider human rights in decision making or act in a way incompatible with a human right. Note that public authority expressly excludes a court and the Legislatively Assembly, unless they are acting in an administrative capacity: *Human Rights Act 2004* (ACT) s 40(2).

[40] *Momcilovic v The Queen* [2011] HCA 34.

[41] Ibid [89]. French was supported by the majority on this point, however note that Gummow, Hayne and Heydon JJ found the provision invalid as it 'attempted a significant change to the constitutional relationship between the arms of government with respect to the interpretation and application of statute law': per Gummow at [183].

[42] Compatibility Statement, Criminal Proceedings Legislation Amendment Bill 2011 (ACT).

[43] Revised Explanatory Statement, Criminal Proceedings Legislation Amendment Bill 2011 (ACT) 2.

[44] Standing Committee on Justice and Community Safety, Parliament of the Australian Capital Territory, *Scrutiny Report No. 36* (29 April 2011) 4 referring to Chief Justice Higgins, above n 5, 5.

[45] Ibid 7, referring to the option raised in Anne Wallace, Lorana Bartels and Anthony Hopkins, University of Canberra, Submission to the Standing Committee on Justice and Community Safety,

The Human Rights Act 2004 (ACT): The First Five Years of Operation, a report to the ACT Department of Justice and Community Safety completed in May 2009, determined that the *HRA*'s most significant impact was at the policy-making level, with human rights being considered in development of new laws and policies.[46] In this respect, it echoed the results of the 12 month review of the HRA. [47] Although the comments of the Scrutiny Committee,[48] raising human rights concerns, were cited by the Opposition in debate and in recommending amendments to the Bill,[49] ultimately the amendments were rejected.[50] This followed a rather cursory response from the Attorney General referring again to the original reasons provided in the explanatory statement.[51] Before proceeding further it must be considered whether the right to a fair trial has been limited and, if so, whether that limitation is justifiable.

IV IS A *HRA* PROTECTED HUMAN RIGHT LIMITED?

In *R v Fearnside,*[52] Besanko J (with whom Gray P and Penfold J agreed) opined that the consequence of removing the right to elect a judge alone trial, necessitating a trial by jury, would not raise issues with the right to a fair trial in s 21:

> It would be a surprising conclusion that a trial by jury would not secure to all accused persons a fair hearing by a competent, independent and impartial court having regard to the facts that before the *Supreme Court (Amendment) Act 1993* (ACT) all charges of serious criminal offences were tried by jury, that in some other jurisdictions in Australia a trial must be by jury and there is no right in an accused person to elect for trial by judge alone and in the case of Commonwealth offences trial by jury is prescribed by s 80 of the Constitution.... [S]ubject to the usual safeguards and rules ... a jury is a competent, independent and impartial body for the purpose of the trial of criminal charges [and] there are a number of discretions designed to protect the position of an accused person ... to ensure, among other things, that the trial is fair.[53]

Legislative Assembly for the ACT, *Criminal Proceedings Legislation Amendment Bill 2011 (ACT)*, 8 April 2011, 2.

[46] Watchirs and McKinnon, above n 33, 169.

[47] The ACT Human Rights Act Research Project, 'The Human Rights Act 2004 (ACT): The First Five Years of Operation' A Report to the ACT Department of Justice and Community Safety (May 2009) 6. The results of the 12 month review in ACT Department of Justice and Community Safety (JACS), 'Human Rights Act 2004 Twelve Month Review Report' (2006) were also referred to in The ACT Human Rights Act Research Project Report (May 2009) 14.

[48] Here the Standing Committee on Justice and Community Safety.

[49] Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 23 June 2011, 2504 (Mrs Dunne) and 2516 (Mr Seselja).

[50] This is unlike amendments proposed to the Health Legislation Amendment Bill 2006 (No 2) which were successful following reference to the Scrutiny Committee: see Watchirs and McKinnon, above n 33, 144.

[51] As reported in Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 23 June 2011, 2516 (Mr Seselja).

[52] *R v Fearnside* (2009) 193 A Crim R 128.

[53] *R v Fearnside* (2009) 193 A Crim R 128, [100]-[101] per Besanko J.

Such a statement is consistent with findings in the United States of America. There, under the *Federal Rules of Criminal Procedure*, an accused person can waive their right to a jury (and instead proceed by judge alone or bench trial) if they have the consent of the government and the court. [54] In *Singer v United States,*[55] the Supreme Court confirmed that the right in the *United States Constitution* art III, § 2 and the Sixth Amendment to a trial by jury did not confer or recognise a corresponding right to a trial by judge alone.[56] As such, asserting many of the same ideas that Besanko J later relied on, the Court held that jury trials are:

> surrounded with safeguards to make [them] as fair as possible ...[and] [i]n light of the Constitution's emphasis on jury trial, we find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury.[57]

However, the comments in the United States must be read in their context. That is, the comments discussed the Constitutional provision and the Sixth Amendment mentioned above, which are specifically directed to jury trials[58] and are not only provided for the benefit of the accused but also for the public in general.[59] This can be contrasted with the provisions in the ACT which more broadly discuss the right to a fair trial before an independent or impartial court or tribunal, specifically choosing not to restrict the right to a jury trial only,[60] and which were established to protect individual interests, as opposed to any collective community interest.

