Criminal Code and Jury and Another Act Amendment Bill 2008

Explanatory Notes

Objectives of the Bill

This Bill will amend:

1. the *Criminal Code* to implement judge alone criminal trials;
2. the *Jury Act 1995* to introduce majority verdicts for criminal trials; and
3. the *Crime and Misconduct Act 2001* to ensure that a witness at a Crime and Misconduct Commission misconduct investigation hearing is not entitled to remain silent or to refuse to answer a question on a ground of privilege against self incrimination.

Reasons for the Bill

In relation to indictable offences for which a person has been committed, section 604(1) of the *Criminal Code* provides that generally, unless the accused pleads guilty to an offence, they are deemed to require and are entitled to a trial by jury.

Section 98 of the *Juvenile Justice Act 1992* currently allows a legally represented child to elect for trial with or without a jury. Trials for offences in Queensland Magistrates Courts are also conducted summarily without a jury.

Section 33 of the *Jury Act 1995* provides that the jury for a criminal trial consists of 12 persons. There is, however, provision under section 57 of the Act for a judge to direct continuation of a trial with less than the full number of jurors (with not less than 10 jurors in a criminal trial) if a juror dies or is discharged after a trial begins and there is no reserve juror available to take the juror's place. Section 59 of the *Jury Act 1995* requires that the verdict in all criminal trials be unanimous.

A number of Australian states and territories, as well as some overseas jurisdictions (including New Zealand), have introduced judge alone criminal trials in higher courts.

While a defendant's right to a trial by jury is a key feature of the common law criminal justice system and the jury system is an effective institution for ensuring community participation, judge alone criminal trials may be appropriate in some cases, for example in complex cases and cases involving significant pre-trial publicity.

In all states and territories that permit judge alone trials, legislation does not allow a judge alone trial to occur without the consent of the accused and no jurisdiction permits the prosecution alone to require a trial by judge alone.

Western Australia is currently the only Australian jurisdiction that gives the court an overriding discretion to decide whether to order a trial by judge alone taking into account the interests of justice. The judge alone provisions in Western Australia were examined by the Western Australia Law Reform Commission (WALRC) in its Report on the Review of the Criminal and Civil Justice System. As a result of the recommendations made by the WALRC, in 2004, the Western Australian Government amended the existing judge alone trial provisions to confer the decision making power on a judge who has to take into account the interests of justice. The WALRC was of the view that a trial by judge alone should be available as an alternative to trial by jury in appropriate cases on indictment but not as of right for either the defence or prosecution.

All other Australian jurisdictions, except the Commonwealth and the Australian Capital Territory, also allow majority verdicts in criminal trials.

Majority verdicts can reduce the number of hung juries by ensuring that jury deliberations are not thwarted by a single person who is unwilling to engage in a proper examination of the evidence. Majority verdicts thereby help give certainty and finality to criminal proceedings.

There are a number of differences between jurisdictions with respect to majority verdicts. These differences relate to the type of offences for which a majority verdict can be given (all jurisdictions except the Northern Territory and New South Wales (NSW) prevent use for murder verdicts); the number of hours a jury must deliberate before being allowed to deliver a majority verdict (these periods range between two to eight hours); and the number of jurors required for a majority (although no jurisdiction permits more than two jurors to dissent).

Section 192 of the *Crime and Misconduct Act 2001* provides that witnesses in misconduct investigation hearings must answer questions put to them by the presiding officer. The witness is not entitled to remain silent or refuse to answer a question on a ground of privilege, other than legal professional privilege, public interest immunity or parliamentary privilege. In the recent case of *Witness "D" v Crime and Misconduct Commission* [2008] QSC 155 (*Witness D),* it was decided that the definition of "privilege" in the *Crime and Misconduct Act 2001* when read with the section had the effect of only excluding claims of privilege on the ground of confidentiality and no other basis. On this interpretation, a witness would be able to refuse to answer a question in a misconduct investigation hearing based on the privilege against self-incrimination. There are a range of matters at various stages of the Crime and Misconduct Commission's investigative process might be compromised by this interpretation

Achievement of the Objectives

The Bill amends the *Criminal Code* to insert a new chapter division for judge alone trials for most criminal proceedings in the higher courts. The provisions in this new division are based on legislation in Western Australia. The amendments will allow a prosecutor or accused to apply to the court for an order that the trial of a charge be by judge sitting alone without a jury. The court will have an overriding discretion to make the order if it considers that it is in the interests of justice but only if the accused consents if the prosecution has made the application.

