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REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO JUDGE-ALONE TRIALS UNDER SECTION 132 OF THE CRIMINAL PROCEDURE ACT 1986

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At Sydney on Wednesday 11 August 2010

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The Committee met at 9.30 a.m.

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PRESENT

The Hon. C. M. Robertson (Chair)

The Hon. J. G. Ajaka
The Hon. D. J. Clarke
The Hon. G. J. Donnelly
The Hon. L.J. Voltz
Ms S. P. Hale

CHAIR: Welcome to the first public hearing of the Standing Committee on Law and Justice's inquiry into judge-alone trials under section 132 of the Criminal Procedure Act 1986. The inquiry was established to consider if the Criminal Procedure Act 1986 should be amended to allow either party in criminal proceedings to apply to the court for trial by judge alone without a requirement that the prosecutor consents to the application. The inquiry's terms of reference outline the proposed model that is under consideration. Today's public hearing is the first of three that the Committee will hold this week to examine the issues surrounding the proposed model. Our first witness today is from the Department of Justice and Attorney General. We will also be hearing from the Director of Public Prosecutions and the New South Wales Public Defender, as well as a number of additional witnesses from the legal sector and the wider community.

Before we commence I will make some comments about procedural matters. I will not read the broadcasting guidelines in toto. A copy of the guidelines is available at the table. In reporting the proceedings of this Committee the media must take responsibility for what they publish or what interpretation is placed on anything that is said before the Committee. Witnesses, members and their staff are advised that any messages should be delivered through the Committee clerks. I also advise that the standing orders of the Legislative Council and any documents presented to the Committee that have not yet been tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by any member of such committee or by any other person. Committee hearings are not intended to provide a forum for people to make adverse reflections about others.

The protection afforded to Committee witnesses under parliamentary privilege should not be abused during these hearings. I therefore request that witnesses avoid the mention of other individuals unless it is absolutely essential to address the terms of reference. I ask everyone to turn off their mobile phones for the duration of the hearing, including mobile phones on silent, as they interfere with Hansard's recording of the proceedings. I welcome our first witness, Ms Penny Musgrave, from the Department of Justice and Attorney General.

PENELOPE MARY MUSGRAVE, Director, Criminal Law Division, Department of Justice and Attorney General, affirmed and examined:

CHAIR: If you should consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. If you do take any questions on notice the Committee would appreciate it if the response to those questions could be forwarded to the Committee secretariat within 21 days of the date on which the questions are forwarded to you. Would you like to start by making a brief opening statement?

Ms MUSGRAVE: No.

CHAIR: Can you outline the key changes that would result from introduction of the proposed model?

Ms MUSGRAVE: Yes, I can. At present under section 132 only an accused person can elect to have a judge-alone trial but only with the consent of the prosecution. Under the proposed model either party may elect, so either the accused or the prosecution, and in the case of an agreement the matter would proceed to a judge-alone trial. In the case of a disagreement where the accused has elected, the court then makes a determination whether or not it would be in the interests of justice for the trial to proceed in front of a judge alone. If the prosecution elects and the accused does not consent, then the matter must proceed before a jury, unless it is a case where there is a risk of jury tampering. That is essentially the shift in the model.

CHAIR: So there is a hoop, with the accused person there has to be an agreement; with the prosecution there does not have to be agreement?

Ms MUSGRAVE: No. If the prosecution elects, the accused must agree to it, so in fact if anything there is a hoop for the prosecution as opposed to the accused, but if there is a disagreement the court is the deciding body.

CHAIR: As it is now?

Ms MUSGRAVE: No.

CHAIR: As it is proposed?

Ms MUSGRAVE: As it is proposed in the model, that is correct.

CHAIR: As it is now?

Ms MUSGRAVE: As it is now the prosecution has the power of veto on the accused's election, so it would not be in front of the court. That determination is made before it reaches that stage.

CHAIR: It is made between the two?

Ms MUSGRAVE: Yes.

CHAIR: Since the introduction of the judge alone provision in 1989, how many judge-alone trials have been requested each year, how many judge-alone trials have been held each year since 1989 and how many jury trials have been held each year?

Ms MUSGRAVE: I am unable to give the Committee any details on the number of requests because, consistent with the answer to the last question, those requests go from the accused to the DPP. The DPP then makes a determination under its prosecution guidelines. The Director of Public Prosecutions might be able to give you information on that. As to the number of judge-alone trials and jury trials since 1989, what I do have is details from the Bureau of Crime Statistics and Research on trials from 1993 through to 2007. I have a breakdown by year, the number of judge-alone trials and the percentage that represents of all trials in that year and I can provide that to the Committee in written form rather than read that out to you now. But it might assist if I just give you some figures that reflect that period 1993 to 2007.

Over that period judge-alone trials represented 5.1 per cent of the total number of trials; that is 640 out of a total of 12,474 over that total period. The percentage of judge-alone trials each year varied from a low in 1997 of 1.74 per cent through to 7.88 per cent in 2007 but there does not appear to be any clear overall trend; it is up and down. There was a slightly higher percentage of judge-alone trials in the Sydney west courts and regional courts but it was not pronounced. Judge-alone trials made up 4.3 per cent of trials in Sydney, 5.5 per cent in Sydney west and 5.6 per cent in other courts.

The Hon. DAVID CLARKE: What reasons would there be for the prosecution not to agree to an accused having a judge-alone trial?

Ms MUSGRAVE: There was a written guideline that was annexed to Mr Cowdery's submission. I think it is guideline 24. I have a copy here.

The Hon. DAVID CLARKE: Would you like to comment on that?

Ms MUSGRAVE: No, I do not want to comment on that, except to say that there are submissions that go to those issues and the Chief Judge, Justice Blanch, has already put in a submission which shows the earlier guideline that was put in force when the provisions were first put in and there is now guideline 24. This whole discussion is about a balance in terms of the right to a trial by jury, the application of community standards and various other things. Part of this review is all about how best to reflect those standards, whether it should be with the prosecution or whether it should be with the court.

The Hon. DAVID CLARKE: If there were a higher percentage of cases proceeding before a judge alone—I think you said the average was about 5 per cent or thereabouts?

Ms MUSGRAVE: That is right.

The Hon. DAVID CLARKE: Although there may only be a low percentage of accused who are seeking to have judge-alone trials, if that were the case, justice would certainly be coming more quickly, would it not?

Ms MUSGRAVE: If judge-alone trials were more available?

The Hon. DAVID CLARKE: If they were more widely available, yes?

Ms MUSGRAVE: One of the later questions is about the efficiencies that can come out of judge-alone trials and whether that would in fact speed up the process. It is one of the issues that the Law Reform Commission looked at back in 1986. There are two chapters in that report that actually discuss the issue of judge-alone trials and one of the points they looked at is whether it would make the trial process more efficient and if the trial process is more efficient, it should mean that you will reach your trial more quickly. I am not aware that there has ever been any empirical study quantifying the savings of judge-alone trials but clearly there are steps in the trial process that would be collapsed and reduced if a judge is sitting alone and is not with a jury.

The Hon. DAVID CLARKE: It would stand to reason that one would assume there would be savings though?

Ms MUSGRAVE: I think we can go to distinct steps in the trial process that would be reduced; if you do not have to give complicated directions to a jury that would evaporate. A judge is required to take into account those directions but he does not have to sit there and explain it. You do not have to empanel the jury; you do not have to give them directions every afternoon at the end of the proceedings.

The Hon. DAVID CLARKE: You do not have to pay a jury?

Ms MUSGRAVE: That is true. You also do not have to have days off when one juror is sick, which is what happens at the moment. A trial can be adjourned for two or three days because one juror is not well, so there are a number of instances. Currently on a voir dire you take evidence in front of the judge. If that evidence was admissible, you then repeat that process in front of the jury.

The Hon. JOHN AJAKA: Would there be less risk of retrial as well if a jury—and I use that terrible word—was suddenly contaminated and the judge was forced to discharge a jury halfway or three-quarters of the way through a trial and you then have to start again. That is fairly major?

Ms MUSGRAVE: Yes, it would reduce the risk of retrials based on the discharge of a jury. A lot of work has been done in that respect and everyone is trying very hard to reduce the risk of discharge in other ways but if you do not have a jury it stands to reason that there is a saving.

The Hon. DAVID CLARKE: Correct me if I am wrong but did I understand from what you said earlier that your department does not have any figures on how many occasions an accused has sought to have a judge-alone trial?

Ms MUSGRAVE: That is right because those requests are dealt with by the DPP. They go to the DPP. The DPP consents or does not consent and then the courts advise that it will proceed by way of judge alone, so all the department receives is the notification that there is an agreement that it proceed by way of judge alone.

The Hon. JOHN AJAKA: Can I summarise it in this way: The current situation now in reality would require both the defendant and the DPP to consent to a judge-alone trial, end of story?

Ms MUSGRAVE: Essentially, yes.

The Hon. JOHN AJAKA: With the few exceptions?

Ms MUSGRAVE: Yes.

The Hon. JOHN AJAKA: The new model basically removes the Director of Public Prosecution's veto, in reality, because you still cannot ever force a defendant to a judge-alone trial?

Ms MUSGRAVE: That is correct.

The Hon. JOHN AJAKA: You would still always need the consent of the defendant either in the current model or in the proposed new model?

Ms MUSGRAVE: The only time you could have a judge-alone trial in the absence of the accused's consent is the risk of jury tampering.

The Hon. JOHN AJAKA: Leaving aside for now the jury tampering, which is a whole area in itself, we have had situations where a defendant has wanted a judge-alone trial, has agreed to a judge-alone trial and for some reason under the current Director of Public Prosecution's guidelines he has said no. I know you cannot answer that and we will have to ask the Director of Public Prosecutions what the percentage of that is. If there have been only one or two situations of that over the years, in reality, we are not going to have much difference between the current system and the new model, but if we discover there are 20 per cent to 30 per cent of trials where that occurs, that is clearly something we have to look at. What I wanted to understand from a layman's point of view is that to me it is extraordinary that we would have a situation where, in effect, a judge would agree to it because the defendant has applied for it, where the defendant's counsel has requested it, all of those safeguards and it occurs prior to anyone knowing the identity of a judge—which would have to be fundamental so there is no judge shopping—that the Director of Public Prosecutions could still find a reason to refuse it. From your department's personal view do you see a reason other than the current Director of Public Prosecution's guidelines as to why a defendant should be refused?

Ms MUSGRAVE: I have to say, I have not gone through the exercise of comparing the guidelines to what the court would be looking at in the interests of justice, but if I can say this. Currently, the director is making a determination based on that guideline and I am confident the director does make the determination based on the guideline, but there is no legislative control over that guideline and if that determination is made by the court in accordance with the test set out in the provisions—

The Hon. JOHN AJAKA: In the new model?

Ms MUSGRAVE: In the new model—you will have consistent and transparent decision making on that right.

The Hon. JOHN AJAKA: The reality is that the guidelines change with Directors of Public Prosecution?

Ms MUSGRAVE: I think that is clear from the submissions.

The Hon. JOHN AJAKA: If you look at the chief judge's guidelines, according to him they worked well while he was Director of Public Prosecutions. Of course, the new director comes along and says, "I want to change the guidelines," and there is nothing to stop the next director from changing the guidelines again. So, there really is no need for legislative change if we want to keep some form of consistency.

Ms MUSGRAVE: A determination by the court would provide that consistency and transparency.

The Hon. GREG DONNELLY: Can you shed any light about these types of judge-alone trials in other common-law jurisdictions overseas analogous to what we have in Australia?

Ms MUSGRAVE: I cannot give you an exhaustive analysis of the models overseas. There are judge alone provisions in other common-law jurisdictions and I know there have been studies of the way in which judges make determinations when sitting as a judge alone as opposed to a judge with a jury. For example, there is a Melbourne examination of courts in Florida, from memory, as opposed to courts in South Australia. I do not have available any details about the model applied because we have looked very closely at South Australia, the Australian Capital Territory, Western Australia and Queensland because we had a wealth of comparative material here.

The Hon. GREG DONNELLY: So there are no overseas jurisdictions that you would suggest we look at if we are going to consider this whole matter in detail?

Ms MUSGRAVE: No. We would have brought those to your attention. But if there is anything you feel you would be assisted by, we would be more than happy to pull up those details or contact our people overseas to get that information.

The Hon. GREG DONNELLY: Is there any particular reflection you would like to make about any or all of the other Australian jurisdictions that provide for judge-alone trials that you think are worthy for us to have a good look at?

Ms MUSGRAVE: I think the Committee has most of the details in the submissions that have been supplied. Essentially, if I can summarise it, they do fall into two distinct categories. You have the provisions in South Australia on the one hand and in Western Australia and Queensland on the other. The model we have proposed is more closely aligned to the Western Australia and Queensland models. Those details have been set out in the submission put to you.

The Hon. GREG DONNELLY: Do you think that the Western Australia and Queensland provisions are working reasonably effectively?

Ms MUSGRAVE: I note the Committee has the benefit of submissions from both those jurisdictions, and our understanding is they are working quite well. We initiated inquiries with the departments in those jurisdictions but I note that the Western Australian submission came from the Attorney General there. We have not had any feedback from the departments but we can pass that on once it is received. But at the moment we understand they are working quite well.

CHAIR: Do you know if the introduction of the changes has increased the number of judge-alone trials in those jurisdictions?

Ms MUSGRAVE: I do not have the statistics. I could make that inquiry for you. I will just see if we have anything available. I do not have details for you but we can make some inquiries and see if there has been any increase as a result of the changes in those jurisdictions.

The Hon. GREG DONNELLY: I will just go to what is our question on notice No. 10. The proposed model states that an application for a judge-alone trial must be made in less than 28 days before the commencement of the trial except by leave of the court. Several jurisdictions have raised the issue of judge shopping in relation to this aspect of the model. Are you in a position to respond to that?

Ms MUSGRAVE: I can. Twenty-eight days was selected after some consideration and in part to try to address those concerns about judge shopping and whether or not the identity of the judge was known. One of the considerations was to ensure there was sufficient time to make preparation for a judge-alone trial and avoid the need to summons a jury. If the application is made on the day, the jury has been summonsed and there are no efficiencies built in there, but that is not the prime driver. In a typical case in the metropolitan region, making an application 28 days out from the trial date would mean that the identity of the judge would not be known unless the matter has been case managed. In regional areas it is likely that the identity of the judge will be known because it is a circuit and that circuit will have been fixed. So, selecting the 28 days is a balance and it may not in all cases avoid the identity of the judge being known but it is difficult in regional courts to address that concern.

The Hon. GREG DONNELLY: Can you just describe what this issue of judge shopping is and the implications of that?

Ms MUSGRAVE: It is a phrase that is used very loosely in this context. It is probably not the most appropriate phrase to use. You are not judge shopping, you are forum shopping in some way or process shopping. An accused may feel that they are prepared for their matter to be dealt with by that judge alone but in some instances knowing that they have that judge, they would prefer the decision to be made by a jury. It is not judge shopping in the traditional sense but I know the phrase is used throughout the submissions and the past work.

CHAIR: So, in the country you are contradicting the judge shopping phrase because you are saying you are going to cop this judge or cop this jury?

Ms MUSGRAVE: That is right. You know which judge you have and you are going to be stuck with that judge but you would prefer to have the jury to make the decision as opposed to the judge.

The Hon. JOHN AJAKA: Is the new model not based upon the decision being made as to judge alone or judge with jury weeks before the proposed trial, and you are not going to get the judge who will make that decision? So, if a decision is made for judge alone the accused has no idea who the judge will be?

Ms MUSGRAVE: In most cases that would be correct but in some regional courts you might have circuit sittings or you might have a judge sitting in Wollongong permanently or sitting up in Newcastle

permanently. It is almost as though there are three tiers. You have a metropolitan region, where it rotates all the time; you have the outer metropolitan, where you might have a fixed judge; and then you have the broader regional areas where you have circuit court sittings. It is difficult to find a model that fits all and you do not want to prejudice those regional areas by saying, "You cannot have a judge-alone trial because you will never be able to make an application when the identity of the judge is not known."

The Hon. LYNDA VOLTZ: You may be able to answer a question in relation to Queensland. My understanding is that under its current legislation a judge-alone trial can only be ordered if the defence agrees to it, is that correct?

Ms MUSGRAVE: I have a copy of the Queensland legislation here.

The Hon. LYNDA VOLTZ: Can I just read a bit from what the Queensland Law Society said. It said:

> Either party may apply for a judge-alone trial.
>
> The Society supports this proposal, the current position in Queensland, which we consider appropriate, that either party can apply for a judge-alone trial, but such a trial can only be ordered with the consent of the defence.

That would imply that the prosecution does not need to?

Ms MUSGRAVE: Which would be similar to the model that has been put forward here, that is, an inalienable right for an accused to have a trial by jury. So in the absence of consent from the accused it is not appropriate to have a judge-alone trial, unless there is a jury tampering consideration.

The Hon. LYNDA VOLTZ: Some of the figures you quoted about judge-alone trials in New South Wales are around the 670 mark. According to their information, in the two years since the provisions have been in operation in Queensland there have only been a couple of judge-alone trials conducted.

Ms MUSGRAVE: The figure I gave you was for 1993 through to 2007, so that is a 14-year period, and I have not done the comparison with Queensland. I am happy to have a conversation with Queensland and explore it.

The Hon. LYNDA VOLTZ: So you do not really have a view as to why the figures are so low in that jurisdiction?

Ms MUSGRAVE: No, I do not. In South Australia I think there is clearly a reason why they have quite low numbers, because it affects appeal rights by the prosecution if you go to a jury trial. So I think there is a clearly definable difference in their legislation that affects their numbers. With respect to Queensland I am afraid I cannot put my finger on the difference.

The Hon. LYNDA VOLTZ: With regard to applications being made later than 28 days before the trial, that obviously has to do with judge shopping and a whole range of things, but also media coverage of cases. Some cases attract a large amount of publicity that other cases do not and it is a bit hit and miss. Are there any provisions within the Act that will allow a judge to determine a judge-alone trial based on the media coverage?

Ms MUSGRAVE: In the model that has been proposed we would not have a restrictive list of considerations. It would be a broad interest of justice test. I would anticipate that pre-trial publicity would be one of the factors the court would take into account, because back in 1986, when it was first looked at by the Law Reform Commission, pre-trial publicity was one of the two main drivers behind the recommendation.