As discussed below, the Canadian experience, with provisions that provide personal guarantees, albeit to a greater extent given the entrenchment of rights in the *Canadian Charter of Rights and Freedoms*, correlates more closely to the ACT. If the ACT judiciary considers the judgments of Canadian courts it may, conversely to the logic in *Fearnside,* indeed find that the right to a fair trial is limited.

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[54] 18 USCA FRCRP Rule 23. This is also echoed in many of the States: see, eg, AL R RCP Rule 18.1; DC Code § 16-705; ID ST § 19-3911; KY ST RCRP Rule 9.26; NV ST 175.011. Although note that there are some differences in the procedural requirements.

[55] *Singer v United States,* 380 US 24 (1965).

[56] Ibid 26. This was earlier decided in *Adams v United States ex rel. McCann,* 317 US 269 (1942).

[57] *Singer v United States,* 380 US 24 (1965) 35.

[58] The Sixth Amendment states that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...' and article III, § 2(3) of the *United States Constitution* provides '[t]he Trial of all Crimes, except in cases of impeachment, shall be by Jury'.

[59] See discussion in *R v Turpin* [1989] 1 SCR 1296, 24-27.

[60] See discussion about earlier attempts to include the right to a trial by jury in a Bill of Rights for the ACT Standing Committee on Justice and Community Safety, Parliament of the Australian Capital Territory, *Scrutiny Report No. 32* (10 February 2011) 2-3.

A The Canadian Experience

The *Canadian Charter of Rights and Freedoms* s 11(d) has similar wording to the *HRA* and guarantees the right to 'a fair and public hearing by an independent and impartial tribunal.'[61] Canada allows for judge alone trials in its *Criminal Code,*[62] with provisions most similar to the amendments to the judge alone provisions in the ACT. Generally, like the ACT, an accused person can choose a judge alone trial.[63] Also like the ACT, particular offences, including murder (but not sexual offences or other offences involving death), are excluded from the ambit of an automatic right of election.[64] However, and this is where the two jurisdictions markedly diverge, in Canada, even excluded offences may be tried by judge alone if both the accused and the Attorney General consent.[65] A refusal of consent by the Attorney General can only be reviewed if an abuse of process is demonstrated.[66] It is in this context that the Canadian courts have had cause to consider whether requiring an accused person to have a jury trial may breach their right to a fair trial.

The accused in *R v Turpin*[67] had been acquitted of murder at first instance following a trial by judge alone. The trial judge allowed this mode of trial, accepting the accused's arguments that the provisions in the *Criminal Code* preventing the accused from choosing this mode as of right breached the *Canadian Charter of Rights and Freedoms.* The Crown successfully appealed the acquittal on the grounds that the trial judge did not have jurisdiction to proceed in that manner. The Supreme Court then confirmed that the *Canadian Charter of Rights and Freedoms* s 11(f) guaranteeing a right to a trial by jury did not correspond to a right to a judge alone trial where this was excluded by the *Criminal Code.* Such a finding meant that, as the case was argued, the accused's rights had not been infringed and, as such, the accused was not entitled to a declaration under s 24 of the *Canadian Charter of Rights and Freedoms*. Subsequent to that decision, lawyers for accused persons faced with the prospect of a mandatory jury trial, following the Attorney General's refusal of consent to trial by judge alone, turned to an argument that an abuse of process existed as *other* constitutional considerations were engaged, that is, the accused's right under s 11(d) guaranteeing a fair and impartial trial was being infringed. In *R v McGregor,*[68] the Ontario Court of Appeal accepted this argument. The Court supported the trial judge's decision to grant a judge alone trial, over the Attorney General's refusal of consent, where there was evidence that the effects of the enormous media attention were still being felt one year on from the offence, and taking into consideration expert evidence that in notorious cases it is 'more difficult to identify prospective jurors who lack the

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[61] *Canada Act 1982* (UK) c 11, sch B pt I s 11(d).
[62] *Criminal Code,* CRC c 46, pt XIX.
[63] Ibid s 558.
[64] The other offences listed in *Criminal Code,* CRC c 46, XIX, s 469 include offences such as piracy and sedition.
[65] *Criminal Code,* CRC c 46, Pt XIX, s 473.
[66] *R v Wright* [2011] ABQB 145, [22].
[67] *R v Turpin* [1989] 1 SCR 1296.
[68] *R v McGregor* [1999] 43 OR (3d).

necessary impartiality.'[69] This decision has been confined to its 'unique circumstances',[70] and subsequent cases have refused to find that unfairness is the necessary result of publicity or other perceived prejudice,[71] relying instead on other 'time-honoured statutory and common law procedures designed to preserve and protect the right of every accused to a fair trial by an impartial tribunal.'[72] However, *McGregor* demonstrates that it is possible, in some instances, for courts to find that these other procedures provide insufficient protection.

