

# Criminal Code Amendment (Judge Alone Trials) Bill 2020

Submission to the Office of Strategic Legislation and  
Policy, Department of Justice

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## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA office is located on the land of the Gadigal of the Eora Nation.

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Introduction

1. The ALA welcomes the opportunity to comment on the Criminal Code Amendment (Judge Alone Trials) Bill 2020 (the Bill).
2. The ALA supports the right of every defendant to elect a judge alone trial if they wish to do so. The election should be the defendant's alone. As the ALA's National Criminal Justice Spokesman Greg Barns SC has written: "If an accused person believes they have a better chance of getting a fair trial before a judge rather than a judge and jury, they ought be able to exercise the right to pursue that course, irrespective of what anyone else thinks. After all, it is their liberty and reputation on the line."<sup>2</sup>
3. To the extent this Bill provides that right the ALA supports the Bill. The Bill reflects the language, in part, of the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic).
4. In this submission the ALA proposes some key amendments to ensure the integrity and appropriateness of the procedures proposed by this Bill

## Section 361AA(2)(a) - the date for giving notice that a jury is not required

5. According to section 361AA (2)(a) of the Bill, there is a requirement that an application by an accused person for a judge alone trial be made within two months after being committed to trial for the crime. The ALA does not agree with this requirement. Such a restriction does not exist in section 132 of the NSW *Criminal Procedure Act 1986* or in the new Victorian legislation. There seems to be no justification for such a restriction.
6. The ALA submits that the restriction is unreasonable given that pre-trial disclosure of evidence remains tardy and incomplete. Asking a defendant to make the decision to elect a judge alone within two months of being committed to the Supreme Court from the Magistrates Court would mean that the decision would be made before the investigation and disclosure are even finalised (a common problem we see in many newly committed matters), and before an indictment is settled or filed. The suggestion that notice to elect

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<sup>2</sup> Greg Barns, 'Everyone should have right to trial by judge, not jury', *The Sydney Morning Herald* (online, 12 September 2019) <<https://www.smh.com.au/national/everyone-should-have-right-to-trial-by-judge-not-jury-20190821-p52j9i.html>>.

judge alone should occur *after* service of Crown Papers would mean that the decision to elect a judge alone trial is made at a time when the crimes stated in the indictment and the evidence are fully known to defence – therefore, informed legal advice can be given.

7. The ALA submits that the Bill should be amended to remove the two-month requirement.

### **Section 361AA(3)(a) – ‘exceptional circumstances’**

8. While an application can be held outside the two-month period, under section 361AA(3)(a) such an application carries the added burden of the applicant having to show ‘exceptional circumstances’. There is no guidance given to the meaning of ‘exceptional circumstances’.
9. The ALA submits that the ‘exceptional circumstances’ test under section 361AA(3)(a) is likely too high a threshold given the two-month deadline. A lower threshold, such as "in the interests of justice", would be more appropriate.

### **Section 361AA(6)(b) – satisfying the court that the accused person has been provided with appropriate legal advice**

10. The ALA submits that section 361AA(6)(b) should be amended to make it clear that Counsel only needs to hand up a certificate to the effect that the accused person has been provided with appropriate legal advice, and that the Court is not to inquire into specifically what advice was given.

### **Other comments**

11. The ALA submits that a provision should be inserted to require a timeframe for the Court to deliver its judgment and reasons, as otherwise accused persons and victims may wait many months for decisions. This problem is compounded for persons remanded in custody or subject to onerous bail conditions. As a point of reference, usually juries return a verdict within one business day.
12. The ALA also submits that the Crown should not be able to make an application for a judge alone trial. The Crown is meant to be a moral exemplar and concerned with justice, not convictions. That being so, the Crown should see jury trials as no impediment to it undertaking its functions.

13. The ALA also submits that the legislation should include a provision similar to s118(2) *Criminal Procedure Act 2004* (Western Australia) to the effect that a decision for a Judge alone trial should be made prior to the identity of the trial Judge being known. The ALA submits that the Bill should go a step further and preclude the Judge making a decision on the application from sitting as trial Judge in the case. Such a provision would have two key benefits:

- a. By ensuring that a separate Judge makes the decision on application and verdict it will remove the possibility that, having heard arguments related to the case in the application, a Judge would form a view as to guilt or innocence prior to the trial;
- b. It would reduce public apprehension of bias or conflict that may arise where the same Judge decides on a Judge alone trial and reaches a controversial albeit correct decision.

## Conclusion

14. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Criminal Code Amendment (Judge Alone Trials) Bill 2020.

15. The ALA strongly supports the right of every defendant to elect a judge alone trial if they wish to do so. However, we submit that the Bill should be amended as suggested above to ensure that this right is appropriately realised.



**Sebastian Buscemi**

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