The Hon. LYNDA VOLTZ: But would the 28-day provision allow a judge the flexibility in that case?

Ms MUSGRAVE: I think in most cases it is likely it would, because a great amount of pre-trial publicity is when the offence is committed. Twenty-eight days out from a trial, you are really in a position of assessing the impact of that earlier publicity on the trial and its commencement date. In that four-week lead-up it is not the volume of material that is out there in the community.

Ms SYLVIA HALE: Just on that point, if I may interrupt—one option would be for the trial to be held elsewhere rather than in the vicinity of where the crime is committed, where there is maximum publicity.

The Hon. LYNDA VOLTZ: Which always helps when you have national press.

Ms MUSGRAVE: That is something that was considered by the Law Reform Commission. It is true: the traditional response to pre-trial publicity is a change of venue, or directions to the jury, such as, "Put out of your mind anything you may have read about this case. Don't look at the newspapers when you go home in the evening." One of the things that the Law Reform Commission did not really look at—because back in 1986 it was not an issue—is the impact of technology. It is difficult now with the Internet dealing with pre-trial publicity because it crosses borders, because it is on your computer at work, and because it is very difficult to avoid. As time goes on, the change of venue option will become more and more limited because the information is too easily available.

The Hon. LYNDA VOLTZ: I am sorry; I have now lost my train of thought on the question I was going to ask. It will come to me.

CHAIR: We can come back to you.

Ms SYLVIA HALE: I believe that in some jurisdictions, rather than a 28-day period, there is a 14-day period. If that period in which to make the election were reduced to 14 days, would that present insurmountable administrative difficulties?

Ms MUSGRAVE: I am not aware of what date the jury summonses go out, but as I said, that is only one aspect of the time period. It would be advantageous to have a time period that avoided that happening and avoided inconvenience to members of the community who get the notice and have to make arrangements, but the 28 days was really selected to try to maximise the number of cases where the judge would not be known. It would simply be a matter of looking at the court requirements and the court listing arrangements when summonses go out and trying to pick a date that maximised the ability of the parties and the court to make preparations and reducing the chance of the judge being known.

The Hon. DAVID CLARKE: The change in the period from 28 to 14 days would have an impact in regional areas, would it not?

Ms MUSGRAVE: I suspect it would. I hesitate to give a firm answer because it is very much down to court processes. I am fairly confident that circuits are set prior to that time. I am fairly certain it is. I can confirm that.

The Hon. DAVID CLARKE: Thank you.

Ms SYLVIA HALE: One of the proposals in response to question 8 (d) in the submission from the New South Wales Public Defender's Office suggests that it would be appropriate to amend the proposed jury trial to continue as a trial by judge alone without the accused's consent, when the jury is to be discharged because of jury tampering. Would you think that would be an efficacious move?

Ms MUSGRAVE: The Senior Public Defender does note that that is something that happens in the United Kingdom. I am actually not sure if he is advocating that as a model. It is something that we would have to explore in more detail. In the time available, we have not been able to pull down the United Kingdom guidelines to which he refers. I think it raises a number of issues that do not really go to the heart of the issues that we are trying to address here. Some of the things we would be looking at is just how the judge changes his role part of the way through the trial. If the Committee, having heard from the Senior Public Defender, thought that was an option worth considering, it would of course be considered, but I cannot comment on it now.

Ms SYLVIA HALE: How would the judge's role change from when you have a jury trial to a judge-alone trial? What is the substantial difference?

Ms MUSGRAVE: Instead of giving directions as to law, the judge would become the finder of fact in the trial, and would stand in the shoes of the jury.

Ms SYLVIA HALE: So you would think his whole approach to the trial would be substantially different as to the issues that he focused upon?

Ms MUSGRAVE: I am simply flagging it as an issue that we would consider, if we were ever asked to look at that proposal. I am not sure what my view would be, having looked at it.

Ms SYLVIA HALE: I think it is Peter Breen's submission that expresses great difficulties with the judge being the determiner of the facts.

Ms MUSGRAVE: Yes. Mr Breen's submission is really going to the question of whether or not you should have judge-alone trials as opposed to what the question is here, which is what processes should be in place to ensure that there is a fair and appropriate method for applying for a judge-alone trial. His concern really goes to that fundamental question whether you should have a right to it at all.

Ms SYLVIA HALE: Returning to the issue of judge or forum shopping, I am here possibly playing the devil's advocate role. Given that an accused is entitled to be considered innocent until proved guilty, he is confronting the whole weight of the legal system and is supported merely by the legal team that he must hire or is otherwise supplied with by Legal Aid. Is it really inappropriate for an accused person to try to find a judge who may be more sympathetic to the issues that are before him, given the balance of power between the prosecution and the defence?

Ms MUSGRAVE: I am not sure I entirely follow the question.

Ms SYLVIA HALE: It seems to be just an automatic assumption that it is wrong to judge shop, as it were. My question is: Is that inherently wrong?

CHAIR: I think Ms Hale is asking for a values statement.

Ms MUSGRAVE: I think so.

The Hon. GREG DONNELLY: It is a matter of policy.

Ms MUSGRAVE: Yes, it is a matter of policy.

Ms SYLVIA HALE: It may well be. The underlying assumption in a lot of submissions is that this is inherently evil and wrong, and we must guard against it.

Ms MUSGRAVE: If I may, I will answer it this way: Judge shopping or forum shopping was a concern raised in the submissions, so there is a need to address that—to consider that concern and address that concern. It seemed to be something for which it was appropriate to put processes in place to minimise that, and that is reflected in what has been put forward.

The Hon. DAVID CLARKE: Ms Hale's question is: What is the problem with forum shopping? Why should not an accused be entitled to do that?

CHAIR: Or a prosecutor.

Ms MUSGRAVE: It is a fairly value-laden question, but looking at it from the other way, it is important that everyone has equal access to justice and that it be seen as fair and consistent, and that you really do get the trial by the person that you have been allocated to. True, if an accused is given that right, why not the prosecution and everybody else? It is a bit of a Pandora's box.

The Hon. DAVID CLARKE: I guess a response to that might be that it would allow some accused to manipulate the system and there would be circumstances that would arise that would allow an accused to manipulate, whereas other accused would not have the same opportunity.

Ms MUSGRAVE: Also there would be concern about public confidence in verdicts, if that was the case. It really means that you have a highly individualised approach to justice and a great weight of responsibility on individual decision makers, if they suddenly become an individual personality as opposed to a judge of a jurisdiction.

The Hon. JOHN AJAKA: I grew up as a lawyer, as they say. We were taught that all judges are equal and that it is imperative that there be uniformity with the judges. From my perspective, that is one of the

ultimate goals and responsibilities of a government—the Attorney General and the Chief Judge, et cetera—to ensure that all judges are the same. One of my concerns with this is that by saying that an accused can go shopping for a better judge, it is almost an admission of the part of the government and an admission on the part of the Director of Public Prosecutions that we have a fundamental flaw in our system when in fact all judges should be equal. My question to you, which also will be directed to the Director of Public Prosecutions, is this: Should the onus not be more on ensuring that there is uniformity in our judges' approaches to matters so that this is no longer a problem, rather than denying a defendant the right to be tried in the most appropriate manner, if he consents to it?

Ms MUSGRAVE: Perhaps, putting in a different way, it is simply a matter of addressing perception. If there is a concern in the community that an accused might be judge shopping, you address that concern. But I do not think that takes the emphasis off the responsibility of the judiciary and government to ensure that there is consistency and uniformity in decision making. Those words came up earlier when I talking about the prosecution's right of veto and putting that decision in the hands of the court because they would be giving some consistency and transparency. One of the things that flows from judge-alone trials is that decisions are made and recorded, which of course is something that does not happen with the jury.

The Hon. JOHN AJAKA: That is where my concern is. My concern is that, by having one of our most senior officers, the Director of Public Prosecutions, saying, "I don't want to agree to this. I don't want to lose my right of veto because there is a possibility of Judge shopping", that is an admission that our system is flawed and that our judges are not uniform, which increases that public perception, as you said, as opposed to a former Director of Public Prosecutions, who is now the Chief Judge of the District Court, saying, "Look, I didn't have a problem with it proceeding. I gave my guidelines. I wasn't vetoing it the way the current system is." It concerns me that in effect we are admitting or are being perceived to admit that our judges' system is flawed because they are not uniform whereas, by giving the judges the discretion and leaving it in the hands of the trial judge, we are in fact saying, "We trust you. We trust that you will make the right decision."

CHAIR: About whether you have a jury or not?

The Hon. JOHN AJAKA: About whether or not to have a jury. That is basically what the new model is proposing. Am I wrong in thinking that?

Ms MUSGRAVE: It is probably not a question I can answer, but I think I did previously answer it when I said that you do have that consistency and transparency in the determination, if it is in the hands of the court.

Ms SYLVIA HALE: It is clear that when judges hand down sentences there often can be a wide variation in their sentences for similar offences and that in fact this is counteracted by the introduction of sentencing guidelines. Indeed, there is also the possibility of appealing against a sentence because it is unreasonable, or whatever. That clearly indicates to me that among the judiciary they are not all the same and that their perceptions of dishonesty, et cetera, are widely varied. When you have a judge-alone trial, you probably will have a judiciary that is subject to the same biases, prejudices or preconceptions as to outcomes. That strikes me as one of the difficulties of a judge-alone trial. I suppose the antidote to that would be that the judge will be required to give reasons and that therefore many of those reasons may be subject to appeal.

Ms MUSGRAVE: If I can, I will answer it this way: There has been work done on judges' decision making, as I said, as a judge alone as opposed to the decision making of a jury. But, as I have previously said, this really is not an inquiry into whether or not there should be judge-alone trials. That provision is already in the Act and the Law Reform Commission made that recommendation, which was adopted by government. The suggestion is not that judge-alone trials should not be an option; it is simply the best way of making it available in the appropriate circumstances.

Ms SYLVIA HALE: Even though this is an inquiry into that, it is the fundamental issue upon which a lot of attitudes to judge-alone trials will be based. If you have a fundamental conception that jury trials are an indispensable aspect of the legal system, the rest of it becomes just an application to particular circumstances. The fundamental issue is the one as to whether in fact it is an appropriate form of justice. My apologies: that is probably an observation rather than a question.

The Hon. LYNDA VOLTZ: I was wondering whether there was an answer.

CHAIR: No, Ms Sylvia Hale answered it herself.

Ms SYLVIA HALE: I think the Public Defenders Office suggests that in terms of jury tampering we insert the word "identifiable" rather than "perceived".

Ms MUSGRAVE: Yes.

Ms SYLVIA HALE: Are you happy with that?

Ms MUSGRAVE: I cannot see an issue with that. There will be very few cases when that is truly an issue. There are a lot of processes in place already to deal with jury tampering and this is really the safety net, so I would see no significant problem with having the words "identifiable", "real" or "substantial" placed there.

Ms SYLVIA HALE: Similarly in the question of the interests of justice it says, "When considering the interests of justice a court may refuse to make an order where the trial will involve a factual issue that requires the application of objective community standards such as "reasonableness, negligence, indecency, obscenity or dangerousness". There has also been the suggestion that we add the word "dishonesty". Do you have problems with that?

Ms MUSGRAVE: I think the point to make here is that it would be a broad interests-of-justice test. They would simply be examples. Any legislation would not set out an exhaustive list; it would be an inclusive list. I hesitate to say it is more of a drafting issue but it almost becomes a drafting issue as to how best to convey that concept of objective community standard.

CHAIR: It may get changed as cases come through.

Ms MUSGRAVE: True. Currently we have an objective test of dishonesty.

The Hon. LYNDA VOLTZ: When you spoke about the DPP being the person who decides, and that right being taken away so that now the judge will decide consistency in terms of how you define the test of each case, judges obviously make rulings that are not always consistent. Is there a mechanism to appeal against any of these?

Ms MUSGRAVE: This was raised in the submission and I have to confess we have not looked closely at that. The question would be whether it is appellable under the existing provisions, and it may be. I would have to confirm to the Committee what the status of it would be. Existing provision where interlocutory decisions of judges are appellable is simply a technical matter of whether it falls within that category or whether it would have to be a specific inclusion.

The Hon. LYNDA VOLTZ: Will you take that question on notice?

Ms MUSGRAVE: Yes.

The Hon. JOHN AJAKA: Leaving aside the existing system, under the proposed new model is it intended, or is it something that we as a Committee need to look at, that an appeal process should be permitted if the judge makes a decision using his or her discretion that it will be a judge-alone trial or it will not be a judge-alone trial, and suddenly the DPP has a right to appeal it on the basis the judge made a mistake, or the defendant has a right to appeal on the basis the judge made a mistake. Are we looking at allowing appeals or will simply the judge's decision be final with no right of appeal? That would need to be contemplated in any legislation surely.

Ms MUSGRAVE: I will take that question on notice and respond because it is a question that has to be addressed. Often in the course of a trial there is a real concern about rulings being appellable because you have the jury waiting and you do not have that concern if the application is being made 28 days outside the trial date.

The Hon. JOHN AJAKA: As a lawyer I can anticipate that if I wanted to drag a matter on and on, in the hope that witnesses will suddenly not be available, or for other reasons that will work in my favour, I would ask for a judge-alone trial. If it were refused, and I knew it would be refused, I would then lodge an appeal and a further appeal and then two or three years later I am back to where I started.

Ms MUSGRAVE: Yes, having said that though the speed with which the Court of Criminal Appeal deals with interlocutory appeals has—I do not know the figures—mechanisms in place to deal with them very quickly, which have been built up because of that need to avoid jury discharge. There will inevitably be, if you put in an appeal right, a rash of appeals and determination by a higher authority as to whether it was appropriate. But that does give you guidance on how you should be making a decision. It is a bit like the appeals about Commonwealth trials. There was that rash of High Court decisions, determinations made and there is nothing since.

The Hon. JOHN AJAKA: The other side of the coin is that if a defendant who sought a judge-alone trial under the new model was successful and then the DPP appealed which involved more costs, time and stress for a defendant that would concern me too.

Ms MUSGRAVE: I hesitate because I will take this on notice and put something in writing. We can speculate for some time.

The Hon. JOHN AJAKA: That is something we need to look at.

Ms MUSGRAVE: I think time would be a factor as well because it would feed into that perception about judge shopping because if you had a 28-day appeal period then you would know who your trial judge was. So there are a number of considerations there.

Ms SYLVIA HALE: I am not sure whether this matter has been covered but when it is left to the court to determine whether a trial will be by jury or a judge alone, will the judge who makes that decision be the judge who automatically subsequently hears the case, or it will be a different member of the judiciary?

Ms MUSGRAVE: There would not be a fixed rule because of the difficulty with regional listings. In the city it would be unlikely. In country sittings or the wider metropolitan area it may be the same judge.

Ms SYLVIA HALE: In the interests of consistency would it be better for there to be one or two members of the judiciary whose responsibility is to adjudicate in those cases on the grounds that they are in a position to better weigh up the pros and cons of the argument in light of previous decisions?

Ms MUSGRAVE: There are probably two considerations. One is entirely a practical one with listings. It is very difficult to get matters in front of a handful of judges who may be sitting in Sydney and with the regional applications it would be very difficult to get them in front of that person. The other thing is if the judge is applying an interests of justice test, part of which is objective community standards, I think there is some merit in having all members of the judiciary contributing to that decision.

The Hon. DAVID CLARKE: Apart from the 28-day cut-off period for a defendant to make an application are there any further measures that should be taken to reduce the risk of forum shopping?

Ms MUSGRAVE: None proposed at the moment.

The Hon. DAVID CLARKE: None that you can think of?

Ms MUSGRAVE: No, the 28 days was after some deliberation.

The Hon. DAVID CLARKE: When we talk about the option given to a defendant to choose to have a judge-alone trial, the fact is it is not really a full option but is really subject to a veto by the prosecution?

Ms MUSGRAVE: At the moment it is.

The Hon. DAVID CLARKE: It is really only a partial option, is it not? The defendant has always got that guillotine hanging over him or her, as it were?

Ms MUSGRAVE: Currently that is the situation. They are making an application to the DPP.

CHAIR: Would you send to the Committee the information that is being utilised on the current communication on sentencing—the Attorney and members are working in the public about sentencing guidelines.

Ms MUSGRAVE: The sentencing forums?

CHAIR: Yes the information that is provided at the sentencing forums.

Ms MUSGRAVE: The Sentencing Council with the Attorney General are doing a series of sentencing forums very much of a question and answer format.

CHAIR: That is right but they are providing documents about the process for sentencing for the community which would be very helpful to us.

Ms MUSGRAVE: There is a sentencing package on the department's website. I will make that inquiry and I can provide that.

CHAIR: That will be useful for the Committee to have. In relation to the submission from the Director of Public Prosecutions suggesting prosecutors are better equipped than the judiciary to determine if a judge-alone trial is a suitable option, your submission says there is no reason to believe that. Will you provide a bit more detail on why you believe that to be the case?

Ms MUSGRAVE: In part it has been said in some of the answers to date but one thing I draw your attention to is that the judge will only be making a determination where there is a disagreement about whether this should proceed to trial by way of judge alone. Yes, the prosecution is often in a position of knowing more about the facts of a case before a trial commences. They do not necessarily know what the issues are from a defence perspective and the role of the decision maker in this process is actually to arbitrate between two competing positions. Part of that is an examination of the facts but essentially it is arbitrating between those two positions, and that is what a court does, that is the job of the court.

The Hon. JOHN AJAKA: It comes back to the fundamental proposition that the referee makes a decision. If the prosecution is one team and the defence is the other team why would you give the prosecution, one team, the right to make a decision and not the referee?

Ms MUSGRAVE: I do not in any way suggest that the director is inappropriately applying those guidelines and doing that very properly and I do not disagree with his statement that the prosecution would know the facts of the case better up until the commencement of the trial, but it is balancing two competing interests. It is an exercise in arbitration. It will involve a consideration of the facts but we have an adversarial system and both those sides can be put to the court.

CHAIR: One submission referred to the fact that the accused learned all of the facts of the prosecution case before the trial. I may have misunderstood when the disclosure amendments went through Parliament. Was that only to do with the accused information and not with prosecutor information?