Certainly the offences chosen for exclusion from judge alone trials in the ACT arguably include those that would attract the greatest notoriety and prejudicial publicity or raise other prejudice in the mind of potential jurors.[73] In all jurisdictions that offer a judge alone mode of trial, offenders charged with sex offences and offences involving the death of a person are the most likely to proceed or seek to proceed via that mode.[74] In those jurisdictions that require disclosure of reasons for seeking judge alone trials, assertions of potential prejudice have featured as one of the main justifications for seeking this mode of trial.[75]

Concern about prejudice arising from publicity is particularly pertinent in the ACT,[76] a small jurisdiction where other protections, such as transfer of proceedings, are unlikely to be an effective means of combating the anticipated prejudice.[77] The Supreme Court, with jurisdiction over these serious matters, is situated in Canberra and even crimes committed on the furthest borders of the ACT have occurred no more than 80 kilometres away, a short distance for journalists to travel to report on these matters. It has been noted that jurors' recollection of pre-trial publicity is greater for crimes that occur in their community and that 'partial' changes of venue to a place where publicity about the offence is still readily available will have little impact on the influence of prejudicial publicity.[78] Arguably, the ACT, given its size, is one big community within which jurors will recall notorious matters more easily. Further, the advent of the internet and increase in the use of social media where prejudicial

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[69] *R v JS-R* [2008] CanLii 54305 (ON SC) [6]-[7].
[70] *R v Ng* [2003] ABCA 1, [59].
[71] Such as *R v Choy* [2008] ABQB 626.
[72] *R v Khan* [2007] OJ No 4383 (CA) [15]-[16].
[73] Anne Wallace, Lorana Bartels and Anthony Hopkins, University of Canberra, Submission to the Standing Committee on Justice and Community Safety, Legislative Assembly for the ACT, *Criminal Proceedings Legislation Amendment Bill 2011 (ACT)*, 8 April 2011, 2.
[74] Jodie O'Leary, 'Twelve Angry Peers or One Angry Judge: An Analysis of Judge Alone Trials in Australia' (2011) 35 *Criminal Law Journal* 154, 165.
[75] This includes prejudice due to pre-trial publicity and other prejudice: see ibid, 164-165.
[76] Anne Wallace, Lorana Bartels and Anthony Hopkins, University of Canberra, Submission to the Standing Committee on Justice and Community Safety, Legislative Assembly for the ACT, *Criminal Proceedings Legislation Amendment Bill 2011 (ACT)*, 8 April 2011, 2.
[77] See comments in ACT Law Society, Submission to Attorney General, *Criminal Proceedings Legislation Amendment Bill 2011 (ACT)*, 17 June 2011, 3 and Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 23 June 2011, 2524 (Mrs Dunne).
[78] Janet Chan, Shelley Hampton and Michael Chesterman, 'Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales' (University of New South Wales and the Law and Justice Foundation's Research Centre, 2001) 206 [521]-[522].

material can remain available on an archive to be accessed with a few keystrokes, the click of a mouse or the touch of a screen, [79] has decreased the usefulness of other remedies such as adjournments, designed to allow any prejudice to abate in potential jurors' minds. Chief Justice Spigelman confirmed this in 2004:

> the ability of a stay or adjournment to ensure a fair trial has been substantially attenuated by the immediate accessibility of information on the internet with an efficiency that overrides the practical obscurity of the past. This accessibility poses significant challenges for the administration of criminal justice.[80]

The effectiveness of judicial directions to disregard extraneous material, the most favoured method of combating any pre-trial publicity and attempting to ensure a trial before an impartial tribunal, is also questionable, particularly given recent research in England and New South Wales.[81] In England, in 2010, Thomas detailed survey results that 26% of jurors reported that they came across publicity on the internet during the trial of high profile cases.[82] Research in Australia too has indicated that jurors do make their own inquiries despite judges directing them to the contrary.[83]
But are assertions of potential unfairness, given the unlikely effectiveness of other provisions, enough? To answer this question, judicial musings about the situation in the United Kingdom are relevant.