The Bill also amends the *Jury Act 1995* to allow a jury to reach a majority verdict in a criminal trial for most offences if, after deliberating for at least 8 hours or such further period the judge considers reasonable having regard to the complexity of the trial,

- the judge is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation.

A majority verdict is defined as a verdict on which all jurors except one juror agree provided the jury consists of at least 11 jurors.

Majority verdicts will not be available in trials for murder or an offence against section 54A(1) (*Demands with menaces on agencies of government*) of the *Criminal Code* which have mandatory life imprisonment as a penalty. They will also not apply to trials for Commonwealth offences.

The provisions for majority verdicts are not based on any particular interstate model.

Following the decision in *Witness D,* the Bill includes an amendment to section 192 of the *Crime and Misconduct Act 2001* to clarify that a witness at a Crime and Misconduct Commission misconduct investigation hearing is not entitled to remain silent or to refuse to answer a question on a ground of privilege against self incrimination.

Estimated Cost for Government Implementation

There are not likely to be any costs arising from the implementation of the amendments in the Bill.

Consistency with Fundamental Legislative Principles

Applications for judge alone trials may be made under section 590AA of the *Criminal Code* as a pre-trial direction/ruling. A direction or ruling under this section is binding unless the judge presiding at the trial or pre-trial hearing, for special reason, gives leave to re-open the direction or ruling. A direction or ruling must not be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence. This restriction on appeal rights is considered justified on the basis that decisions made under this section are of an interim and procedural nature.

Under the amendment to section 192 of the *Crime and Misconduct Act 2001*, 9a person cannot remain silent or refuse to answer a question on the ground of the privilege against self incrimination. Where a person claims that privilege under section 197, the answer is not generally admissible in evidence against the person in any civil, criminal or administrative proceeding, subject to stated exceptions including a proceeding about the falsity or misleading nature of the answer. It is important that the Crime and Misconduct Commission has the power to require a person to give evidence in these circumstances with protection to elicit evidence of more serious criminal activity or misconduct that would otherwise not be available.

The amendment also has retrospective effect. New section 384 (clause 13) provides that from the commencement of section 192, a witness at a commission hearing was not entitled to refuse to answer a question on the ground of the self incrimination privilege or the ground of confidentiality. This is consistent with the previous longstanding interpretation of section 192. It is consistent with the position for investigation hearings under

section 190 of the *Crime and Misconduct Act 2001* and equivalent provisions of the previous *Criminal Justice Act 1989* and the *Crime Commission Act 1997* which the *Crime and Misconduct Act 2001* replaced. There would be serious and costly consequences relating to previous, existing and future prosecutions if the retrospective declaration is not made.

Consultation

The Chief Justice, Chief Judge, Chief Magistrate, Queensland Law Society, Bar Association of Queensland, Director of Public Prosecutions and Legal Aid Queensland were consulted during the drafting of the Bill on provisions relating to judge alone trials and majority verdicts.

The Crime and Misconduct Commission has been consulted on the proposed amendments to section 192 of the *Crime and Misconduct Act 2001*.

Notes on Provisions

Part 1 Preliminary

Clause 1 provides that the Act's short title is the Criminal Code and Jury and Another Act Amendment Act 2008.

Part 2 Amendment of The Criminal Code

Clause 2 provides that Part 2 amends the *Criminal Code*.

Clause 3 amends section 590AA(2) to insert a new paragraph (da) which provides that a pre-trial direction or ruling may be made in relation to a trial by a judge sitting without a jury.

Clause 4 amends section 604(1) of the *Criminal Code* to insert a reference to the new chapter division 9A dealing with trial by a judge alone. Section 604(1) provides for a trial by jury unless the accused pleads guilty on an indictment.

Clause 5 amends Chapter 62 of the *Criminal Code* to insert a new chapter division dealing with judge alone trials.

Proposed section 614(1) provides that a prosecutor or an accused person may apply to the court for an order that the trial of a charge be by a judge sitting alone without a jury. An application must be made before the commencement of the trial however if the identity of the trial judge is known to the parties an order can only be made if the court is satisfied there are special reasons for making it. Section 615(5) provides that the court may inform itself in any way it considers appropriate in considering the application.