Ms MUSGRAVE: The prosecution has a duty of disclosure to the accused, and has had for a long time under common law principles.

The Hon. JOHN AJAKA: I am aware that the prosecution must serve a brief of its entire evidence well and truly prior to the date even being set.

Ms MUSGRAVE: I did not note that line but the authorities currently dictate a very high level of disclosure. The onus is on the prosecution to prove the case. The amendments to the Criminal Procedure Act encourage early disclosure and enshrine a legislative scheme for disclosure in case managed matters.

CHAIR: The Director of Public Prosecutions suggested a District Court experience in the prosecution of Woon may have provided the impetus for the proposed changes to the judge-alone trial provisions. Will tell us about the Woon case and why it raised concerns over the existing judge alone provisions?

Ms MUSGRAVE: I am aware that the director has referred to the Woon case in his submission. I think he has gone into some detail about it and suggests that that is an inappropriate vehicle for reform. It is correct that the Chief Judge wrote to the Attorney after the Woon case. However, he was pointing not only to that but also to the experience in other jurisdictions. The concern he had about the prosecution right to veto which is

consistent with the submission that he put in to you so the department then undertook an analysis of the legislation in other States and undertook consultation with key stakeholders and came up with this model.

CHAIR: It was a trigger?

Ms MUSGRAVE: It was a trigger but I would also like to add that it has been simmering for some time. In 1986 in the Law Reform Commission report they not only looked at whether there should be judge-alone trials but made a clear and direct statement that the prosecution should not have a right of veto. So the process has been the subject of debate since that time. It is in chapter 10 of that report.

The Hon. JOHN AJAKA: I found an anomaly in the submission of the Director of Public Prosecutions in the last paragraph where he argues the case why he should be allowed to insist on a trial by judge alone and not allow the defendant to have a veto situation and yet at the same time he has taken the contrary view. Do you have any comment on that?

Ms MUSGRAVE: The only comment is consistent with the answers that the accused should have the right to a trial by jury, and the department considered that suggestion.

The Hon. JOHN AJAKA: But is it not the case that he should not be arguing one way when he is giving examples of the other?

Ms MUSGRAVE: I do not have a view on that.

CHAIR: I thank you very much for coming today. You have given us very, very useful information. We do have some questions on notice on which the secretariat will get back to you.

Ms MUSGRAVE: I have a note of those.

(Short adjournment)

NICHOLAS RICHARD COWDERY, Director of Public Prosecutions, Office of the Director of Public Prosecutions, affirmed and examined:

CHAIR: Thank you for coming to this first day's hearing of the Law and Justice Committee's inquiry into judge-alone trials under section 132 of the Criminal Procedure Act 1986. I will not read the formal processes because you have heard them before and because I have read them in full this morning. I welcome you to the hearing today. Could you identify your job title and employer, and if you are appearing in a representative capacity?

Mr COWDERY: I am Director of Public Prosecutions for New South Wales, employed by the Government of New South Wales, appearing on behalf of the Office of the Director of Public Prosecutions.

CHAIR: Do you have an opening statement?

Mr COWDERY: Not an opening statement; there is a written submission, as you know, which includes a copy of correspondence to the Attorney General, as I recall, and a subsequent letter. I rely on what is included in those submissions, and may I add four comments? One is that it appears to me from the terms of reference of the inquiry that jury trial is in fact the preferred default position for the criminal justice process, and I refer particularly to terms 5, 9 and to some extent 3 as well. The point we have made in our submission is that the Crown is the party to criminal proceedings which is in the position to safeguard the public interest in that respect.

The second comment is that we would suggest in term of reference 8 that the committee should have regard also to the issue of dishonesty as one of the issues that arise where community standards need to be applied. The reason for that is there is no definition of dishonesty. Courts are told that dishonesty is what is judged by the community to have been dishonest in the circumstances. So that is a quality or a concept that we would submit requires the input of the community as well.

The third point is that if interlocutory appeals were able to be brought from decisions made by a court exercising the interests of justice test then that could significantly delay and complicate the process of criminal trials. It has not been tested, of course, but it is quite likely that a decision whether or not to allow a trial without a jury is an interlocutory order under section 5F of the Criminal Appeal Act and interlocutory appeals of that kind could be expected if people had decisions that they were not happy with. So that would further delay and complicate the process.

The final comment is that it is reported to me anecdotally that in jurisdictions where the Crown has not been required to consent to trial by judge alone there has been a significant increase in the number of judge-alone trials and some instances of what is commonly, loosely and, I think, probably inaccurately, referred to as judge shopping do occur. Those are the four additional things that I would like to raise. Otherwise we rely on the submissions that have been made.

CHAIR: The appeals question came up earlier from the Hon. John Ajaka. Do you know if this has become a problem in Queensland and Western Australia where they have changed the Acts to what is proposed here?

Mr COWDERY: I do not have that information, I am sorry. I can inquire of my colleagues in those States but I do not presently have that information.

CHAIR: There is absolutely no way people can appeal the process if the prosecution objects?

Mr COWDERY: No.

CHAIR: There is no way there is an appeal process?

Mr COWDERY: That decision is not reviewable and in one of the decisions of the Supreme Court involving Ivan Milat, one of the M judgements, that was a point that was taken and Justice Dunford ruled that that decision was not reviewable by the Supreme Court.

CHAIR: Can you outline the factors that are considered by your office in evaluating applications for judge-alone trials at this time? Have you got these questions?

Mr COWDERY: Yes. I will just turn up the questions. That is question number one?

CHAIR: Yes. What are the main reasons for a request for a judge-alone trial being denied? What are the main reasons for a request for a judge-alone trial being granted? Are there any particular types of offences that are more likely to result in an application for a judge-alone trial being granted or even being requested?

Mr COWDERY: The factors that we take into account are set out in prosecution guideline 24, which I sent in with the correspondence. The main reasons for a request being denied are set out in that guideline, but, in summary, they are situations where issues raising community values need to be adjudicated; for example, reasonableness, provocation, dishonesty, indecency, substantial impairment under section 23A of the Crimes Act, cases that are wholly circumstantial or in which there are substantial issues of credit. Those are matters that guideline 24 sees as reasons for denying a request for a judge-alone trial and putting those matters before a jury.

There is a further area, that is, cases in which the interests or concerns of the victim of crime really point towards the issues being resolved by the community. Victims of crime have a much enhanced status in the whole process now than they once did—certainly when I was first appointed director—and there are some situations that arise where a victim, for all kinds of reasons, usually very complex, personal reasons, may only be satisfied by the adjudication of fellow members of the community. It is difficult to describe the particular circumstances that might arise but it does happen, and that is another aspect which is covered in prosecution guideline 24. Question B, the main reasons for granting a request for trial by judge alone, are cases where the evidence is of a technical nature. The real issues might turn on scientific evidence, technical, medical evidence, a contest between expert witnesses, that sort of thing.

CHAIR: Can I just ask a question that is probably way out of line? This definition of technical evidence, obviously those giving the evidence are outside the expertise of the juries or the judge, so how does that become a defining part of the process?

Mr COWDERY: 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 12 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. There is also the aspect that when you have got that sort of evidence it requires very much longer to satisfactorily lay it out for a jury than it does for a judge. Judges are usually able to pick up the core of the evidence and the nature of the issues more quickly. So there are benefits, we think, in preferring or leaning on the side of a judge-alone trial where there is evidence of that kind, which is the central part of the evidence, the central part of the case.

Another kind of case more suitable for judge alone is where there are going to be lengthy arguments over the admissibility of evidence in the course of the trial, because, as you would know, when those matters need to be decided the jury has to be taken out and there is a lot of disruption and interruption to the flow of the trial. Sometimes juries can be out for days while particularly difficult issues are explored on the voir dire and rulings made about the admissibility of the evidence. That is less of a problem these days where much more of these things are being heard before the trial actually commences—

CHAIR: With disclosure?

Mr COWDERY: With increased disclosure. There has always been disclosure by the prosecution but we are getting a bit more from the defence now and a bit more case management from judges, which is leading to these sorts of issues being resolved before the trial actually starts before the jury. But still it can arise. Another area is where there has been quite significant pre-trial publicity or something else has happened that is capable of prejudicing the court against the accused. In most cases where that happens it is sufficient for a judge to give a direction to a jury to disregard anything they might have heard or seen outside the court, and there is research to show that those sorts of directions are effective and are taken into account by the jury. But there may be cases where the publicity is recent, it is highly prejudicial, it is not in the interests of justice to adjourn the proceedings and, therefore, it is better for a judge who can put those things more easily out of his or her mind because of the discipline that attaches to that position than to have them before a jury.

Another area is where the only issue in the case is a matter of law. The question of the interpretation and application of legal provisions is much better suited to a judge alone determining. Another in the guideline is where the offence is of a trivial or technical nature. I suppose I should say that if the offence is of a trivial nature, it may well not proceed because prosecution guideline 4 would come into operation and it may be that in the exercise of discretion we would not proceed with the matter. Nevertheless, sometimes trivial matters do come for hearing for all sorts of other reasons where the offence is of a technical nature. This particular line in the prosecution guideline really is directed towards those matters that can be disposed of very quickly by the tender of statements, tender of submissions, shortcutting rules of evidence and having the judge deal with the matter in a very expeditious manner. Those cases are pretty rare.

Another one is where we have reason to believe that either a witness or the accused person might conduct themselves in the course of the trial in a way that would cause a jury trial to abort. Sometimes we have people who we know are going to play up, putting it broadly, and make trouble in the course of the trial because they do not want to be there or they do not want to be giving the evidence they are being asked to give. Or we might have an accused person who is unstable and might say or do things that would make it necessary for a jury to be discharged. But a judge can direct himself or herself appropriately and carry on notwithstanding that unusual behaviour. Again, those cases are not common.

The Hon. JOHN AJAKA: But that person has to ask for the judge-alone trial first and foremost?

Mr COWDERY: That is correct, at this stage. Yes. That would be pretty rare. But it is one aspect in prosecution guideline 24 that we take account of.

The Hon. JOHN AJAKA: If he wants to cause trouble, so to speak, I would be surprised if he actually first asked for a judge-alone trial?

Mr COWDERY: Yes.

CHAIR: But his legal adviser might perceive that that is the best way to go?

Mr COWDERY: The legal adviser might, yes. We might be able in negotiations to get to that position where they do request it. If the Crown could request judge-alone trials, that would be very advantageous. The final aspect of guideline 24 where a judge-alone trial might be favoured is where significant hurt or embarrassment to any victim of crime may be reduced. A victim of crime might be required to give evidence of degrading treatment or embarrassing conduct. It may be in the interests of justice to reduce the public exposure of that sort of information or at least not require 12 citizens to become involved in determining issues arising out of it. The third question is: Are there any particular types of offences that are more likely to result in an application or an application being granted? I think not. This really is directed more to the nature of the evidence and the nature of the process rather than the nature of the offence that is being prosecuted. I do not think you can say there are any particular offences that are better suited to one mode of trial or the other.

Ms SYLVIA HALE: Your final point in enumerating the issues that the DPP may take into account is that significant hurt or embarrassment to any alleged victim might be reduced. Would not the option in any jury trial be for the judge to close the court in order to reduce that embarrassment? You do not think that is an adequate response to that embarrassment on the part of the victim?

Mr COWDERY: That is all correct, but it would be better if even the 12 jurors did not have to deal with the detail of whatever it is that might be revealed and cause hurt or embarrassment to a victim. Yes, the court could be closed. That would keep members of the public away from the information, but there are still 12 members of the public who are sitting in the court.

Ms SYLVIA HALE: A number of submissions suggest that juries may have different notions of what constitutes dishonesty and different levels of dislike of particular activity but, ultimately, what one hopes comes out of a jury decision—perhaps it may be the lowest common denominator—is some sort of agreement as to the offensiveness of the action. Because the perceptions of a judge in a judge-alone trial are not challenged by other members of the community, other than eventually having to give reasons for his decision he alone is equally subject to perceptions, prejudices or unthinking assumptions. For that reason, would you believe a jury trial could be preferable to a judge-alone trial?

Mr COWDERY: I do, because you get 12 heads banging around together rather than one. Bear in mind that judges are both male and female. You were saying "he" makes the decisions and gives reasons.

Ms SYLVIA HALE: Yes. I am sorry for the sexist terminology.

CHAIR: That is the first time she has been picked up for that. It is the third time she has done it.

Mr COWDERY: It is very important because we have quite a large proportion of female judicial officers these days, which is a good thing.

The Hon. LYNDA VOLTZ: You cannot have too many.

Mr COWDERY: Exactly, and prosecutors for that matter. The office position is that in those sorts of situations where there might be differing views, it is better to have those views being shared, discussed and moderated in a jury process rather than running the risk of one person having a particular set of views, which would then prevail without any of that discussion and compromise that is part of a jury process.

Ms SYLVIA HALE: In one submission reference is made to Richard Dawkins and his experience serving on a trial. He is of the view that were he innocent he would prefer a judge-alone trial, but were he guilty he would prefer a jury trial. Do you have any observations in that regard?

Mr COWDERY: I did not know Richard Dawkins had said it, but I have said it a number of times. I am pleased I am mentioned in such exalted company. I agree. It is a bit of a flippant remark, really, but juries are known to bring in merciful verdicts of not guilty in circumstances where the offence has in fact been proven. Our system is flexible enough to cope with that—it has for centuries—whereas a judge would not operate that way. A judge would be much more constrained, I suspect, to apply the law strictly and not to import that human quality of compassion or whatever it might be. If I were facing a trial and I was not guilty and I believed that the case could not be proved against me, yes, I would probably favour a judge-alone trial rather than take the risk that the jury might get it wrong.

The Hon. LYNDA VOLTZ: Could not also the opposite be true, that juries also can carry certain prejudices of their own? If I were of a certain ethnic or cultural group I may in fact prefer a judge-alone trial for exactly the opposite reasons?

Mr COWDERY: That certainly is a good point. The system goes to great lengths to try to compensate for that sort of outcome. Prejudices are something that very often are referred to in counsels' addresses and the judge's summing up to the jury. Bear in mind that on a jury you will still have 12 mixed people most likely of different ethnicities, different religions, different backgrounds, different levels of education et cetera. You have much more of an opportunity for conflict and the resolution of conflict within the jury if those sorts of issues are going to be present.

The Hon. LYNDA VOLTZ: But would the statistics not say that if you have a population that is 0.8 per cent of the population yet overwhelmingly is a large proportion of the prison population that there may be some inequities in that system?

Mr COWDERY: Oh yes, and I think that is a different issue. I do not think the trial process is responsible for that.

The Hon. LYNDA VOLTZ: Sorry, I thought we were talking about sentencing and conviction rates.

Mr COWDERY: Law enforcement and crime prevention issues really arise there. I was interested when you said 0.8 per cent, if you are talking about Aboriginal-identified people. I thought it was about 2 per cent?

The Hon. LYNDA VOLTZ: It is about 0.8 per cent. The figures have risen a bit as people are identified more as being of Aboriginal descent as opposed to being identified as Aboriginal, which is the anomaly in the statistics.

Mr COWDERY: They are over 20 per cent in the prison population. I think amongst Aboriginal women it is 22 per cent or something like that, which is appalling. We are doing something wrong.

Ms SYLVIA HALE: If I could return to the previous issue. You have said that your perception is that if you were innocent you would prefer a judge-alone trial and if you were guilty you would prefer a jury trial. Why over the past decade has the DPP adopted almost consistently a position of refusing judge-alone trials, at least so far as the Public Defender's Office is concerned?

Mr COWDERY: With respect to the public defenders—I respect them enormously—they must be wrong because the last year, in fact, the only year that we have figures for judge-alone trials is 2007. In that year there were four judge-alone trials in the Supreme Court—bear in mind that almost all Supreme Court trials are murder trials—and there were 48 District Court judge-alone trials. A large proportion of our matters have public defenders on the other side, legally aided representation. I would not have thought that is almost consistently refusing. I cannot tell you how many requests were made because we do not have that statistic.

The Hon. DAVID CLARKE: But is that not the important issue, what percentage of requests are granted? Is that not the real issue?

Mr COWDERY: It is a relevant issue, yes.

The Hon. DAVID CLARKE: You do not have those figures?

Mr COWDERY: No, we do not.

Ms SYLVIA HALE: Would it be possible to obtain them?

The Hon. DAVID CLARKE: Are those figures of the number of requests made available to you?

Mr COWDERY: Only by physically searching every file.

Ms SYLVIA HALE: I think a further issue—

The Hon. DAVID CLARKE: Do you have a view as to what the percentage might be? Might it be a high or low percentage or do you not have any view?

Mr COWDERY: I do not have any view about that. The function of consenting to a judge-alone trial is delegated to Crown prosecutors and trial advocates and, of course, to my two deputies.

There are occasions where a Crown prosecutor or a trial advocate refers a matter to me and says "Look, there has been a request for a judge-alone trial and I am a bit uncertain about it. These are the circumstances. What do you think?" and I give my view. That happens a few times a year but I really have no way of assessing how many requests are made.

Ms SYLVIA HALE: I think one of the comments by the Public Defender was that there was this perception that one had very little hope of getting the DPP to agree to a judge-alone trial and therefore people were no longer making the requests?

Mr COWDERY: Well, there may be perfectly good reasons for that and it may be an entirely correct way to proceed. Maybe a lot of requests were being made in circumstances where consent was not justified under prosecution guideline 24, but that is speculation on my part.

The Hon. LYNDA VOLTZ: Just getting back to guideline 24, and you may have already explained this, but we have the letter from the Hon. Justice Blanch, the Chief Judge, regarding the changes in those guidelines. He was the original Director of Public Prosecutions in 1989 when the original guidelines were written up. Could you elaborate on those changes?

Mr COWDERY: Certainly. Originally when the legislation came in, I think in 1990, what was then section 32 of the Criminal Procedure Act, my predecessor included in his director's guidelines from that time on a guideline to this effect—I will not read it all, but an important part of it is "normally the Crown will give consent if the accused elects". That is how it was expressed at that time. That continued until 1994. I was appointed in 1994. In the financial year 1995-96 I conducted the first review of the prosecution policy and

prosecution guidelines, which were then in two separate documents because they had not been looked for some time and I thought it was appropriate that we do that.