B The Experience in the United Kingdom

In *Fearnside,* Besanko J cites decisions from the European Court of Human Rights, including *Pullar v United Kingdom,*[84] as support for his view that 'a jury is a competent, independent and impartial body.' [85] In *Pullar*, the Court considered whether the presence on a jury of a work colleague of a key prosecution witness breached the accused's right under the *European Convention on Human Rights* article 6(1) 'to a fair and public hearing ... by an independent and impartial tribunal established by law.' In that decision, the Court articulated that impartiality had two limbs, one subjective,

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[79] The ease of searching the internet was noted in *News Digital Media Pty Ltd v Mokbel* [2010] VSCA 51, [79].
[80] *John Fairfax Publications Pty Ltd & Anor v District Court of NSW & Ors* (2004) 61 NSWLR 344, 360 [64].
[81] For further discussion of the inadequacy of judicial directions see Elizabeth Greene and Jodie O'Leary, 'Ensuring a Fair Trial for an Accused in a Digital Era: Lessons for Australia' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds) *Courts and the Media in the Digital Era* (forthcoming with Federation Press, 2011).
[82] Cheryl Thomas, *Are Juries Fair?* Ministry of Justice Research Series 1/10 (February 2010) 50.
[83] See, eg, New South Wales Law Reform Commission, *Jury Directions,* Consultation Paper 4 (December 2008) [5.9] and [5.23]-[5.24] referring to results from Jill Hunter, Dorne Boniface and Don Thomason, *What Jurors Search for and What They Don't Get. Pilot Study: Juror Comprehension and Obedience to Judicial Directions Against Juror Investigation,* Centre for Interdisciplinary Studies of Law, University of NSW, funded by the Law and Justice Foundation of NSW (2010).
[84] *Pullar v United Kingdom* [1996] III Eur Court HR [30].
[85] *R v Fearnside* (2009) 193 A Crim R 128, [100]-[101] per Besanko J.

> that is, no member of the tribunal should hold any personal prejudice or bias [and]...Secondly, the tribunal must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.[86]

This second limb is an important protection, given the court's comments that jury determinations in themselves are not in contravention of article 6(1) purely because they inevitably provide an absence of reasons.[87] But it is not the fact that persons charged with the excluded offences in the ACT are necessarily going to be heard in front of a jury that affords the reason for the suggestion that this provision breaches the *HRA*. It is not contended that all, or even most trials before a jury, fall short of the requirements of fairness and impartiality outlined. Rather, it is argued that in some instances, and the possibility is more acute for these excluded offences, regular safeguards will be insufficient to ensure that a prosecution before a jury is fair from an objective viewpoint. That is, in some instances, legitimate doubts will exist about whether the jury can be or was impartial or, '[p]utting the matter in another way, a jury ... would not be a tribunal which would inspire the necessary confidence in the public and the accused.'[88] This was the case in the recent New South Wales District Court decision of *R v GSR(3),*[89] in which Woods J ordered a judge alone trial for indecent assault charges predominantly because the accused had been subject to 'poisonous, inflammatory' and 'very nasty' pre-trial publicity, which represented 'a continuing and serious risk to the integrity' of the trial.[90]

Courts in the United Kingdom have had cause to consider whether there is a difference between prospective and retrospective determinations of impartiality and fairness. For example, in *Transco Plc v Her Majesty's Advocate,*[91] there was agreement that a prospective determination would only result in a finding of unfairness where the proceedings would necessarily breach Convention rights or inevitably result in proceedings being unfair.[92] Lord Hamilton cited earlier comments of Lord Craighead to further express that pre-trial determinations of unfairness are only possible in rare and isolated cases.[93]

Such an approach replicates that taken by Australian courts in pre-trial applications for permanent stays on grounds of unfairness (especially on the grounds of prejudicial

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[86] *Pullar v United Kingdom* [1996] III Eur Court HR [30]. Similar statements were made in New Zealand, in consideration of s 25(a) of the *New Zealand Bill of Rights Act* (1990) in *Deborah Gordon-Smith v The Queen* [2009] NZSC 20, [73]: 'The fair trial right will be breached if ... [there are] reasonable grounds for apprehension by a well-informed observer that the jury is not impartial.' This same test has been confirmed in Australia in *Webb v R* (1994) 181 CLR 41 and in the House of Lords in *R v Abdroikof* [2007] UKHL 37.
[87] *Refick Saric v Denmark* (European Court of Human Rights, Application No. 31913/96) cited in *Transco Plc v Her Majesty's Advocate,* Appeal Court, High Court of Justiciary, 16 September 2004.
[88] *Transco Plc v Her Majesty's Advocate* [2004] HCJAC 68, per Lord Osborne at [23].
[89] *R v GSR(3)* [2011] NSWDC 17.
[90] Ibid [28].
[91] *Transco Plc v Her Majesty's Advocate,* [2004] HCJAC 68.
[92] Ibid [7] per Lord MacLean, [21]-[24] per Lord Osborne and [42]-[45] per Lord Hamilton.
[93] Ibid per Lord Hamilton, [44].