Proposed section 615 contains provisions relating to the making of an order that the trial of a charge be by a judge sitting without a jury. This new section provides that an order may be made if the court considers that it is in the interests of justice to do so. However, if the prosecutor has applied for the order, the court may only make the order if the accused person consents to it. If the accused person is not represented by a lawyer the court must be satisfied that the person properly understands the nature of the application.

Proposed section 651A provides that an order for a trial by judge alone cannot be made if an accused is charged with two or more charges that are to be tried together unless an order is made for all of the charges. Similarly, if there is more than one accused, an order cannot be made unless an order is made for all accused.

Proposed section 615B sets out the law and procedure to be applied in a trial by a judge sitting without a jury.

Pursuant to section 615C a judge sitting without a jury may make any findings and give any verdict that a jury could have made or given and any such finding or verdict has, for all purposes, the same effect as a finding or verdict of a jury. A judge must also include in his or her judgment the principles of law that have been applied and the findings of fact on which he or she has relied although the validity of the proceedings is not affected by failure to comply with this requirement.

Proposed section 615D provides that a trial by judge sitting without a jury will not be available in relation to a trial on indictment before a Childrens Court judge given part 6 of the *Juvenile Justice Act 1992* or trials on indictment for Commonwealth offences.

Proposed section 615E is a general provision to ensure that references to the trial of a person by a jury and to a jury in the trial of a person in an Act include references to a trial by judge alone and a judge sitting without a jury.

Clause 6 inserts a new chapter 83 into the *Criminal Code* which contains transitional provisions for the amendments in relation the judge alone trials. Proposed section 720 provides that the provisions in relation to judge alone trials in Chapter 62, chapter division 9A apply in relation to a trial begun after commencement of the amendments irrespective of whether the offence was committed before or after commencement.

Part 3 Amendment of The Jury Act 1995

Clause 7 provides that part 3 amends the *Jury Act 1995*.

Clause 8 replaces section 59 of the *Jury Act 1995* which requires unanimous verdicts in all criminal trials.

The proposed new section 59 provides that unanimous verdicts will be required in criminal trials on indictment for murder, an offence against section 54A(1) of the Criminal Code and an offence against a law of the Commonwealth. Majority verdicts will however be available for alternative verdicts in relation to these offences, except for Commonwealth offences. Unanimous verdicts will also be required for criminal trials for any offence where the jury consists of only 10 jurors (whether or not the jury consisted of more than this number at any point).

Proposed section 59A will allow majority verdicts in trials for other offences. This section provides that if, after the prescribed period, the judge is satisfied that the jury is unlikely to reach a unanimous verdict after further deliberation, the judge may ask the jury to reach a majority verdict. If a majority verdict can be reached it is deemed to be the jury's verdict.

A ***majority verdict*** is defined to mean:

(a) a verdict on which at least 11 jurors agree if the jury consists of 12 jurors; or

(b) a verdict of at least 10 jurors if the jury consists of 11 jurors.

The ***prescribed period*** means:

(a) a period of at least 8 hours after the jury retired to consider its verdict (excluding those period when the jury is not deliberating such as, for example, meal breaks); and

(b) any further period the judge considers reasonable having regard to the complexity of the trial.

Clause 9 inserts a transitional provision for the amendments in relation to majority verdicts. This section provides that section 59 as in force immediately before commencement of the amendments will continue to apply to a trial that has begun but not yet been completed. The amendment to section 59 and the new section 59A will apply to a criminal trial starting on or after commencement irrespective of whether the offence was committed before or after commencement.

Part 4 Amendment of The Crime and Misconduct Act 2001

Clause 10 provides that Part 4 amends the *Crime and Misconduct Act 2001.*

Clause 11 provides that a person who is a witness at a Crime and Misconduct Commission misconduct investigation hearing is not entitled to remain silent or to refuse to answer a question on a ground of self incrimination privilege or the ground of confidentiality. The person is entitled to refuse to answer a question of the ground of legal professional privilege, public interest immunity or parliamentary privilege.

Clause 12 provides that, from the commencement of section 192, a witness at a commission hearing was not entitled to refuse to answer a question on the ground of the self incrimination privilege or the ground of confidentiality.