The process of review involves senior lawyers in the office, so it involved the deputy directors, the senior Crown prosecutor, the solicitor for public prosecutions, the deputy solicitors for public prosecutions and I think at least one Crown prosecutor, perhaps more. We went right through the policy and guidelines. When we were considering that one, which was directors guideline 8 under Reg Blanch, the committee thought that that was too generous, too liberal a statement of the policy or the guidelines that should be followed—"normally the Crown will give consent that the accused elects".

We then set about identifying what are the circumstances when it would be appropriate to give consent and that was when guideline 24 was created, pretty much in the same terms as it is in now. There has not been any significant change to guideline 24. There was a change when the section was changed to 132 and there have been one or two other changes, for example, when significant impairment was changed from diminished responsibility and so on, but by and large it has remained pretty much the same since 1995-96.

In that time the guidelines have been reviewed on three more occasions, most recently in 2007 and on all those occasions the committee conducting the review in which I have been involved has not considered it appropriate to change the guideline. So we have looked at it; we have kept it under review, along with all the other guidelines, and we have decided that, no, those are the sorts of issues that we should be taking into account when these decisions have to be made. It may be just a different personal view of the importance of jury trial to our criminal justice system.

I should say this however, without meaning any disrespect whatsoever and I respect Reg Blanch enormously in all the roles that he has occupied. Reg Blanch is a numbers man. Reg Blanch, when he was Director of Public Prosecutions, was very keen on operating efficiently and in a streamlined way and clearing matters through the process, and he has continued that philosophy on to the District Court, to his credit. He has cleaned up that court and reduced the backlog and made it much more efficient than it used to be, and he is doing a superb job. It is the most efficient court in the country, but he has a focus on throughput, and I think that guides, influences, his approach to issues of this kind. There is no doubt that judge-alone trials are faster and cheaper. I just happen to think, and the committee reviewing the guidelines has thought, that criminal justice needs something more than that.

The Hon. LYNDA VOLTZ: Can I take you back to the original comments in regards to Richard Dawkins, "If I was guilty I would prefer a trial by jury. If I was innocent I would prefer a trial by judge alone." What I read from what Reg Blanch has said is that the original guidelines are in favour of consent unless there is a reason not to?

Mr COWDERY: The word he used is "normally". That is from the guideline itself in his time, "Normally the Crown will give consent if the accused elects".

The Hon. LYNDA VOLTZ: And that is the presumption in favour of consent unless there is a reason not to go ahead with judge alone and given the presumption that one wants to convict people if they are guilty—going back to the original one—if there is a judge-alone trial and the anecdotal evidence that certain people would not go before it, why is there a downfall in favour of consenting to judge-alone trials unless there is a reason not to?

Mr COWDERY: I think the jury is a very important part of the process for other reasons too. The involvement of the community gives a greater legitimacy to the criminal justice process. It brings people into the process itself, making decisions about it; the old saying of a judgement by your peers—although we do not have that strictly speaking of course—there is value in being assessed as to whether or not you have acted criminally by your fellow citizens. I think there is some value. It also improves community acceptance of the process because the rest of the community knows that representatives of the community have been involved in it, and a good number of them, so they find the process more acceptable than just sending people off to be dealt with by a single individual who may, as you pointed out earlier, have all kinds of prejudices, beliefs and attitudes that cannot be tested and cannot be modified. The other aspect of jury trial is to get the community's assessment of those sorts of values which are set out in your term of reference 8 and set out in my prosecution guideline 24 where the judgement of the community is really what we need to have brought to bear.

The Hon. LYNDA VOLTZ: In terms of judge alone and trial by jury, are there any statistics in regard to conviction rates as a comparison?

Mr COWDERY: Yes, there have been in the past, not in recent times but there have been compilations done in past years.

The Hon. LYNDA VOLTZ: Is it possible that we could be provided with those?

Mr COWDERY: Yes, I could have those turned out.

The Hon. GREG DONNELLY: I turn to question No. 4 on notice. Under the proposed model where the prosecution applies for a judge-alone trial the accused must consent to their trial proceeding by a judge alone. Your submission suggests that this may be an inappropriate power to provide to an accused person. Could you explain that line of thinking, about it being an inappropriate power?

Mr COWDERY: Certainly. I want to put that extract in context because there is a little bit more in that passage in the letter. What I said in my letter dated 18 June 2010 is that when the Crown makes application and the defence refuses—this is under the proposal—that provides the accused with an unfettered veto over a Crown decision. In some cases this may hamper the administration of justice. That is really what I was directing my attention to and it would be an inappropriate power provided to an accused person. I am submitting that it is an inappropriate power to provide to an accused person because in some cases it may hamper the administration of justice because if the accused is able to veto a Crown application for a judge-alone trial, those matters that I referred to out of prosecution guideline 24 would not be taken into account.

It would potentially, in some cases, result in longer and more expensive trials having to be conducted before a jury in circumstances where justice could still be done perfectly properly more quickly and more cheaply before a judge alone. It may be that victims would be exposed to embarrassing or humiliating scrutiny. It may be that in the case of truly exceptional cases where there is horrific material that has to be dealt with by a jury, a jury is going to be unnecessarily subjected to that. I think that sort of power of veto is inappropriate to repose in somebody who has an individual interest in the conduct of the case.

The Hon. GREG DONNELLY: Question No. 12 relates to this notion of so-called judge shopping that has been used in some of the submissions. You say that in the proposed model an application for a judge-alone trial must be made not less than 28 days before the commencement of the trial set by the court and several submissions have raised this issue of judge shopping in relation to aspects of the model. There are then four subparts. Could you express your views on judge alone shopping in relating to the 28 day commencement of the trial?

Mr COWDERY: I am not sure that judge shopping is the right way to describe this because it is not a situation of choosing between judges. It is a situation of choosing between a judge or a judge and jury.

CHAIR: We were given the term forum shopping earlier?

Mr COWDERY: Forum shopping would be a better way of describing it, yes. You do have situations of judge shopping, particularly in a centre like the Downing Centre where you have a number of courts sitting at any one time where defence representatives—of course the Crown would not do this—would contrive to have their case moved from one judge to another. Certainly in the old days it used to be done, I know from my days in private practice. I did not do it, of course, but these days it is much more difficult to do. That is what is really meant by judge shopping, trying to get yourself, by various means, before a judge who is going to be more sympathetic, more lenient. Here, forum shopping or forum selection is really what the issue is all about. You have to keep in mind that in New South Wales there are three different areas of courts sitting in the District Court, and the District Court is where we are mostly concerned with these matters.

In the Downing Centre 16 or 17 courts are sitting at any one time. Any judge, on a Monday or Wednesday, can come into any court to commence a trial. You do not know who it is going to be and you do not find out, usually, until the day of the trial. You might find out the day before but usually not until the day of the trial. So, the opportunities for making a considered decision in order to manipulate that situation in some way in Sydney are non-existent, really. So, 28 days would be fine in Sydney, as it is called, the Downing Centre.

In Sydney west—Campbelltown, Parramatta and Penrith—the situation is somewhat different and, again, it is different between Parramatta and the other two. Judges are usually rostered into those courts for six months or 12 months at a time and there is some movement, some rotation. But you know who the judge is going to be or who the judges are going to be for at least the next half year. In Parramatta there are many more courts so it is much closer to the Sydney situation. But in Campbelltown or Penrith you may have only one judge doing trials for a period of time so you have an opportunity there to make an assessment whether you are better off with that judge or better off with a judge and jury. Mind you, if I were an accused at Campbelltown I would go for a jury every time because they do not convict anybody, or so it seems to us.

It is different in the country. Country is a bit of a mix. In Wollongong, Newcastle and Lismore we have resident judges and they do not change. In Wollongong it is one judge doing trials. In Newcastle it is one or two. In Lismore it is one. So, again, you know who the judge is going to be, and 28 days or six months would not make much difference. On the country circuits, the rosters for country circuits are usually drawn up six months in advance or for six-month blocks, and it is possible to know who is going to be in a particular country town for a particular sitting. So, 28 days would not be sufficient to cover that situation in relation to country circuit courts. So, it is a mixed bag.

The question really I think is that defence representatives in particular will seek to take advantage of an opportunity that presents itself. If, when the crunch time comes, they decide that a judge is going to be more favourable to them than a judge and jury, they will make an application for a judge-alone trial. There could be all kinds of considerations that will influence a defence representative in making that decision. There are some sub questions in that one: How frequently does the problem arise? I think very infrequently in terms of forum shopping. I think if an application is going to be made by the defence for a judge-alone trial, it is on the grounds of the substance and the nature of the case rather than trying to guess that the judge is going to be more lenient than a jury. The second question, the time frame—I have referred to that. The third question, any further measures that should be taken—yes, maintain trial by jury as the preferred default option, and the fourth question I think I have identified the issues that arise in the different parts of the State.

The Hon. DAVID CLARKE: The Hon. Lynda Voltz referred to a situation where a defendant may prefer a judge-alone trial because of perceptions of prejudice, and you responded by saying that the law compensates for that at present. Can you elaborate on how that is compensated for?

Mr COWDERY: Jury selection, which is going to be broadened in the near future I gather, tries to sample the population fairly widely to bring in people from all kinds of backgrounds. It is going to be an even more representative sample when the new provisions are implemented. I cannot sit on a jury of course—I would love to. Jurors are identified by number only, so there are no clues other than appearance to those who may be exercising challenges to jurors, or are, indeed, making submissions to them or giving evidence to them. As I said before, responsible counsel and judges in their directions, if it is suspected that some kind of prejudice or some kind of preconception might have some bearing on the outcome of the case, will make submissions about that and give directions about that. I have seen that done. By and large I think we can have confidence that juries do follow directions given by judges. Not always. There are some who cannot resist the temptation to go on the Internet and look up everything about everybody or to make inspections of crime scenes in the middle of the night, and that causes problems, but they are very rare. They are exceptions.

Generally I think they follow the directions they are given. Also, as I said before, when you get the 12 jurors in the jury room together I am confident—perhaps it is misplaced confidence—that when you get 12 people from different backgrounds coming together and discussing matters, they will do it in an equitable way, in a balanced way and in an inclusive way and not prey on prejudices that might be apparent in the way they operate on decision-making by the jury. When we are a multicultural, multi-ethnic, multinational community, and that is represented on juries, I do not think prejudice overcomes reason and reasonableness in the approach juries adopt.

The Hon. DAVID CLARKE: I would like to go back to question 4, a question asked by the Hon. Greg Donnelly, when you suggested it is inappropriate to give the accused a veto n the circumstances outlined in that question. Would that not bring about an inequality between the of the prosecution and the accused, because presently the prosecution has a veto, and are you suggesting in response to that question that there should not be a veto by the accused in that particular situation outlined in question 4?

Mr COWDERY: That is correct. And I think you have to keep in mind the nature of the parties who are being talked about here. Our system of criminal justice is not a search for the truth; it is a case of the

prosecution mounting a case which it says it can prove; of the defence responding to that case and perhaps mounting its own case on the basis of evidence; and the court adjudicating. The adjudication is not who has established the truth; the adjudication is has the prosecution proved its case beyond reasonable doubt.

The accused is interested in only one thing: Getting the best outcome for the accused and the accused's representatives. That is our system; that is the way it works. The Crown has much more onerous responsibilities. The Crown is not there to obtain a conviction. That is not the role of the prosecution. The prosecution is there to present its case as firmly, strongly and fairly as possible and to deal with whatever might be put up by the defence and ultimately to make the submissions that are appropriate. In doing all of that the Crown must have regard to the fact that it represents not one person, not the prosecutor, not the policeman in charge of the case, not the victim. The Crown represents the whole community. Everything the Crown does must be in the general public interest. So, a lot of duties and obligations on the Crown are not on the accused. So, I think you cannot make a simple comparison between the prosecution and the defence and one having a veto and one not having a veto. Part of the role of the Crown is to ensure the public interest is satisfied and that means that the court process is the most appropriate process they should be operating in a particular case

The Crown will refuse to consent to an application for trial by judge alone for those reasons set out in guideline 24. The guideline is publicly available. People know before a case starts what sorts of considerations the prosecution is going to take into account. If the accused has a right of veto over the Crown, potentially it can result in delay, cost, harm to the jury, harm to the victims, as I have mentioned, and the potential for mistrial. The Crown takes all those sorts of matters into account before it decides whether or not to veto the accused's application. So, the Crown is already making the sort of assessment that I anticipate the proposed model would have in mind for the interest of justice test. We are doing that already.

The Hon. DAVID CLARKE: So, if the Government followed what you suggest in response to that question 4, this in effect is going to be a restriction, a restriction presently not there, to the right to trial by jury of an accused in certain situations? Is that the bottom line of that situation?

Mr COWDERY: Yes, that would be the effect.

The Hon. JOHN AJAKA: Can I just go to three main things, without repeating what has been raised by my colleagues, that are of real concern to me with your position? The first concern I have is that you consider that the prosecutor on the day is best equipped to make a determination because he is aware of all the evidence in front of them as opposed to the judge. My dilemma with that is that if we take the fact that we have a good and fair adversary system whereby you are the Crown, your job is to prosecute on all the bases you have mentioned. You have a defence lawyer who is there to defend and answer the case. You have a judge who makes a determination and who, in effect, in simplest terms, is the referee. I find it difficult that you, as one of the two opposing teams, should suddenly have the right to say yes or no when that really should be a decision made by the referee. Yes, your Crown prosecutor might be aware of all the facts. The reality is the prosecutor is not aware of what the defence facts are unless the defence lawyer suddenly wanted to tell you everything in their case. So, why should you have this right to veto? Why should you not trust that judgement to the referee, the judge?

Mr COWDERY: Two things. First, the judge will not have what is in the knowledge of the defence. We do not have full defence disclosure in our system. Some things have to be disclosed but not much. Secondly, I take issue with the fact that the judge in that situation is an independent referee. The judge is one of the two options. It is either trial by judge or trial by judge and jury. The judge is being invited to be a judge in his or her own cause, in making a decision about whether or not he or she will prevail. I do not think it is a case of leaving it to the referee. I think the Crown, with its obligations and its duties to the public interest, is in a better position, privy to knowledge that, if the judge had to make a decision, that would have to be conveyed to the judge, with possible disadvantages that that might entail.

The Hon. JOHN AJAKA: But is there not a perception that the Crown may want to win at all costs and, therefore, there is an inherent prejudice from the Crown's perspective that it wants to make a determination that will best obtain a conviction?

Mr COWDERY: Well, Reg Blanch and I, since 13 July 1987, have been working very vigorously and very hard to dispel that perception. I think we have made some progress in New South Wales. There may be some other jurisdictions where it is not quite as hunky-dory, but the prosecution in this State, since 1987, has been at great pains to make it clear to the community that it is not the prosecution's job to win at all costs: in

fact, I have banned the use of the words "winning" and "losing" in my office. People make jokes about it, and that is fine, but at least it brings it to people's attention—that winning and losing is not what it is all about as far as the Crown is concerned, and never has been in our system, properly applied. If there is a perception that the Crown is doing that, we will have to work harder to dispel it, but it is not the reality. The reality is that we present our cases fully, firmly and clearly. If there is an acquittal, the system has run its course. No-one gets beaten up for an acquittal being entered.

The Hon. JOHN AJAKA: If we look at the situation that is referred to by some as judge shopping or forum shopping, the basis of a good judicial system is that all judges are equal. The basis of responsibility of a government is to ensure that those judicial officers who are appointed are the best and that there is all this equality. In a perfect world, there should be absolutely no difference if you go before judge A, B, C or D. if we are concerned about allowing the judges to make these decisions because some judges will be different than others, is not the Government or the principal judicial officer, such as the Director of Public Prosecutions or chief judges, in some way implying that they do not trust their judges to make these decisions; that clever defence lawyers can play the system?

Mr COWDERY: We do not live in a perfect world. I wish we did, but we never will because it is full of human beings. Yes, the theory is that all judges are equal. The reality is that all judges are human beings, individuals, have different backgrounds and have different approaches to things as well as different interpretations, even on the same set of circumstances. So judges will react differently to the same stimulus. I think we have to be realistic about that. That is why we make these points that we do.

There are some judges who are content to sit back on the bench and allow the trial process to take a huge amount of time—as much time as the parties want to take; there are other judges who intervene and move things along much more expeditiously. There are some judges who are not going to be fazed by having to write a lengthy and considered judgement at the end of a judge-alone trial. There are other judges who will see that as a huge additional burden that is imposed on them. All those sorts of things, and much more besides, in reality are going to influence the decisions that judges make. It is better to keep it away from them, in my view.

The Hon. JOHN AJAKA: Just on a different tack, I am not aware if the new model covered this or the proposed legislation does, but do you have an opinion on whether in relation to the decision of a judge—if the new model is adopted and it will be a judge only trial or it will be a judge-jury trial—either party should have the right to appeal that as an interlocutory matter so that it is a decision that is reviewable, or would the better outcome be that the legislation provide that once a judge has made that decision, it is a non-reviewable decision and there is no right of appeal by either party to that decision?

Mr COWDERY: That is a difficult one for me to answer.

The Hon. JOHN AJAKA: I am happy for you to take it on notice, if you prefer.

Mr COWDERY: No, no—it will still be difficult next week. As I presently understand the law, if a judge were to be making decisions of this kind, it would be appealable under section 5F of the Criminal Appeal Act as an interlocutory order, and that would add unnecessary complication and delay to the process, in my view. Having said that, it is quite conceivable that a judge may make an order, one way or another in a case where it is regarded as important by either party, that is wrong, that is mistaken, that perhaps misconstrues material that has been put before the judge, that perhaps misinterprets things, and perhaps just gets something plain wrong. I mean, it does happen. That is why we have appeal proceedings in relation to all aspects of our process. To shut out the right of appeal might be a bit harsh and counter-productive. A sort of half-way house, I suppose, would be where an appeal could only be brought by leave of the appeal court, but again you would still have the same sort of delay and disruption if that process is to be followed as well.