publicity).[94] This approach suggests that arguments that a fair trial before an impartial jury will not be had will be difficult to sustain, instead such arguments will be more likely successful retrospectively, taking into account the proceedings as a whole. Following a trial it may be asserted that the accused did not receive a fair trial and this may be linked to allegations of partiality of jurors, jurors that had to be involved due to the inability to hold a judge alone trial. This appeared to have occurred in the Queensland case of *R v Fardon.*[95] Fardon, charged with rape, applied for a judge alone trial. In the application it was argued that due to Fardon's notoriety the jury's deliberations would be affected and the usual safeguards would not ensure a fair trial. The request was denied; the Judge expressed confidence that the regular protections afforded by the nature of jury trials, the ability to give directions and the threat of prosecution for jurors who conduct their own inquiries would be adequate to ensure a true verdict. Fardon was found guilty and successfully appealed. The Court of Appeal found that the jury verdict was unreasonable and unsupportable on the evidence, with Chesterman J commenting that perhaps 'on this occasion the [Judge's] confidence was misplaced.'[96]

This foregoing analysis is supportive of Higgins' extra curial statements and contrary to those made by the Attorney General. The amended provisions do indeed limit the right to an impartial or independent tribunal, an integral aspect of the *HRA* protected right to a fair trial. However, to constitute a breach of the *HRA* such a limitation must not be justifiable.

V IS ANY LIMIT JUSTIFIABLE?

As previously stated, human rights protected by the *HRA* may be subjected to reasonable limits. In determining reasonableness, one of the relevant factors outlined in the *HRA* is 'whether any less restrictive means are reasonably available to achieve the purpose the limitation seeks to achieve.'[97] In short, it needs to be considered whether the reasons cited for limiting the right to a fair trial are legitimate and proportionate to the consequence. Such reasons for limitation are often based on competing rights or other public policy interests. The Court in *Blundell v Sentence Administration Board of the ACT*[98] cited authority from the European Court of Human Rights that to be legitimate the limitation has to correspond relevantly and sufficiently to a pressing social need.[99] Further, to be proportionate the means used must be no more than is necessary, requiring a balance between individuals' rights and those of the community.[100]

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[94] See for example *Dupas v The Queen* (2010) 241 CLR 237, 247.
[95] *R v Fardon* [2010] QCA 317, [30].
[96] *R v Fardon* [201] QCA 317, [75].
[97] *Human Rights Act 2004* (ACT) s 28(2)(e).
[98] *Blundell v Sentence Administration Board of the ACT* [2010] ACTSC 151, [181].
[99] *Sunday Times v United Kingdom* (1970-80) 2 EHRR 245, [62].
[100] *Blundell v Sentence Administration Board of the Australian Capital Territory, The Australian Capital Territory and the Chief Executive of the Department of Justice and Community Safety* [2010]

The purpose of the limitation here is, as stated earlier, to reduce the number of judge alone trials, to re-affirm the value of jury trials (especially in matters involving the application of community standards) and, arguably, to increase the number of convictions, with the broader objective of re-establishing the community's confidence in the legal system. The problem with this purpose is that it is not 'demonstrably justified' as required in the *HRA*.[101] To be so, cogent and persuasive evidence[102] would need to be provided of the need to inspire community confidence. As noted in the submission of the Australian National University, it is unknown whether the rate of convictions would have been greater if juries had been involved.[103] And even if they were, would such an increase inspire confidence in the administration of justice in the ACT? One of the reasons that some accused who proceed by judge alone may choose that mode of trial is because of concern that they will be convicted on the basis of prejudgment if they are faced with a jury. In those circumstances, an increased number of convictions may in fact be *cause* for concern.

As the author has argued elsewhere, a judge alone trial may be one of the only ways to ensure confidence in the courts.[104] Without the ability to hold a judge alone trial some notorious accused may attract levels of publicity that inevitably preclude any fair trial before a jury; the Court's only remaining option a permanent stay. Such a result would not be popular with the community and so resort to a judge alone trial may be the only way to ensure such accused face trial.[105]

Needless to say that confidence in the system may still be undermined even with jury involvement.[106] For example, in Western Australia, an accused person's conviction in a notorious matter subjected to a jury trial after an unsuccessful application to proceed by way of judge alone was said to destabilize community perceptions of the justice system, even following a successful appeal.[107]

This is assuming, of course, that it can be shown that there is a community confidence problem in the first place and, given the lack of persuasive evidence, it seems unlikely

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ACTSC 151 (2 December 2010) [182] citing *Huang v Secretary for State for the Home Department* [2007] 2 AC 167, [19].

[101] *Human Rights Act 2004* (ACT) s 28(1).

[102] *R v Momcilovic* (2010) 265 ALR 751, [143]-[144] citing *R v Oakes* [1986] 1 SCR 103 with approval.

[103] Gregor Urbas and Robyn Holder, Australian National University, Submission to the Standing Committee on Justice and Community Safety, Legislative Assembly for the ACT, *Criminal Proceedings Legislation Amendment Bill 2011 (ACT)*, 8 April 2011, 5-6.