The Hon. JOHN AJAKA: I was intrigued to note that you would need to go into files to provide statistics. Is it open for your office to look at the situation of a record being kept each time someone seeks a judge-alone trial and whether the application was accepted or refused by you, if I may use that terminology, and whether it ultimately ran? It is interesting to note that you mentioned 48 within the District Court. It would be great to know if it was 48 out of 60 who applied, as opposed to 48 out of 600 who applied. It would be important for us to be able to determine what the real effect of this would be.

Mr COWDERY: People such as this Committee have come along at various times and have an interest in particular things that happen, and in measuring particular things that are happening. We cannot

always predict that somebody is going to have a legitimate interest in knowing that sort of information, so our programs are not set up to be able to extract that sort of information in every case. Yes, it is technically possible for the computerised case tracking system, CASES, to be enhanced and to have an additional task inserted into it for the prosecutor to record that sort of information to which you have referred, but we do not have it at the moment. To enhance the system costs money, takes time, and then we have to train the staff and we have to get the staff complying with it. All those things are management issues and—

The Hon. JOHN AJAKA: Funding!

Mr COWDERY: Funding. We have not got enough money to run prosecutions at present, let alone enhance information-capturing programs for the benefit of outsiders. At the moment, the only way we could do it would be to go back physically through the files, get them in from archives, have somebody sit down, go through them and look for notes that would be on the files of where somebody asked for a judge-alone trial.

The Hon. JOHN AJAKA: That would be a nightmare situation.

The Hon. DAVID CLARKE: The situation is that it would be a difficulty at this stage, keeping in mind your financial constraints.

Mr COWDERY: It would be a great imposition, yes.

CHAIR: Thank you very much for attending today. As usual, we could probably have chatted for another good hour. There were several questions that we sent you earlier. If possible, would you mind taking those on notice?

Mr COWDERY: Yes, certainly. I can respond.

CHAIR: We have allowed 21 days after you receive them from the secretariat for reply.

Mr COWDERY: After I receive—

CHAIR: The list of questions on notice from the secretariat.

Mr COWDERY: Yes, those that are still to come, but not the list that was sent before?

CHAIR: I should imagine that they would be included.

Mr COWDERY: All right. I am certainly happy to do that—yes, of course.

CHAIR: Thank you very much indeed. If there is any further information you think we might need, you can include that in your answer.

Mr COWDERY: Thank you.

(The witness withdrew)

CHAIR: I welcome you to the first day public hearing of the Law Justice Committee inquiry into judge-alone trials under section 132 of the Criminal Procedure Act 1986. I will not read all the formal processes. We have guidelines on broadcasting. Anybody who wishes to broadcast understands those and has access to those guidelines. If you have any messages that you want delivered to the Committee would you use the secretariat or the clerks to do that? The Committee hearing is not intended to provide a forum for people to make adverse reflections about others. The protection afforded to Committee witnesses under parliamentary privilege should not be abused during these hearings. I therefore request witnesses avoid the mention of other individuals unless absolutely essential to address the terms of reference. If you have a mobile phone would you please turn it off as it interferes with the recording equipment.

MARK JOSEPH IERACE, Senior Public Defence, New South Wales Public Defenders Office, affirmed and examined:

CHAIR: In what capacity do you appear before the Committee?

Mr IERACE: I am a Senior Public Defender from the Public Defenders Office. To some extent I think I am appearing in a representative capacity for that office.

CHAIR: If you take any questions on notice you will have 21 days from the time secretariat sends them to reply. Do you want to make an opening statement?

Mr IERACE: Essentially I rely upon the submissions that I have already made in my letter to the Committee dated 28 June 2010. I have received from you a list of possible questions that may be asked.

CHAIR: Under the proposed model, if the prosecution applies for a judge-alone trial, the accused must consent to their trial proceeding as judge alone. The Director of Public Prosecutions suggests that this may be "an inappropriate power to provide to an accused person". Do you want to comment on that view?

Mr IERACE: I am unclear as to what is meant by that submission. I noted it in the director's written submission, and I was present for the last 10 minutes or so of his evidence before this Committee, and I am still unclear as to why it would be that it would be an inappropriate power to provide an accused person. It is not a matter of balance being required between the accused and the prosecution because the underlying principle is the right of an accused to trial by jury. If the accused chooses to forego that right then it does not follow, to my mind, that the prosecution should equally have that right for a trial by judge alone.

The Hon. LYNDA VOLTZ: One of the questions asked of the Director of Public Prosecutions referred to statistics on requests for trial by judge alone as opposed to how many actually occurred to give an indication of what is the rate of approval by the prosecution. The Director of Public Prosecutions did not have that statistic. Does the Public Defenders Office have those statistics?

Mr IERACE: As it happens I asked our research officer to check for that statistic about half an hour ago and to send it through to me on my mobile. I am unable to get a signal for the mobile even outside the Parliament which probably reflects on my provider. I will provide that figure.

The Hon. LYNDA VOLTZ: If you could provide that on notice it would be a great help. Obviously the guidelines changed at some point during the mid-1990s away from the presumption in favour to granting judge alone as opposed to a criterion of approval. Do you have any figures that go back that far?

Mr IERACE: No, we would not have that unfortunately. I was surprised at the figure of 48. That was higher than I expected.

CHAIR: In 2007?

Mr IERACE: Yes. I would have thought there were a lesser number of trials by judge alone. We do not keep in our office such statistics now, nor have we in the past.

The Hon. LYNDA VOLTZ: When the Public Defenders Office requests a trial by jury on behalf of the person it is representing does it have a criteria about when is the most appropriate time to request trial by judge alone or is it more about the presumption to do that?

Mr IERACE: As I indicated in my written submission, we rarely turn our minds to it because in our experience over many years approval has not been forthcoming from the DPP in any of the rarest of instances. So it is not something that we turn our minds to as a matter of course. I think if the decision-making power was transferred to the judiciary that we would, and we would as a matter of course give consideration to that issue. The types of cases where we would do so are, in no particular order, cases where there has been adverse widespread publicity if it is metropolitan or regional based court in which the trial would take place, or local publicity if it is a country court where the evidence is of a technical nature perhaps. I think overall it is the issue of prejudice that is the case where we would most often use it. If it transpired—let us assume that the proposed model was legislated—then at least initially I think there would be a number of applications made in the Supreme Court in murder trials and then we would be guided in the first instance by the response of the list judge, presuming that is where the application was made, and ultimately by the response of the Court of Criminal Appeal.

I agree with Nicholas Cowdery that it is a decision, an order, that is appellable under section 5F of the Criminal Appeal Act and inevitably that would happen, but over time we would see guidance being provided by the Court of Criminal Appeal to judges in how the power should be exercised. Although perhaps I am getting a little bit away from the question the approach that is likely to be taken by an appellate court is to not interfere if the decision made is reasonably good in the bounds of the discretion given to the judge because of the terms of the proposed model to provide for discretion to be exercised. To give an example, point eight reads:

> When considering the interests of justice the court may—

And I emphasise that word—

> refuse to make an order where the trial would involve a factual issue that applies to the application of objective community standards such as an unreasonableness, negligence … and dangerousness—

Including the word "may" provides a discretion to the judge who makes the decision and that discretion would be respected by the court but nevertheless there would be the benefit of guidelines. I might also add that with the passage of time one could expect fewer appeals being made from the decision of the judge whether it in the Supreme Court or the District Court simply because over time it would become more commonly understood what was reasonably within the ambit of the judge to decide the issue.

The Hon. GREG DONNELLY: Your submission notes that "it has been the experience of counsel for the defence over many years that when consent is sought of the DPP for trial by judge alone, it has rarely been forthcoming". How has that practise developed over time?

Mr IERACE: Yes. I do that by referring you to the guideline that was initially provided. A copy of that is attached to the written submission of the Chief Judge of the District Court. At point eight is a succinct guideline that makes the point that there is effectively a presumption in favour of consent by the DPP. These words are used, "normally the Crown will give consent if the accused elects". In that short guideline there is no criteria provided in the sense of eliminating from consideration types of cases as is presently the case in the DPP guideline. I was not able to find a copy of the guideline that immediately replaced that of the Chief Judge when he was the DPP. I did turn up a 1995 version. I think by then Nicholas Cowdery was the DPP, I am not sure, but there was one change in that version from the current version, and the current version is annexed to the written submission of Nicholas Cowdery. That change is that in the current edition "substantial impairment" has been added as a particular category of cases where it is not appropriate to decide in favour of trial by judge alone.

My point is that the fall-off in applications, or as I have earlier said in the beginning, the consideration to making an application to the DPP is due to a change in the guidelines and perhaps also a different application for the guidelines. I think that will depend on the terms of the guidelines before 1995. It is my recollection as a practitioner that there was a significant downturn in agreement by the DPP to applications for a trial by judge alone in the early 1990s, that is, before 1995. It became clear at that point that really it was only in an exceptional case that the DPP would be favourable.

Ms SYLVIA HALE: Why did that come about?

Mr IERACE: Well, it is a mystery to me a little bit because I do not know what prompted the DPP to change tack so as to speak so there is a degree of speculation on my part, and perhaps a lapse of memory. I do not remember whether in the early 1990s there was, for example, publicity to the effect that defence lawyers were engaging in judge shopping and that may have been the reason, or whether there was some concern that verdicts given by judges were inappropriate and, therefore, there was a move away from a trial by judge alone as a matter of policy in the DPP or whether perhaps it is reflected by a change in the personnel from Reg Blanche to Nicholas Cowdery, I do not know. I am only speculating. But the end result is that there was a significant drop off.

The Hon. GREG DONNELLY: The Department of Justice and Attorney General noted in its submission that under the proposed model, the decision as to whether to proceed with a judge-alone trial shifts from the prosecution to the judiciary, and that "there is no reason to believe the prosecution is better placed to weigh the competing interests than the judiciary". Would you comment on that?

Mr IERACE: I think that in one sense at least the judiciary is better placed in that, effectively, at the hearing there would be an opportunity for an immediate exchange of views and opinions. At the moment the process of application is by letter, that is, defence counsel sends off a letter to the Director of Public Prosecutions, the DPP considers the contents of that letter and the decision is then forthcoming. So the procedural difference, I think, would lend to an immediate exchange of views on the issue and that airing, if you like, of the issue would be beneficial to a more appropriate outcome that would lead to that. Beyond that I think that the view expressed is correct. However, even so, I do not think that it follows that there would necessarily be the same outcome. In other words, it may well be the case that the judiciary approves more trials by judge alone than is presently the case by the DPP, and that would come about, I think, by a more flexible approach to the criteria that is proposed in the proposals.

The Hon. GREG DONNELLY: Question number 9, going to the issue of community perception, in your view what would be the impact of the proposed model on the community's perception of the judicial system, particularly if there is an increase in the number of judge-alone trials?

Mr IERACE: I indicated earlier that to some extent my views are representative of my office and to some extent, by implication, they are personal, but overall it is a defence perspective. If I can put that to one side, because I think it is appropriate to do so, I think the negative side of trials by judge alone is, firstly, that even where both parties agree to that process, the community has an interest in trials by jury and to some extent that interest is downplayed when there are trials by jury, certainly if they are to occur on a large scale. What I am saying is that it is not only in the interests of the accused to have the right to trial by jury but it is some guarantee to the community that the verdict is an appropriate one, whatever it is. Arguably, in some cases that guarantee is lessened when it is a trial by judge alone.

Secondly, when a verdict is given by jury that many would regard as contrary to the public expectation of what the verdict would be—with the possible exception of recent publicity in the *Daily Telegraph* in relation to the Lindy Chamberlain trial—that verdict is not criticised, it is accepted, and the community moves on. I can well imagine that if there was a very large increase in the number of trials by judge alone that that would not necessarily be the same practice by certain aspects of the media. In other words, that is, for example, where there was an acquittal that was not well received by the media, the judge would come in for personal criticism.

So I think that the committee has to factor in, if you like, in your deliberations that these are possible consequences if the model is likely to deliver trials by judge alone on a large scale. However, I do not understand that the proposed model would lead to such a large increase and that those negative consequences are likely necessarily to flow, and that comes about because of point 8, what I would see as a wide discretion given to the judge and some refining of the matters that the judge is to take into account.

The Hon. JOHN AJAKA: My understanding is that there have always been two golden threads in our criminal system. The first is that you are innocent until proven guilty, which puts the onus of proof on the prosecution, and the second, of course, is the right of a trial by your peers or, as we call it today, the jury system. I am a little intrigued with the Crown's view that they seem to have on the one hand a perception that they should be able to make that final determination through their veto if a defendant wants a trial by judge only as opposed to allowing a judge to make that determination when we really do have two opposing teams, so to speak: you have got the Crown on the one side, the defence on the other and the judge as a referee. I put that to

Mr Cowdery and you might have been here at the end when I put that to him. His view, of course, is that no, it does not happen that way; the Crown is not really seen as one opposing team. Do you have a view on that?

Mr IERACE: Perhaps a couple of points. The Crown often presents itself as the representative of the community. It certainly often does so in the course of a trial, usually at the beginning when the Crown opens its case to the jury. I have often found and continue to find that not only inappropriate but incorrect. If the Crown represents the community one might ask rhetorically then who does the jury represent? I think that the more accurate portrayal of the Crown in the context of a trial is simply the prosecution, and whilst the prosecution is not there to secure a conviction but rather to present all of the evidence, and certainly robustly to press the case for a prosecution but not to secure it, I find it inconsistent that it can play some other role representing the community. The submissions by Nicholas Cowdery both today and, more particularly, in his written submissions seek to portray the DPP in the pre-trial stage as having the interests of the community as one of its responsibilities and, in particular, in determining whether it is appropriate for there to be trial by judge alone. Reading that submission prompted me to consider whether if the DPP does not represent the community in the trial could it be said that it does so in the pre-trial phase? I think the answer to that is no. So I do not accept that the DPP has such a role in the pre-trial phase.

Secondly, it is not clear to me, and I have alluded to this earlier, what it is that is being said by and on behalf of the DPP that it brings to bear in the decision-making process that a judge cannot. In the written submissions reference is made to the DPP being aware of any prior criminal history of the accused without spelling out what the relevance of that is as to whether a trial should proceed by judge alone or before a jury, and I cannot see the connection. If it be suggested that it is not, in searching for a possible connection, to my mind, if it be suggested that the prior record has some bearing on whether a trial should be by judge alone or by a jury then implicit in that, it seems to me, is the notion perhaps that if the accused has a prior criminal record then a trial should proceed one way or the other for that reason, that that somehow has some bearing. In struggling to find a connection, because ultimately I cannot, I can only pose these rhetorical questions: Is it being suggested that there is more likelihood of a conviction in the mind of the DPP institutionally if the case proceeds one way rather than the other, and even if there is then how can a prior criminal record be properly relevant to that consideration? But that is pure speculation on my part. I simply do not see the connection.

The Hon. JOHN AJAKA: Even on that point, where I feel uncomfortable with this is that if one looks at a situation with a certain defendant, whether it be based on his ethnic origin, based on his occupation, based on his or her religion, are we going to suddenly have a situation where the Crown will sit down and say, "What will the jury more likely do with this type of defendant?" as a criteria for, "Do I veto the defendant's request or not veto it?" Do we suddenly create a perception that the Crown is sitting there and the opposite of judge shopping, in fact, jury forum shopping? Am I wrong to think that?

Mr IERACE: I accept unreservedly the statements by Nicholas Cowdery that I heard not long ago in this room that, in effect, the Office of the Director of Public Prosecutions, under his stewardship and that of his predecessor, strives for complete fairness. Again, we are left with the difficulty of not having the dots connected. I do not know what the connection is. I was interested to hear his evidence to see if there was some attempt to connect them. It may be that the director is concerned that in such cases where there is a prior criminal record if the matter proceeds to trial by judge alone and there is an acquittal that at that point if publicity is given to the prior record that there would be more public criticism of the verdict than had it been by jury, and that would be although not a consideration I think should be taken into account. It would certainly be more palatable. So I agree with you that it is important that some issues be identified as extraneous and not playing any part in the decision-making process, whether it be by the DPP or by the bench, the judiciary.

The Hon. DAVID CLARKE: Your submission suggests that there would be a significant increase in the number of applications by the defence for a judge-alone trial if the proposed model is enacted. Why would there be such a significant increase? Secondly, what would be the impact on the judicial system if there were to be an increased number of judge-alone trials?

Mr IERACE: I think the answer to the first question is along similar lines to my earlier answers, that defence counsel would perhaps not immediately but within a reasonably short period begin to, as a matter of course, turn their mind to that possibility and make application. It is not always successfully, I imagine, but there would be a significant increase in applications because defence counsel in many instances would advise their clients that the matter would proceed—the trial itself would proceed faster and perhaps the real issues would be arrived at much earlier by the fact-finder and there may well be a better hearing in terms of avoiding pre-trial publicity and perhaps also where there is a lot of technical evidence.

Before I move on to the second point I pause to say something about technical evidence. The advantage, I think, for the procedure of trial by judge alone where there is technical evidence is that in such cases, that is trial by judge alone, in my experience there is more of an exchange between the judge and counsel at the Bar table and also between the judge and witnesses. The jury, of course, have the opportunity of asking questions of witnesses, usually, depending on the particular judge, in the form of handing a written question to the judge and the judge can then ask that question of the witness, but the freer exchange where a judge can simply in the middle of examination by counsel clarify something with the witness means that the understanding of technical evidence is better facilitated by the fact-finder—that is, in this case, the judge.

I guess that is why I expect there would be more applications, not straight away but in the short term. I should add that in many cases—that is, I should add to the types of cases where there is likely to be an application made by the defence where there is not at the moment—where evidence is distressing, often in those circumstances the defence counsel would prefer there to be a trial by judge alone because of concern that the jury may not be able to distinguish between the normal unavoidable emotional reaction to parts of the evidence on the one hand and on the other hand their role to decide dispassionately as to whether the accused is guilty. I do not say that would be the case in all cases and I emphasise that in relation to each of the categories to which I have just referred it is important that the right of the accused to trial by jury be respected. I think you asked me also about the consequences?

The Hon. DAVID CLARKE: Yes, what would be the impact on the judicial system?