[104] See Greene and O'Leary, above n 81.

[105] This was discussed in ibid, using the example of *R v Ferguson* [2009] QDC 049, a high profile matter that proceeded by judge alone and resulted in an appropriate acquittal and in O'Leary, above n 74, 168.

[106] See O'Leary, above n 74, 168.

[107] Malcolm McCusker, 'Bad Press: Does the Jury Deserve It?' Paper presented at the 36th *Australian Legal Convention* (September 2009) – discussing the case of *Martinez v Western Australia* (2007) 172 A Crim R 389.

that this is a pressing social need. Even if it is, though, the approach of the amendments is heavy handed.

In the Canadian case of *R v Oakes,*[108] Dickson CJ noted that an important component of proportionality is whether the measures adopted to fulfil the purpose are 'arbitrary, unfair or based on irrational considerations.'[109] As previously noted, the arbitrariness of the amendments to the ACT legislation has been criticised.[110] Although the Attorney General alluded to the seriousness of offences as justification for their selection for exclusion, questions have been raised as to why particular offences have not also been included or why some offences have been tarred with the 'serious' brush.[111]

One of the arguments proposed as justification was that these matters often require application of objective community standards.[112] However, as Chief Justice Higgins noted, this does not explain why other offences, that also require consideration of community standards, such as dishonesty, are not excluded.[113] Further, the inclusion of the word 'often' in the above statement should be carefully analysed. It is true that in some instances, trials of serious offences will require the application of objective standards, for example where issues of self-defence and provocation are raised in murder matters.[114] Yet in other instances of the offences subject to exclusion, it may well be clear that the conduct is wrong (not raising any community standard); instead the question the court will focus on is whether the accused committed the act.[115] If the exclusion of murder from the ambit of automatic rights of election can be considered non-controversial (after all, similar provisions exist, for example, in Canada),[116] the same cannot be said for sex offences or other offences involving death. Moreover, even in Canada the ability to proceed by judge alone is not completely excluded for those accused of murder, with the capacity to seek the Attorney General's consent to proceed in that manner.[117] The Canadian approach demonstrates that there are means available that are less restrictive.

Having the Attorney General/prosecutor, or the court, act as a threshold has proved effective in keeping the numbers of judge alone trials to a lower rate in other

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[108] *R v Oakes* [1986] 1 SCR 103.
[109] Ibid 139.
[110] See above n 29.
[111] See, eg, ACT, above n 51, 2515.
[112] ACT, above n 23, 257
[113] Higgins, above n 5, 5.
[114] This was noted by White J, the Judge presiding over one of the first trials by judge alone in Australia: *R v Marshall* (1986) 43 SASAR 448, 497.
[115] This was raised in relation to homicide in *Arthurs v Western Australia* [2007] WASC 182, [65]. For an example of a case involving sex offences where permission was given for trial by judge alone, despite provisions in the legislation allowing judges to refuse applications for judge alone that would necessitate the contemplation of community standards, as there was no question that the conduct was indecent see, *R v Ferguson* [2009] QDC158.
[116] *Criminal Code,* CRC c 46, Pt XIX, s 469.
[117] Ibid s 473.

Australian States, at a maximum of five percent, achieving an appropriate balance between the rights of accused and that of the community in retaining jury trials.[118] In New South Wales, where the Court has recently been tasked with permitting judge alone trials over the prosecutorial objection (if it would be in the interests of justice), there were reports of a sharp increase in the incidence of judge alone trials.[119] However, any rise in the number of judge alone trials in this jurisdiction cannot be described as alarming with statistics showing a projected increase since the introduction of these provisions of only 14 trials.[120] Such examples support the contention that the current ACT approach is disproportionate.

VI IMPLICATIONS

The only protection that remains available, under the *HRA,* for this breach of its provisions is by way of the judiciary. It is unlikely, however, that the interpretive provisions of the *HRA* will provide any protection.[121] The amended section 68B is drafted as follows:

> (1) A criminal proceeding against an accused person for an offence other than an excluded offence must be tried by a judge alone if—
>
> (a) the person elects in writing to be tried by a judge alone; and
>
> ... [certain other procedural requirements are met]
>
> (4) In this section:
>
> "excluded offence" means an offence against a provision mentioned in an item in schedule 2 (Trial by judge alone—excluded offences), part 2.2, column 3 of an Act mentioned in the item, column 2.

It is clear in this provision that courts do not retain any discretion. The provision removes the right of election to judge alone trials for particular offences, with no judicial oversight, so courts at first instance or on appeal will not find themselves in a position to interpret the legislation. Indeed, in the past, the only aspect of the judge alone provisions that has been subject to the interpretive provisions of the *HRA* relate to the time at which an election could have been made.[122] Even if, by some ingenious stroke of advocate creativity, the matter did come before the court for interpretation, the requirement in s 30 to interpret the law consistently with its purpose, coupled with the lack of ambiguity in the purpose of this legislation (as explained in the Explanatory Statement the amendments specify 'a class of offences where an election

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[118] See O'Leary, above n 74, 167-168 (fn 126) which references various sources for the rates of judge alone trials in other jurisdictions. The range in South Australia (where the accused has a right to a judge alone trial) was, at various times, between 3%-15%, in New South Wales the rate was approximately 5%, in Western Australia between 1% and Corbell's source of 2.7% (mentioned in ACT, n 22) and in Queensland at 0.5%.

[119] Lisa Davies, 'Jury Out on Judge Trials' *Sydney Daily Telegraph* (1 August 2011) 1.

[120] Mark Ierace SC, 'Trials in NSW by Judge Alone: Recent Legislative Changes' Paper presented at *AIJA Conference: Criminal Justice in Australia and New Zealand – Issues and Challenges for Judicial Administration* (September 2011).

[121] That is, *Human Rights Act 2004* (ACT) s 30.

[122] See, *R v Fearnside* (2009) 193 A Crim R 128.

to be tried by judge alone cannot be made')[123] leaves the court little room to divert from Parliament's intention, without the prospect of being labelled as judicial activists. Like the cases before the courts in Victoria,[124] and subsequently in the High Court where French CJ noted that 'if the words of a statute are clear, so too is the task of the Court in interpreting the statute with fidelity to the Court's constitutional function',[125] the approach in the ACT to date has certainly been cautious. The courts have acknowledged their role under the *HRA* as subordinate to the legislature[126] and have shied away from the latitude taken by courts in the United Kingdom.[127]

Therefore the only remaining option is a declaration of incompatibility. Although this provision has existed since the introduction of the *HRA*, such a declaration has proved to be a last resort and has only been made on one occasion in the ACT.[128] The lack of use of the provision has been attributed to the apparent toothlessness of this remedy, given that it does not automatically invalidate the law.[129] As such, it has little appeal, especially for those who may not have the funds to support further litigation, and where, for example, 'a person could still be convicted of an offence, even though a declaration of incompatibility has been made to the effect that the legislation under which the conviction has been entered is incompatible with human rights.'[130]

To date, declarations have been sought but not made in three cases.[131] In all of these cases the court found it unnecessary to consider such a declaration as either: the legislation was not found to breach a human right or, if it did, such a limitation on rights was justifiable,[132] or; interpreted the provision in a way that would not be inconsistent with human rights.[133] However, *In the Matter of an Application for Bail*

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[123] Revised Explanatory Statement, Criminal Proceedings Legislation Amendment Bill 2011 (ACT) 2.
[124] See, eg, *R v Momcilovic* (2010) 265 ALR 751.
[125] *Momcilovic v The Queen* [2011] HCA 34, [39].
[126] *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010) [56] and [59].
[127] The United Kingdom approach is outlined in *Ghaidan v Godin-Mendoz* [2004] 2 AC 557, although see comments in *Hansen v The Queen* [2007] 3 NZLR 1, [152] that the 'balance may have swung back a little', referring to *R (on the application of Wilkinson) v Inland Revenue Commissioners* [2006] 1 All ER 529. For ACT examples of caution see *R v Fearnside* (2009) 193 A Crim R 128 and *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010).
[128] *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147.
[129] Watchirs and McKinnon, above n 33, 160.
[130] *R v AM* [2010] ACTSC 149 (15 November 2010) [59].
[131] *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125, *R v AM* [2010] ACTSC 149 (15 November 2010) and *Blundell v Sentence Administration Board of the Australian Capital Territory, The Australian Capital Territory and the Chief Executive of the Department of Justice and Community Safety* [2010] ACTSC 151 (2 December 2010).
[132] In accordance with *Human Rights Act 2004* (ACT) s 28. This was the case in *R v AM* [2010] ACTSC 149 (15 November 2010).
[133] *Blundell v Sentence Administration Board of the Australian Capital Territory, The Australian Capital Territory and the Chief Executive of the Department of Justice and Community Safety* [2010] ACTSC 151 (2 December 2010) and *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125. For further discussion of *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125, see Gabrielle McKinnon, 'An Opportunity Missed? Comment on SI BHNF CC v KS BHNF IS [2005] ACTSC 125' (2006) 9 *Canberra Law Review* 21.