Mr IERACE: This is another negative. The judge, unlike the jury, would be required and, indeed, is required under current law, to give reasons for the verdict or verdict. That involves identifying and stating the relevant principles of law and the findings of fact. The judge in a jury trial receives the verdict, which is simply one or two words, and effectively moves on to sentence. Where there is a trial by judge alone the judge has to make time to consider his or her verdict and write the appropriate judgement. That will take some time. Of course, it is not possible to say how long; it would vary from judge to judge and case to case depending on the complexity of the evidence. However, that downside, that is, the cost to the community of a judge not hearing evidence but rather sitting in chambers writing a judgement, has to be balanced against the inevitable savings in time of a trial by judge alone as opposed to a jury trial. I am saying that a trial by judge alone is significantly shorter than a jury trial if only because the various procedures in a jury trial are not required, such as explaining to a jury their role, opening and closing addresses by counsel to the jury would be far shorter in a trial by judge alone, and many of the questions asked of jurors would be unnecessary. So, there is that counterbalancing effect.

Your question also requires me to identify as another negative that one can expect there to be more appeals from convictions by judges who have arrived at the verdict as opposed to jurors. That is because having exposed his or her reasoning there is more opportunity, if you like, for defence counsel to find error. By contrast, with a verdict by jury—although such verdicts can be and often are successfully challenged; the appellate court has to engage in the process of determining whether the conviction was not reasonably available on the evidence given to the jury—there is more opportunity for appeals. However, to the extent that we already have trials by judge alone, I do not know that the likely additional number of appeals is such as to cause any great concern. In other words, I would not expect if trials by judge alone occurred more often than they do presently that there would be an avalanche of additional appeals, nothing like that.

CHAIR: Are there any indicators from the current use of judge-alone trials in New South Wales of appeal processes increasing?

Mr IERACE: That would be relatively easy to determine. The way to do it would be to simply do a search on Lawlink on cases and type into the search fields of the CCA the appropriate words, "conviction of appeals by trial by judge alone" perhaps by reference to section 132 of the Criminal Procedure Act. Failing that, perhaps it could be an inquiry of the Criminal Appeal Registry, Gabrielle Drennan being the Registrar. She may have some means of easily identifying that. That would be an interesting statistic.

The Hon. DAVID CLARKE: The model states that if there are multiple accused and not all agree to a trial by judge alone that the trial must proceed before a jury, subject to the jury tampering provisions. What are your views on this aspect of the proposed model?

Mr IERACE: I agree with the proposition that if all accused are not agreed on trial by judge alone, then it should be trial by jury. The only scenario I can think of where that might be a problem is where there is a

trial by jury that aborts through suspected jury tampering, which relates to one accused and not others. In that circumstance there is the possibility of a trial by judge alone being forced upon the co-accused if they are to be tried separately. That concerns me because the accused who are not suspected of having any role to play in the jury tampering would be deprived of their right to trial by jury. The pragmatic answer is that wherever possible the case against the accused who is suspected of jury tampering be separated so there is a separate trial in relation to that accused. I can imagine circumstances where there may be costs to pay for that.

For example, in again a rape case, if one of the accused is suspected of jury tampering and not the others, you would not necessarily want the victim or victims having to give evidence more than once. I would identify that as a grey area, a problem, but I hasten to add that I would think it would be a rarity because, although I am not aware of any statistical evidence as to the frequency of jury tampering, I would be surprised if it was anything other than rare and, therefore, the incidence of trial by judge alone where the criteria of the jury tampering is satisfied is likely to be very low, and then within that you have the subgroup of such trials where there are multiple accused and where only one is suspected of involvement in the jury tampering. That is not to say that there has to be some legislative answer to it and I am not sure what that should be.

CHAIR: It would be complex, would it not?

Mr IERACE: I really see the principle of the right to trial by jury as absolutely paramount.

The Hon. DAVID CLARKE: That is a difficult situation, is it not?

Mr IERACE: Yes it is.

The Hon. DAVID CLARKE: If we get to that very small category of cases to which you have alluded?

Mr IERACE: Yes. It may occur only once every 10 years, but what does one then do?

The Hon. DAVID CLARKE: You have no obvious suggestion as to how that can be done?

Mr IERACE: Only the pragmatic ones.

The Hon. DAVID CLARKE: What are those pragmatic ones?

Mr IERACE: The ones I have indicated, that the accused be separated. I should add into the reasons why it would be a rarity to have to resort to trial by judge alone the experience I have had in respect of such a situation as a prosecutor where the resources available to the court in that case met the risk of jury tampering and I think more broadly they are likely to do so. Very rarely will the stipulation be that there be trial by judge alone where there is jury tampering. That is subject to the Committee accepting my respectful submission that points 9 and 6 be tightened. I do not know whether you would like me to say something about that. I am happy to rely on what I have communicated to you by written submissions, but I think that really needs to be tightened.

Ms SYLVIA HALE: That is in regard to the identifiable risk of jury tampering?

Mr IERACE: Yes. It has to be far more than the risk of jury tampering. If you have regard to the legislative schemes in New Zealand and Britain as examples, both of those schemes go way beyond the risk as it should. The relevant terminology is in my written submission. I think that is important.

CHAIR: We picked that up with Mr Cowdery as well.

Ms SYLVIA HALE: All the submissions to the Committee start out dealing with the question of the interests of justice, saving time, resources and money, and administrative efficiency is a secondary consideration. Everyone has been at pains to say that. However, if there is wider accessibility to judge-alone trials, do you anticipate that defence counsel may unduly recommend to their clients that they request a judge-alone trial because that would lessen the interests of the accused but would be more in the interests of the defence team in their time and the fact that presumably their court appearance fees are a lesser cost burden than those involved in preparing the case?

Mr IERACE: One must not underestimate the ego of barristers when it comes to the prospect of an acquittal.

Ms SYLVIA HALE: I was thinking of their avariciousness.

Mr IERACE: As to that imperative, if the client is a private client with ample funds, then to the extent that there is a financial motive, that would be met by a jury trial rather than a trial by judge alone because almost inevitably the jury trial will take longer, which means more money in the pockets of the defence counsel. I suppose that would be the only class, if you like, of defence counsel where there would be that financial motive to go for a longer trial. That would not be a concern in trial by judge alone. In circumstances where there may be a financial motive to go the other way, perhaps where a private barrister is appearing with a grant of legal aid, which, for whatever reason, is strictly limited in regard to days in court, if one then goes to the category of public barristers, that is, public defenders, where there is no financial motive to drag out a case, then I think that is neutral.

There is no financial advantage either way for the public barrister. I would not like it to be thought that because I have only so far spoken crudely about financial motives and ego that that is all that comes into play—far from it. In my experience, the great majority of barristers who do defence work regularly are highly principled. That is not to say that there is not some credible evidence that there are some who do not run a trial efficiently even when it is on the public purse. Without wanting to get too far off the topic, there are policy steps in place to address that within the Legal Aid Commission that I think will go a long way to addressing that. To get back to your basic question, I am not concerned that defence counsel would inappropriately advise their clients to opt for trial by jury alone.

Ms SYLVIA HALE: There has been a suggestion that judges can be more dispassionate, they can separate the consideration of the material before them from any adverse media publicity that might surround a particularly notorious event and that they are better able to stomach very disturbing evidence than a jury might be. But if you then balance that against the fact that judges tend to be drawn from a very select strata of the community and their life experience is very different, other than by third-hand observation, from that of many of the people who appear before them, do you think that it is inappropriate therefore to be adopting measures that will encourage the use of judge-alone trials?

Mr IERACE: I think the short answer is yes, but I share your observations about judges. I think one could easily overstate the ability of the judge to deal with their own emotions and arrive at the appropriate decision dispassionately. They are, first of all, human beings and I think as a community we place too high an expectation on judges being able to deal with such matters and, secondly, to overcome, if you like, their often, in an experiential sense, narrow backgrounds. In order to become a judge a prerequisite is that you are a very good lawyer and in order to get to that point of being a good lawyer with appropriate experience it does not necessarily but it usually follows that you have spent many years as a barrister or a solicitor long hours and weekends at the one occupation, so the option of trial by judge alone I think should be realistically understood as not a match for the broad human experience of a jury. That is one of the primary considerations that good defence counsel would take into account in determining whether a case is appropriately dealt with by a judge alone as opposed to a jury.

I was present when Nicholas Cowdery earlier noted that whilst the theory is that all judges are alike, that is not the practice, and of course that is the case. There are as many different personalities on the bench of any of our courts as one expects there to be in a jury of 12. There are a range of personalities, a range of life experiences and of course all of that must play some part in the ultimate decision. I am not suggesting that it would be determinant of the ultimate decision but nevertheless in cases other than simply technical cases where human experience is called upon, that must play some part. To get back to your question, I agree that one must accept that the notion of trial of judge alone involves some loss in contrast to trial by jury but when defence counsel takes that into account, they are not likely to advise their client to proceed by judge alone unless overall it is seen to be advantageous, and I refer back to some of the earlier issues.

Ms SYLVIA HALE: In the director's guidelines, which Mr Cowdery attached to his submission, there is a list of the criteria that the DPP says should be satisfied if the case is to proceed to a judge-alone trial, and there are about six or seven, including one that I have a few problems with—"significant hurt or embarrassment to any alleged victim may be reduced". It seems to me that that is not necessarily a criterion that you should bear in mind when determining the forum you are going to use. Do you think it is reasonable that in applying for a judge-alone trial the defence should be able to satisfy a series of criteria?

Mr IERACE: The defence does not have any say over the criteria.

Ms SYLVIA HALE: Not necessarily these criteria but some that are commonly agreed?

Mr IERACE: It simply falls to the defence to respond to the criteria that it has to address. I think it is reasonable for there to be some guidance to the judge in determining whether or not to order a trial by judge alone and I agree that the last factor you mentioned, that is significant hurt or embarrassment to any alleged victim, is not likely to be one that much regard would be had to, not out of callousness towards victims but, rather, because not much really turns on it. It is going to be embarrassing to victims giving evidence in court usually, some types of victims especially, regardless of whether there is a jury there or not.

It is marginal whether the additional embarrassment might be caused by the jury—if anything, I would have thought that is a factor in favour of a trial by judge alone. I noticed as I turned the page, earlier I tried to find a reference in Nicholas Cowdery's submissions to the criminal antecedents of the accused. I had thought that was in his submission to the Committee. In fact, it is in an attachment to his submission, which is a letter to the Attorney General at page 5, the first and second points under the heading "ODPP".

CHAIR: Mr Cowdery brought up another issue in relation to paragraph (8) of our terms of reference about including the word "dishonesty" as one of the criteria that the community needed to be involved in the assessment of. I have personal difficulty with that word. Mr Cowdery said it is incredibly difficult to define. To me the word "dishonesty" is a personal belief rather than a community or set of community beliefs. Do you believe it is appropriate to include that in paragraph (8) of our terms of reference?

Mr IERACE: To my mind dishonesty incorporates fraud, in other words, property offences.

CHAIR: So it is not personal, is it? Defining the word "dishonesty" is like a personal definition rather than a community-based definition.

Ms SYLVIA HALE: What is a lie and what is a white lie?

Mr IERACE: I am not in favour of including it in the criteria because if the Committee does that, then it really begs the question: what is left? If dishonesty incorporates types of offences involving fraud, if it is that broad, then the net that is cast for crimes excluded is such that there is not a lot left. I think more importantly I do not understand why that should be included.

CHAIR: Sorry, I was asking for a thought on that thought?

Mr IERACE: I am not sure what is meant by "dishonesty"; in other words, what types of offences the director has in mind. I imagine it is offences such as fraudulent offences, obtain benefit by deception, that sort of thing.

The Hon. LYNDA VOLTZ: More an intention to deceive?

Mr IERACE: I would have thought it includes perception crimes but goes beyond that. If we are speaking of dishonesty crimes that involve an element of dishonesty, that is a very large number of crimes.

CHAIR: And human life and communities—dishonesty?

Mr IERACE: Yes. I do not know why a judge sitting alone could not properly hear a case involving dishonesty; in other words, where community standards come into that, why one would need to have a jury to deal with such an offence.

CHAIR: But how would you define a standard?

The Hon. JOHN AJAKA: We have magistrates hearing what could easily be classified as dishonesty cases sitting on their own all the time in the Local Court.

Mr IERACE: Yes, I had the same thought.

The Hon. JOHN AJAKA: I would find it difficult that a judge in the District Court or the Supreme Court could not understand the concept.

Mr IERACE: I would want to hear more from the director as to why he wanted that included.

CHAIR: He did actually make a statement that it was impossible to define. Did you have anything further you wished to say?

Mr IERACE: I wish to say a few words in closing. From a defence perspective, if I take that narrow perspective, then it is a good thing to have trial by judge alone subject to the consent of the accused. It is an avenue that we would use more often. I think it is appropriate to say if one puts oneself in the position of other perspectives, the community and the judiciary, I think there are negative aspects to the notion and it is appropriate to factor them in, in terms of the scheme that ultimately the Committee comes up with, but I would see the proposal, subject to the concerns I have expressed about point 6, as addressing those concerns.

I should perhaps also add—although it is in my written submissions I do not think it has been the subject of a question to me today—that I have some concerns about the British model insofar as it proposes that where a jury trial aborts because of tampering, the trial judge may continue with the trial. I think they are covered in my written submissions and I have accepted that it is a proposition worth considering. But on balance, as I have said in my written submissions, I am opposed to that particular proposal because I think there are too many concerns of bias.

CHAIR: Expediency rather than justice?

Mr IERACE: Yes. In other words, if the trial judge has decided that the accused before him or her has just engaged in jury tampering, it would be very difficult for that same trial judge to continue on the very next day with the balance of the trial before that judge where that judge is the finder of fact and so on balance I think that would be inappropriate. There should be a fresh trial before a judge.

CHAIR: We did not get to all the questions that we sent you. We realise it is extra work but the secretariat will send those to you on notice and we would be grateful if you would reply to those within 21 days. Thank you very much for your evidence today. It has been very useful.

(The witness withdrew)

(Luncheon adjournment)

CHAIR: I welcome you to the first public hearing of the Law and Justice Committee inquiry into judge-alone trials under section 132 of the Criminal Procedures Act 1986. I will not read all the formal processes as you well know them. They relate to broadcasting guidelines, messages and documents to the Committee address mentioned and mobile telephones which we prefer to be switched off. Thanks very much for spending the time and coming to see us today.

PETER BREEN, Solicitor, sworn and examined:

CHAIR: In what capacity do you appear before the Committee today?

Mr BREEN: I am a solicitor in private practice. I appear as an individual.

CHAIR: If you should consider at any stage certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee please indicate that fact and the Committee will consider your request. If you do take any questions on notice the Committee would like your answers within 21 days from when the secretariat sent them. Do you want to make an opening statement?

Mr BREEN: I rely on my written submission. I would be happy to deal with any questions on that. I also have the questions sent to me by the Committee which I have had the opportunity to go through.

CHAIR: Your submission suggests that an increase in the number of judge-alone trials may result in a corresponding increase in the conviction of more innocent people. Why do you consider that to be the case? What are the potential impacts on the judicial system in your view?

Mr BREEN: That observation or comment was made in the context of the Jury Amendment (Verdicts) Bill which was debated in Parliament in 2006. I remember thinking at the time that that was the thin end of the wedge in terms of cutting down or diminishing the number of jury trials. It seems to me that the legislation which the Committee is now considering is similar in that it will result in a reduced number of jury trials. Both of those measures, the Jury Amendment (Verdicts) Act and the proposed legislation that the Committee is looking at, will mean, I think, inevitably that there will be more innocent people convicted. I think commentators agree that between 1 per cent and 2 per cent of the prison population is wrongly convicted, that is, they are innocent. There are no figures to my knowledge about people who are wrongly acquitted, for example. But in terms of wrongful convictions, that is, people who are not guilty of crimes for which they have been convicted, it is between 1 per cent and 2 per cent of the prison population.

The Hon. DAVID CLARKE: But are we not talking about defendants who want to have a judge only trial?

Mr BREEN: Yes, we are. I agree with that but the question that this relates to is whether the legislation is going to result in the conviction of more innocent people. It seems to me from my personal observations of judge-alone trials that judges will not give consideration to the same breadth of issues and the common-person experiences and peer reviews that a jury would give. Judges are over 50, they are mostly male, as I pointed out in my submission and quoting the book by Malcolm Knox *Secrets of the Jury Room*. It seems to me that given that those types of people are making decisions rather than juries it will be more likely that more innocent people are convicted. It is not something I can support with statistics, it is merely an opinion based on my observations of the jury system.

CHAIR: Are you arguing against the current situation with judge only trials as well as the proposed changes to it?

Mr BREEN: Yes, I am a firm believer in jury trials. I have seen enough jury trials and judge-alone trials to form the view that jury trials are a more effective measure for determining the guilt or innocence of the accused. I do not think either is satisfactory and I think there is a strong argument that the inquisitorial system that operates in Europe, for example, is a much better way to convict guilty people and to acquit innocent people. But the system that we have, the adversarial model, which consists of more jury trials than judge-alone trials is a better system than more judge-alone trials.

The Hon. DAVID CLARKE: Do you want to take away the right of the defendant to have a judge only trial if they wish to go down that pathway?

Mr BREEN: They already have the right under the legislation.

The Hon. DAVID CLARKE: Do you agree with that?

Mr BREEN: No, I agree with the status quo. I agree that the Director of Public Prosecutions ought to retain the right to veto that decision to have a judge only trial.

Ms SYLVIA HALE: Why?

Mr BREEN: I heard the comments of Nicholas Cowdery this morning that the Crown Prosecutor represents the community interest. I would have to say that I do support those comments that the role of the Crown Prosecutor is unique. The obligation of the Crown Prosecutor extends much further than convicting the accused. The Crown Prosecutor cannot run a case that is not based on evidence, they cannot speculate and there are lots of restrictions on the way the Crown Prosecutor can bring the case because the Crown Prosecutor represents the community interest.

The Hon. DAVID CLARKE: What about a defendant who has been prejudiced because of adverse publicity and may not want to go before a jury yet their opportunity to have a judge only trial could be vetoed by the Director of Public Prosecutions? What do you say to that?

Mr BREEN: That is a valid observation and there are many cases where in my opinion an accused person is prejudiced by adverse publicity. In those cases I think there are grounds for the accused to apply for a judge only trial. In the present circumstance the prosecutor can object to that. I was surprised that the prosecution objects as much as Judge Blanche noted in his observations and that the Crown Prosecutor has not been acting in the way the judge contemplated when he first introduced the provision, the guideline. I was surprised by that. So if this legislation serves as a balance between the Crown Prosecutor and the defence then that may be a good thing. I was interested to hear the Hon. John Ajaka questioning the Director of Public Prosecutions about that. It occurred to me at the time that a good compromise may be to be able to have the right for the accused to seek a judge-alone trial, and for the Crown Prosecutor also have that right to seek a judge-alone trial, and if they cannot agree then it should go to the judge.

The Hon. DAVID CLARKE: Do you say that the Director of Public Prosecutions should or should not keep the veto or is there a halfway measure that the defence, if there is a veto exercised by the Director of Public Prosecutions, can then appeal to a judge to seek a trial by a judge only or to just have a trial by judge only automatically?

Mr BREEN: I think there is a move to change the present system—and it seems to me the present system works quite well—to have more judge-alone trials. That seems to me to be the fact.

The Hon. JOHN AJAKA: The argument about the problem with the present system is that certain defendants choose to be dealt with by a judge alone with no jury. The Director of Public Prosecutions then comes along and for whatever reason within guideline 24 says, "No, I do not consent." End of story. The defendant must then face trial by jury. The first question that needs to be asked is, "Should the DPP have the right to veto that decision by the defendant?" The new proposed model is basically saying, "Well, no it should not be up to the DPP to veto it but it should go to a judge to make that final decision". Do you believe the DPP should have the right to veto?

Mr BREEN: Yes, I do. I am firmly in the camp with the DPP having the right to veto, make no mistake about that.

The Hon. DAVID CLARKE: Do you say that even if a defendant strongly wants to have a judge-alone trial and his or her counsel believes it is in their best interests you still want the DPP to have an absolute right of veto? Is that what you are saying?

Mr BREEN: Absolutely, no question about that.

The Hon. DAVID CLARKE: Earlier you said if a defendant really wants to have a trial by judge only then they should be able to go before a judge?

Mr BREEN: What I intended to say was that if you are going to change the present situation and take away the veto right of the DPP and you are going to introduce a new system whereby both the DPP and the accused can choose to have a trial by judge alone then in that situation I believe, first, that it should go to a judge for decision. Secondly, I also believe that the judge that decides that question should not be the trial judge. It should be a separate judge because the trial judge is going to be influenced in that argument about whether or not there should be a judge-alone trial. He or she is going to be influenced by the evidence adduced by the parties to argue the cause as to whether or not there should be a judge-alone trial, and that could prejudice the accused.

CHAIR: What is the practicality of that in country New South Wales?

Mr BREEN: I recognise that in country New South Wales there is only one judge but I was interested to hear that Mark Ierace suggested that those applications for judge-alone trials are done on the papers. If that is the case, there is no reason why an application for a judge-alone trial could not be made to another judge in another area based on the papers.

But I think that it is important, certainly in the city, if there is going to be an application for a judge-alone trial that that judge should be a different judge from the judge who is going to be hearing the trial.

CHAIR: But we would have to make it consistent across the State.

Mr BREEN: I understand that but I do not think from a practical point of view that would cause too much difficulty if it is done on the papers. If they had to travel, I agree, it is a problem but it is certainly one possibility. There is no doubt in my mind that a judge is going to be influenced in his or her decision by the application, particularly if there is some problem with the accused that is going to jeopardise their situation and trial and then information has to be put to the judge in the context of the application for a judge-alone trial. I do not think that is a fair situation to the accused.

The Hon. JOHN AJAKA: Are you envisaging a scenario such as a submission would be made by way of an application, a notice of motion—call it what you want—that would go to, for example, the Chief Judge of the District Court, his office, his registry; the Crown would put in its counter submission; a reply would then be put in; and then the chief judge himself or his allocated judge, whichever judge is allocated to look at it, would make the determination on the papers, make a ruling on the papers; and it would go back—so if the person was appearing at Campbelltown, the decision was made by the chief judge at the Downing Centre? The actual judge hearing the case would never have made that determination?

Mr BREEN: Yes, that is right. The judge would not have the knowledge and the information that was given to the chief judge or whoever made the decision.

The Hon. JOHN AJAKA: Those papers remain confidential, a closed file, and then the case runs in front of the judge and a determination is made?

Ms SYLVIA HALE: And that could apply to hearings in Tamworth or wherever you have judges on circuit?

Mr BREEN: Certainly if it is done on papers it could be done that way.

The Hon. JOHN AJAKA: So you would have a system where basically one judge—the chief judge's office, if we can call it that—would coordinate all of these via the chief judge and there is the consistency?

Mr BREEN: Yes.

Ms SYLVIA HALE: Would you favour one or two judges being allocated to that task consistently so that there was a consistency in the decision-making approach or do you think that decision should be rotated among a series of judges?

Mr BREEN: Coming back to the situation that we have at the moment, there is not a great agitation for judge-alone trials. Mr Ierace said there were few applications—he said because they did not have prospects of success. I realise that, but it will be interesting to see what changes result, from a practical point of view, when the legislation is introduced.

Ms SYLVIA HALE: But surely that is the problem with the present situation. Once the DPP changes then we may have the introduction of a totally new set of guidelines and it may revert to the position of Mr Justice Blanch that normally applications for judge-alone trials should be acceded to?

Mr BREEN: Yes.

Ms SYLVIA HALE: So the current situation seems to me to be very unsatisfactory in that it depends upon the particular bent of the DPP and so it would be far better to formalise the process so that in the event of the parties not agreeing there was the possibility of appealing to an independent third party?

Mr BREEN: Yes, I think that is a good idea. If you are going to change the situation, I think it is a good idea to have an independent third party, and one not related to the trial.

Ms SYLVIA HALE: What concerns me is that at the moment the DPP justifies its refusal because it nominates the circumstances, and I think they are attached to Nicholas Cowdery's submission, where it is appropriate to have a judge-alone trial but does not nominate the circumstances where it is not appropriate, because one assumes that it is either judge alone and anything else is going to be jury. If we accept that the horse has bolted, that we have judge-alone trials as well as jury trials, do you think it is appropriate that a set of criteria be established to help determine the situations in which one course of action or another should be followed?

CHAIR: And should those criteria be legislated or in the form they are now? That is the extension of that question.

Mr BREEN: I notice in item 8 of the questions that I was sent it says that , "The proposed model states that, when considering the interests of justice, the courts may refuse an application for a judge-alone trial if the trial will require the application of objective community standards, such as reasonableness, negligence, indecency, obscenity or dangerousness." Those criteria are reasonable and appropriate. I think the Director of Public Prosecutions suggested an additional one, and I would also suggest that another one to be applied is that where there is a substantial proportion of the Crown case represented by the testimony of indemnified witnesses that that also should be a consideration as to whether or not it should be a jury trial or a judge-alone trial.

CHAIR: For the non-legal people can you define "indemnified witnesses"?

Mr BREEN: Since the introduction of truth in sentencing and the electronic recording of police records of interview in the early 1990s it seems to me that there has been a summer plague almost of indemnified witnesses called to give evidence in support of the Crown. These indemnified witnesses are people who are reluctant witnesses but are given indemnities from prosecution and perhaps some other consideration in order for them to give evidence. In those cases juries are most adept, in my experience, at spotting indemnified witnesses who are not only reluctant but who perhaps are not giving the full version of the truth and so those witnesses are better assessed by a jury, in my opinion, than by a judge sitting alone. I would like to see that criterion added to the other criteria for determining whether or not the case should be heard by a judge alone or a jury.

The Hon. JOHN AJAKA: I start with the fundamental proposition about two golden threads: firstly, you are innocent until you are proven guilty, and the onus of proof is clearly on the prosecution's part; and secondly, every person has a right of trial by his or her peers, which in our case is a trial by jury. But if that person, competently advised, being represented by competent counsel, makes a clear determination that they would obtain the fairest possible trial by way of a judge alone, I still find it difficult why the Crown should have the right to say, "No, I veto it, and it is my choice as the Crown, as the prosecutor, to do that", as opposed to the referee—the judge—making that determination.

Mr BREEN: I do not really think the judge is the referee in the sporting sense that we use. I think the judge has a role in directing the jury, and between the judge and the jury, I think that represents the community interest. But the prosecutor is also a part of the community interest. The prosecutor will know things about the

case that the judge will not know and the jury will not know, and the prosecutor will make a decision that it is in the public interest that this case goes before a jury rather than a judge sitting alone. A jury case will extend over a number of weeks whereas a judge sitting alone might deal with the thing in perhaps one week or two weeks.

The Hon. JOHN AJAKA: I accept all of that and that is why I would argue every day of the week that we should never abolish jury trials when a defendant demands his right to trial by jury. But I still find it difficult to relate that where a defendant says, "Because of extreme prejudice I am convinced I would never have a fair trial by jury. I want to be tried by a judge alone", that the prosecutor can still come in and say, "No, I veto it", because there is an implication that the prosecutor thinks he will win the case with a jury but will not secure a conviction with a judge alone. That is the part I am having trouble reconciling.

Mr BREEN: That is your interpretation of what the prosecutor thinks.

The Hon. JOHN AJAKA: Or the implication that some in the community might think that.

Mr BREEN: It is more likely, in my experience, that the prosecutor will have a broader view. The prosecutor may say, "This is a person who overwhelmingly, in my mind as the prosecutor, needs to appear before a jury and have all the evidence ventilated. It is not in the public interest for this to be dealt with simply by a judge who will not attract the same media attention, who will not be able to consider some of the issues that would otherwise be ventilated in a jury trial, and on that basis I, the prosecutor representing the community, believe this matter ought to go to trial". If you do not agree with that role for the prosecutor then it is true that it appears to be ironical that the prosecutor would be arguing, number one, a community interest and, number two, a role in convicting the accused. There does appear to be a conflict on the face of it. But historically the prosecutor has represented the community, and the prosecutor, I believe, in this issue is arguing from that perspective.

The Hon. JOHN AJAKA: The Public Defender who was here before you argues to the contrary. I should indicate for the record that I have not formed a view; I am just trying to play, if I can use the term, devil's advocate. But the Public Defender states the contrary view. His view is that the Crown Prosecutor is a prosecutor; he is not representing the public interest. If anyone is representing the public interest it is the jury as the representative of the community interest and/or the judge. It is interesting that you say the opposite, and that is why I am raising these issues with you.

Mr BREEN: If I could use an example. There are cases where the police will go to the Crown Prosecutor with a brief and say, "This is a case we want you to bring. We think it is a good case; the evidence is strong and you should run it", and the Crown Prosecutor makes an independent decision based on the evidence not to run the case. Then it may go to the Crime Commission, which forms a similar view: "It is a good case to prosecute, we believe the accused is guilty." Again, the Crown Prosecutor may say, "This is not an appropriate case to bring. The evidence is weak. I do not believe in this witness. I think there is a problem with the evidence. I won't bring a case."

Those kinds of decisions are based on community interests; it is not in the community's interests to run a case we are going to lose. It is not in the community's interests to ventilate issues that you have put in this brief. It follows from that, in my opinion, that the Crown Prosecutor also says, "It's not appropriate for this case to be heard by a judge alone. It should be heard by a jury of these people's peers" because the issues that are being canvassed can only be considered by a group of their peers, not by a judge alone. It is a value judgement, but it is one that the Crown Prosecutor makes from the point of view of—

The Hon. JOHN AJAKA: But once he makes that decision, should it not then go to the judge to arbitrate that decision and make a determination—the Crown Prosecutor will argue the case in front of the judge—as opposed to simply giving the Crown Prosecutor the absolute power of veto full stop?

Mr BREEN: Yes, I can see that that is the direction the model is going and that the Crown Prosecutor, for whatever reason, has exercised that veto power consistently and, according to Mr Ierace, unnecessarily.

The Hon. JOHN AJAKA: But he was shocked also to hear that there were 48 judge-alone trials in 2007. He was surprised there were that many.

Mr BREEN: That illustrates the point that judge-alone trials do not get the same publicity or ventilation in the media as jury trials. I am certainly convinced that cases involving paedophilia, for example—

appalling cases as outlined in the prosecutor's submission—should be heard by a judge alone. It is paradoxical in a way that the Crown Prosecutor argues for that because it is contrary to the thrust of his main argument that there should be jury trials. But I think those exceptions exist and somehow should be catered for in the legislation.

The Hon. DAVID CLARKE: You may have heard there was some discussion earlier about who acts in the public interest. Is it the jury? Mr Cowdery suggested that the DPP acts in the public interest. Is it not the public's interest that the law be applied and that justice be done and that, in a way, the jury and the judge are there for that, and we have Mr Cowdery saying that the DPP is there for that? All of these separate entities in their own particular way are there to ensure protection of the public interest. Would you agree with that?

Mr BREEN: I do agree.

CHAIR: And the defendant.

The Hon. DAVID CLARKE: We can take it even further. It may have been suggested that the Public Defender is there for the public interest too. Are they not all there for the public interest in a particular way?

Mr BREEN: Yes. I think that is true, as far as it goes. But the real interest of the Public Defender is to argue the case for the accused. I do not think that can be construed as part of the public interest.

The Hon. DAVID CLARKE: No, I put that aside.

CHAIR: That was me. I was thinking about western New South Wales.

The Hon. DAVID CLARKE: Those other three entities all have an equal part to ensure that they are there for the public interest?

Mr BREEN: Yes. They all have a role to play in the public interest and they all serve a different role. The jury's role is to assess the case from the peer point of view and determine the community's attitude, reasonableness and those sorts of issues. The role of the judge is to direct the jury on questions of fact that might be unclear, on questions of hearsay evidence and so forth. The judge gets involved in the factual situation to that extent. Then the role of the Crown Prosecutor also is a public interest role to ensure the prosecution of reasonable cases, that public funds are not wasted on cases that do not have any prospect of success, that there is no vindictiveness involved in prosecutions, and that it is not just a police case or a Crime Commission case but is one that has been properly and independently assessed by the Crown Prosecutor. There are public interest roles for all those parties involved in the proceeding.

The Hon. GREG DONNELLY: Can we return to the issue raised by previous witnesses that certain matters by their very nature and complexity should be treated as judge alone matters. Do you have a view about that notion that some matters are so complex, difficult or perhaps confronting that we need to almost protect a jury from even considering them? If so, could you elaborate on that?

Mr BREEN: The Director of Public Prosecutions, Mr Cowdery, outlined a particular scenario in his written submission. It is a current case where the facts are horrendous. It involves sexual exploitation of children. To show that information to a jury, according to the Crown Prosecutor, would have such an impact on the jury—psychologically, personally and in every other way you could imagine—that it is not in the public interest for that to happen and the case should go before a judge-alone trial. I actually agree with the Crown Prosecutor and the Office of the Director of Public Prosecutions about those sorts of cases. I also think that a judge sitting alone is better equipped to deal with it than a jury.

Mr Ierace would take a different view and say that that is a good example of a case that should go before a jury so that the peers of the accused decide on their guilt or innocence. It is a question of opinion really and where you come from. I am with the Crown Prosecutor on that. Those cases, even though it is contrary to the thrust of his argument, ought to be dealt with by a judge alone. I do not think you can justify the potential damage to jurors, who often are quite young.

The Hon. DAVID CLARKE: Also, complex technical issues surely should be dealt with by a judge?

Mr BREEN: I am not so sure about technical issues. The jury has had a pretty good record when it comes to sorting out technical issues. Recently I had some experience of jurors dealing with telephone records, for example. I was surprised that the jury was able to sort out the issues and ask some questions about them, but the questions suggested that they understood the issues. Witnesses on technical matters have a duty to bring their arguments into a reasonable and simple form so that juries can understand them.

Ms SYLVIA HALE: It was suggested that one of the benefits of a judge-alone trial is that there would be a much easier flow of question and answer information between the judge, defence or prosecution, and that that process was more constrained with a jury asking questions of a witness. Do you think that is the case? It seems that juries really are not confident in their ability to ask questions.

Mr BREEN: No, but the jury is independent and quite often has a simple view of things. It forces the court—prosecution, defence and judge—to keep it simple so the jury can understand. When there is no jury there is a risk of what is called "group think". Prosecution and defence lawyers get into their jargon and rhetoric. What often happens is that the issue becomes one that is too complicated for the accused. So the accused is not getting the kind of open and simple proceeding before the judge sitting alone as he or she would get before a jury. It takes a lot longer to produce all the evidence and to simplify it; that is why jury trials take longer. By the same token, it gives the person on trial that opportunity of being able to understand the complexities of the case and assess their own position rather than be in a situation where often they are excluded in a judge-alone trial.

Ms SYLVIA HALE: Much of your submission suggests that there has been this greater reliance on indemnified witnesses; juries are much more prepared to discount their evidence than judges. If that is so, does that not suggest that the Crown in even using those witnesses is not acting in the public interest but in the interests of winning a case? That seems to counter your argument that the Crown may be there to represent the public interests but in actual fact is representing the interests of the prosecution?

Mr BREEN: The prosecution gets the brief from the police or the Crime Commission and is constrained by what is in the brief. If the brief includes indemnified witnesses, the prosecution has to run the case on the basis of the indemnified witnesses. There is no sense in which the prosecution makes decisions about that. It is part of the brief or it is not. I do not think the prosecution makes decisions, about who gets indemnities.

Ms SYLVIA HALE: You are saying that their hands are bound by the material put before them?

Mr BREEN: Yes. If an indemnified witness turns out to be a liar, then the Attorney General has to make a decision about whether to give them a new indemnity, or to simply ignore them and not use them in the evidence, or even prosecute them for contempt of court. It is all a government decision; it is not a Crown Prosecutor's decision.

Ms SYLVIA HALE: At least with a judge-alone trial the judge is obliged to produce his reasons for his decision?

Mr BREEN: Yes.

Ms SYLVIA HALE: Does that open up greater grounds for appeal than a conviction from a jury trial?

Mr BREEN: The answer is yes because when a jury makes the decision about the facts, you do not know the basis of its decision. You cannot appeal the jury's decision on the facts. You can say generally that it got it wrong, but you cannot analyse what its decision is because you do not know the reasons for the decision. When a judge sitting alone makes a decision about the facts, the judge has to outline the reasons for his or her decision.