by Isa Islam,[134] Penfold J declared that s 9C of the *Bail Act 1992* (ACT) was incompatible with the *HRA*.[135] Nevertheless, in his required presentation of the declaration to the Legislative Assembly, the Attorney General noted that he was appealing this decision, expressing his disagreement with the Court.[136] The provision has remained unchanged at the time of writing.[137] Given the continued assertions by the Attorney General 'that the right to elect a judge-alone trial is not an element of the right to a fair trial',[138] it seems unlikely that any declaration that the amended s 68B *Supreme Court Act 1933* (ACT) is incompatible with the *HRA* would have any practical impact. Further, it is arguable whether the court would make such a declaration; the High Court's voice in *Momcilovic v The Queen*[139] severely impeding any future reliance on declaration protection for criminal matters. Three of the High Court judges held that the comparable declaratory provision in the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) were invalid, and two of the majority who found these provisions valid noted that '[i]t may be that, in the context of a criminal trial proceeding, a declaration of inconsistency will rarely be appropriate...[and] in the sphere of criminal law, prudence dictates that a declaration be withheld.'[140]

VII SUGGESTED ALTERNATIVES

The preceding analysis confirms that the recently enacted ACT provisions, excluding specified offences from the domain of judge alone trials, do potentially breach an accused's right to a fair trial before an independent and impartial court under the *HRA*. Certainly in some instances, where there is significant prejudice occasioned, for example by pre-trial publicity, and where other remedies have or will prove inadequate to combat its impact, a jury trial may not inspire the necessary confidence in the accused or the community. Additionally, while it is questionable whether the Attorney General would be able to demonstrate that a lack of community confidence is a pressing social need, there is no avoiding the fact that there are less restrictive

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[134] *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147.
[135] In this instance *Human Rights Act 2004* (ACT) s 18(5).
[136] Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 15 February 2011, 71 (Simon Corbell, Attorney General).
[137] Note that the Attorney General presented his response in June this year: see, Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 28 June 2011, 2677 (Simon Corbell, Attorney General) but at the time of writing this matter had not been debated. If the Legislative Assembly refuses to take action arguably the only available oversight is through resort to the United Nations Human Rights Committee in their role monitoring compliance with the *ICCPR*. Such recourse is, however, not necessarily effective as, even if the Committee finds that Australia has breached the Convention, action may not be taken by the Government. As noted in Watchirs and McKinnon, above n 33, 161 – this situation may be different to the United Kingdom experience 'where the government may be called to account before European Court of Human Rights [which may] provide greater incentive to respond positively to such declarations.' Note also that there is no published judgment in relation to the Attorney's assertion of appeal in this matter.
[138] As reported in ACT, above n 51, 2516.
[139] *Momcilovic v The Queen* [2011] HCA 34.
[140] Ibid [605].

ways to resolve this issue. Nevertheless, the protections outlined in the *HRA* have not proved adequate at ensuring this right so far, nor are any of the judicial protections likely to prove of use. Even assuming that a declaration of incompatibility is possible, such a remedy is inadequate for those faced with a jury trial despite concerns of impartiality, even with the ability to appeal.[141] Also, permanent stays of proceedings, which remain the only remedy currently available in such situations, have the potential to further undermine community confidence in the judicial system. The Attorney General's efforts then may achieve the opposite result to that intended.

Of course Parliament does not have to jump through the *HRA* hoops to reignite the discussion as to appropriate human rights compliant amendments to the ability to have a judge alone trial, which would avoid breaching human rights, while ensuring those charged with serious offences face trial. Such amendments might include those suggested by the Opposition in the original debate of the Bill, which would give the court the power to allow a trial by judge alone if it is in the interests of justice to do so.[142] This method would allow the courts to consider the *HRA* right to a fair trial in the exercise of their discretion. However, if concerns remain about this alternative,[143] the other option of requiring the consent of the Attorney General/prosecutor to proceed by judge alone would still be preferable to the present situation. Such decisions could be subjected to judicial scrutiny and provide a remedy of 'appropriate relief' by virtue of s 40C of the *HRA.*[144] Arguably, such a remedy could include a judge alone trial, similar to the remedy in *R v McGregor* [1999] 43 OR (3d), in a situation which might otherwise have had to be permanently stayed because impartiality could not be guaranteed.

There is nothing preventing members of Parliament from regenerating the human rights conversation around judge alone trials themselves. In fact, if they want to inspire confidence in the accused and the community alike that justice is not only done but is seen to be done, this should happen sooner rather than later.

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[141] For example, this will inevitably further extend proceedings and it has been argued that any retrial following a successful appeal may be susceptible to unfairness due to exacerbated public interest in Greene and O'Leary, above n 94. Further, the secrecy surrounding jury's deliberations may mean that the impact of any prejudice is not readily apparent.

[142] Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 23 June 2011, 2556 (Mrs Dunne). This would be similar to the preferred method that now exists in Queensland, Western Australia and New South Wales.

[143] Such as the concerns raised in Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 23 June 2011, 2519 (Simon Corbell, Attorney General).

[144] Note that this argument relies on a determination that the Attorney General/prosecutors are public authorities. Such an assertion has been contested in the High Court by the Victorian Chief Crown Prosecutor: Gans et al, above n 37, 89, referring to *Momcilovic v The Queen* [2011] HCATrans 16.