Ms SYLVIA HALE: Is that not an argument in favour of judge-alone trials as opposed to jury trials?

Mr BREEN: If you want more appeals, then it is likely that more appeals will result from judge-alone trials. Having said that, jury trials routinely are appealed as well. I do not know that it will make that much difference on a practical level.

Ms SYLVIA HALE: I am thinking from the perspective of a person who is found guilty. I am not worried about someone found innocent by a jury trial. A person may wrongly be found guilty by the jury or a

judge. Surely it is in everyone's interest that there be opportunities to appeal that decision, given the onerous nature of the penalties to be suffered?

Mr BREEN: Yes. There are opportunities to appeal decisions, but you have to give notice of them as the trial proceeds. Often you will hear people, both defence and prosecution, objecting to certain evidence in the course of the trial on the basis that they are preserving an appeal point. Similarly, before a judge-alone trial there will be objections to various aspects of the evidence, for example, on the basis that "this might be appealed one day". But there are going to be more appeals and appeal points in a judge-alone trial because the judge sitting alone not only considers the law but has to consider the facts as well. The evidence about the facts is going to give rise, obviously, to more appeal points than to a decision just based on the law.

Ms SYLVIA HALE: If I can return to the question of indemnified witnesses. I assume you suggest in your submission that there needs to be some sort of analysis of the outcome of trials involving indemnified witnesses. Do you think that if judge-alone trials are to continue there needs to be some restriction or restraint placed upon the use of such witnesses or should they only be able to be produced in very particular circumstances? Or do you think it is an essential component of the prosecution's case and to eliminate indemnified witnesses could lead to a miscarriage of justice?

Mr BREEN: I think indemnified witnesses serve a role. I think the reality of indemnified witnesses is that the judge has to direct the jury about the nature of their evidence and has to say, "Look, this person may be giving evidence reluctantly. There may be some reward for them for giving their evidence". Those warnings go to jurors so the jury can take account of that in making their decision about the credibility of the witness. Where the judge sits alone—and there are judges who have made comments about this—the judge will say, "Look this person comes along; they lack credibility; they have got an indemnity; they don't seem to be telling the truth."

Those kinds of decisions that a judge sitting alone will make are different than the jury making similar decisions because the jury will be judging them as a peer whereas the judge is judging them on the basis of their experience in the criminal justice system. And the judge, as I said in my submission, may have a tendency to think that this witness, because they are being produced by the Crown, has more credibility than perhaps the jury would give them. That is the only point that I wanted to make about that. Again that is a personal observation. I cannot produce any evidence to support it but it is just as a result of my own experience of the system. Indemnified witnesses, in my experience, are people that juries are reluctant to believe whereas a judge, on the other hand, seems to me anyway to have a different view about them.

The Hon. GREG DONNELLY: I return to the point I was discussing and reflect on the nature of the increasing sophistication of forensic evidence in criminal trials. Is it the situation in trials where evidence is becoming more and more sophisticated the argument could be put that juries are not able to understand the sophisticated evidence and therefore there is an argument for judges sitting alone to consider these matters because they are more capable of comprehending these matters?

Mr BREEN: I am not sure that judges sitting alone are in any better position to assess that sort of evidence than juries. An example is DNA evidence. In the last 20 years DNA evidence has caused a revolution in criminal prosecutions and forensic investigations. DNA evidence is extraordinarily complicated. They talk about alleles and chromosomes, male DNA and all that sort of thing, and to work it out from the analysis given by the pathology section of the Health Department, it is hieroglyphics; you just cannot understand it. Someone has to explain it to you and that seems to be the role of the Crown Prosecutor because the Crown Prosecutor has to bring it down to terms that the jury will understand.

If they cannot do that, then the evidence is not very good, in my opinion, whereas with a judge sitting alone, the judge will be more inclined to say, "Well, this is from the pathology section. They are experienced in scientific research. They know about DNA. We will rely on them." The judge also may not understand the complexity of the evidence. All I am suggesting is that if you are going to convict someone of a crime, then the evidence ought to be brought down to simple terms which a jury understands, and if it is a judge-alone trial, that requirement is going to be lost.

The Hon. GREG DONNELLY: I turn to a couple of questions on notice and ask you to make some reflections. With respect to question No. 4, one of the arguments often raised in favour of judge-alone trials is that judge-alone trials are likely to be completed more efficiently than a jury trial, resulting in time and cost savings for the judicial system. What is your view about that kind of argument?

Mr BREEN: That is a valid argument and it is true. 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, but the reality is that the criminal justice system includes juries and as a kind of underpinning premise the community should be involved in the criminal justice system. To progressively eliminate juries is to change the nature of the criminal justice system in a way that we might never recover from and it might compromise the threads or principles that the Hon. John Ajaka talks about—the Crown bearing the onus of proof, innocent until proven guilty and the fundamental principle of trial by jury.

The Hon. GREG DONNELLY: So your evidence is that a financial imperative should not be something driving this consideration, which is really behind it, in a sense?

Mr BREEN: Yes. It seems to me that that is one of the imperatives driving the proposed legislation; there is no argument about that. Finances are a legitimate concern. Whether they should be used in this way for the criminal justice system is a matter of opinion really.

The Hon. GREG DONNELLY: I take you next to question No. 7, which in some sense you have answered in some of your evidence this afternoon. You might wish to elucidate the impact of the proposed model on community perceptions about the innate fairness of the judicial system if we increase the number of judge-alone trials in our system?

Mr BREEN: I think that if there is a preponderance of judge-alone trials the community will have a reaction to that. The reaction will be that the system is not operating as fairly as it used to. I think the reason for that is that if there is a judge-alone trial and the verdict is unsatisfactory to the *Daily Telegraph*, for example, or to some other media outlet and the media make a big deal of that, that focuses attention on the judge and whether or not we have appointed the right judge and whether or not the judge has the qualifications and experience to be running the trial and that sort of issue. That does not happen in a jury trial because you cannot focus the attention of the media on 12 individual jurors who have made the decision. We never know what the reason for their decision is whereas with the judge-alone trial, we will know from the moment they make the decision what their reasoning is and the explanation for the verdict that they have come to.

CHAIR: Do we know that now?

Mr BREEN: We do not know the reasons for a jury decision.

CHAIR: No, from the judge-alone trials that are happening now?

Mr BREEN: I do not know enough about them. I am like Mr Ierace; I was surprised that there were 48 of them and I just do not have experience of judge-alone trials to know what the outcome is, but obviously they are not getting into the media, not at this stage, otherwise we would have heard of them.

CHAIR: So we need more information from the other States.

Ms SYLVIA HALE: Is there any evidence from the inquisitorial system as opposed to our adversarial system that that results in greater repercussions for judges?

Mr BREEN: Again, the inquisitorial system has the investigative magistrates who actually go to the crime scene immediately it happens. There are the forensic people, the CSI people, the police, the ambulance and the investigating magistrates; they all turn up at the crime scene so they know from the very beginning what the problem is. They direct the police in their investigation—"We want to know about this, we want to know about that; go and check this", and they come back and report back to the investigating magistrates. They then have control of the whole case from beginning right through to conviction of any accused. That system involves two or three magistrates and because of the fact that they are involved from the very beginning, there is less likelihood, according to received wisdom, of innocent people being convicted and guilty people going free.

Ms SYLVIA HALE: But your life expectancy might be considerably shortened?

Mr BREEN: They bypass that problem by various measures.

CHAIR: Thank you very much for coming to speak with us today. We did not get through all the questions so we will send them to you and trust you have the time to send us the answers.

Mr BREEN: Thank you for the opportunity to be on the other side of the fence.

(The witness withdrew)

(Short adjournment)

CHAIR: Welcome to the first public hearing of the Standing Committee on Law and Justice's inquiry into judge-alone trials under section 132 of the Criminal Procedure Act 1986. We have some formal guidelines, which I will not go through because they will steal some of your time. One of those guidelines relates to broadcasting guidelines and a copy of those guidelines is available at the table. Any messages you may have for the Committee should be delivered through the Committee clerks. Committee hearings are not intended to provide a forum for people to make adverse reflections about others. You should not mention individuals unless it is absolutely essential to address the terms of reference. If you have a mobile phone, please turn it off.

DANIEL McKEAN HOWARD, Barrister and Associate Professor, University of New South Wales, P.O. Box 311, Roseville, New South Wales, 2069, sworn:

CHAIR: If you should consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. If you do take any questions on notice the Committee would appreciate it if the responses to those questions could be forwarded to the Committee secretariat within 21 days of the date on which the questions are forwarded to you. Would you like to start by making an opening statement?

Mr HOWARD: Yes, very briefly. I have read through my submission again, having also read all the other submissions that have been posted on the Committee's website, and there is nothing in that I would change. Perhaps if I could just state a few basic issues that motivated me to make the submission that I have. I have a great respect for the jury system. I do see that the gradual chipping away at the instances where trial by jury is held has gone far enough. What we are talking about here now are indictable matters, as you all know. We are talking about the serious matters that can result in people being incarcerated and going to jail. These are the most serious matters.

We already have summary jurisdiction where, of course, there is no jury in the local court. We have pretty well done away with the jury in all civil matters, bar occasionally defamation matters where you might have a jury but it is still very rare. I feel that the issue involved in indictable offences that can result in somebody's liberty being taken away from them is so serious that it is an issue that the community needs to have a major role in. I feel there has been insufficient consideration given generally in our community to appraising people of the privilege of jury duty. I do not think children learn about it in school. They might go to a courthouse on a school excursion but it is all a bit of fun. They are rarely taught some of these really deep things that have emerged throughout constitutional and legal history, and that emerged for very good reasons. I would like to see more participation by more people in juries.

I know that legislation has recently come through amending the Jury Act to broaden the jury pool to include lawyers such as myself and I think that is a terrific idea. The idea behind that is to enhance the quality of the jury and to make it more representative of the community. I find it a contrary thing to that whole policy for this proposal to be suggesting that the prosecutor, who represents the community, should be taken out of the equation. The prosecutor's veto for trial by judge alone, which looking at the other side of that is the prosecutor's right on behalf of the community to insist on trial by jury, that seems to me to be a fundamental thing that should not be lost.

I have set out in my submission some case examples of instances where a prosecutor has a really deep knowledge of a case. We work the cases up—in many cases over many months—and we know many details that are not going to be ventilated in court, which may include the prior antecedents of the accused that are not able to be presented to a court. If those antecedents were presented to a court it may well bias the court against the accused. That is one issue. There are many cases—and this is not just a fantasy—that I have had where I have had witnesses who I just cannot assess, I cannot comfortably read whether or not they have an agenda. Now when that happens I would much prefer a jury trial because I feel that is fairer to the accused, because they may not know and I will not come into court and say: "I do not know about this witness; I have a visceral feeling that for some reason they are not necessarily telling me everything." I am not necessarily going to prejudge that as a prosecutor—it is not a prosecutor's role to prejudge that.

In those sorts of cases juries have a real function to perform. They have a fact-finding capacity based on the collective nature of a jury and its collective wisdom and common sense that a single judge just does not have. No matter how commonsensical, intelligent and decent he or she may be, a judge does just does not have the capacity to look at things from the many angles that a jury does. Over many years of the many jury trials that

I have prosecuted, and defended, I have acquired an immense respect for the capacity of juries to find the facts. Not just in cases involving issues such as reasonableness or standards that should be left to public measure, but just simple everyday establishing what the fact is.

I think juries are particularly good at sussing out experts who are selling junk science—I made that point in my submission. It is very tempting to say: We have a difficult fraud prosecution here. A jury is not going to understand this. We need a forensic accountant to decide this. A judge has been to university and has been practising law and would be much more capable of sorting out the complexities of the issue. I think that is a misunderstanding. I think juries are very good at sussing out poor experts who are peddling nonsense disguised as science. I think 12 people on a case where there is an issue of that kind have a much stronger sifting process than a single judge.

This is with no disrespect to any individual judge at all, but a typical judge comes from a relatively privileged and, often elite, background. I do not think they could be said to be necessarily representative of our community at all. I think if you look at the ethnicity of the make-up of the bench, for example, it would not fairly reflect our population in terms of its composition and multi-ethnicity. That is an issue as well because when you have a jury, particularly with a broadened jury pool that makes an effort to be representative of the community, then any accused who has a guilty verdict brought against them at least knows it was not some well-connected member of an elite who has made the determination but that it was the community of which they are a part.

I think it is easy to underestimate the importance of that. That goes right back to the very origins of our jury system and why it is such an important protection to our basic rights. I have given some examples in my submission about other jurisdictions where judges have been politicised; for example, the situation in Fiji at the moment. I know we are not Fiji but until a few years ago Fiji was trying to be a proper judicial system. Things have really gone awry there. The people have never had a proper jury system there, they have a system of assessors only and they only make recommendations to the judge, so there is no democratic participation of a meaningful kind in decision-making in Fiji.

Of course, the judiciary there was largely sacked a couple of years ago. The same thing happened in Pakistan. Once you take away from the people the absolute right, not the qualified right, to partake in jury trial and to have as a community a crime determined by a community jury, that is the thin end of a very nasty wedge. We may be very comfortable in the knowledge that we are civilised, it is New South Wales, we are not going to go down the same track as those countries, but if you look at the record of history it happens. Movements come, political fads come and strong men or women come and everybody forgets these checks and balances.

The Hon. JOHN AJAKA: I understand the full concept of two fundamental golden threads—that a person is innocent until proven guilty and the onus is on the prosecution and, secondly, you have a right to trial by your peers. In our case that is the jury system. I appreciate what you said but the reality is that what is being looked at now is not a system where we are taking away a person's right to trial by jury if that person wants it. The fundamental question is that if you have a defendant who is properly advised and is represented by learned counsel and that defendant believes the only way he or she will receive a fair trial is by a judge alone, for whatever reason, why should the Crown prosecutor, the DPP, have the right to veto that if the defendant who has the right to trial by jury says, "I don't believe I'm going to get a fair trial by jury"?

Mr HOWARD: My answer to that is that the trial process is an adversarial one. There are two parties: one is the accused, of course, and the other is the community. The prosecutor represents the community. If one looks at the Constitution, and I appreciate that this relates to Federal crimes, section 80 says that trial on indictment of any offence against any law of the Commonwealth shall be by jury. It does not qualify it by saying "if the accused insists on that". The submissions that have been put in by community groups, victim groups, are clearly against this proposal it seems to me, and they are representing the community. The prosecutor represents those people. We have an obligation to see that the community, which has an interest in the victim seeing justice, is properly represented and also has a fair trial.

The Hon. JOHN AJAKA: But the proposed new model, as I understand it, is suggesting that the defendant must consent to the trial by judge alone. If he does not consent it is the end of the story, with a few exceptions. The Crown can then look at the matter and determine that it can consent and basically that is the end of the matter. The Crown can also say it does not consent. As opposed to the current system where the Crown has in effect a complete veto, the new model is recommending that the Crown will go before a judge and argue why it should not be granted, just as the defendant will argue why it should be granted. You have, in effect, an

independent arbitrator, the judge, representing the community, who will make the decision in the best interests of the community and the best interests of justice. Why should the Crown, the DPP, be given again this absolute right of veto under the legislation that a judge cannot override?

Mr HOWARD: First of all, the judge does not represent the community. That is an easy assumption to make, but with the greatest respect that is not right.

The Hon. JOHN AJAKA: I am not saying that is my view. I am playing devil's advocate.

Mr HOWARD: I understand that and I am responding to it. That is a slippery slope. Let us say you have a victim of a rape or child sexual assault who wants a jury trial. They want to tell their community what happened. If the judge decides "No, I am going to hear this", and the accused is acquitted by a judge, how will that victim feel? They have not had their community determine the issue and they will feel that it is not the real McCoy. I think they will respect the judge less. However, if they know the prosecutor has a right to veto and the prosecutor is of the view it is appropriate to veto, that will not happen.

At the moment both sides in effect have the right to veto a jury trial. That is equality of arms in the jury system. That is why you need equality, because if the average victim wants a trial by jury and does not get it and the accused is acquitted they will be unhappy and feel that the system has let them down. If it is a collective jury decision it is a hard knock for a disappointed victim to receive but usually they will accept it because the community has heard it. It also has to do with the inscrutable nature of a jury's verdict. That has an important service to perform. The judge would have to give reasons. A victim whose alleged rapist is acquitted may not agree at all with those reasons, but 12 jurors with the right to remain absolutely mum—in fact, they have to remain mum about how they deliberated—are a safeguard. That is it; it is like an election result. You cannot go around second guessing every single voter after an election. That is the final decision and it is important to have that finality. I think that without that—without wanting to sound alarmist, there are vigilantes.

The Hon. JOHN AJAKA: Let us assume we pass the proposed model legislation. One of the things that have been raised—I will be intrigued by your answer because of your background—is whether it would be more appropriate for the application to the judge to determine whether a trial will be by judge alone to be on the basis of paper submissions to the Chief Judge for each and every case in New South Wales. The Chief Judge would then look at it or allocate it accordingly. A determination would be made and it would go back to wherever on the circuit it was to be dealt with. That relates especially to judges in regional courts who will ultimately hear the trial. Do you have a view on that? It was raised by the last witness.

Mr HOWARD: This is a way of avoiding the problem of having the same judge determining whether it will be trial by judge alone and hearing the case.

The Hon. JOHN AJAKA: Correct, especially somewhere where there will be only one judge for the next six months.

Mr HOWARD: If this proposal were brought in, and I am not advocating for it at all, I think that issue would certainly have to be addressed. It would be problematic if you had the same judge determining both issues. The forum where the issue of judge-alone trial was determined would have to be one where everybody was heard and submissions could be made. The knowledge that a prosecutor acquires about a case in working it up to present it can at times be quite profound. There can be issues. One I have mentioned is alibi. At the moment the law is that if somebody raises alibi, the police can test out the alibi by interviewing the alibi witnesses or other witnesses, or they might find other evidence such as a closed-circuit television camera that proves that the person was at the scene of the crime and not where he said he was. The prosecution is not obliged to disclose those issues in their case because to do that would destroy the effectiveness of that as cross-examination material against a false alibi.

Imagine having a voir dire before a judge on the issue of whether the trial should be judge alone or not when the prosecution feels these alibi issues are ones that go to the credit and credibility of witnesses that a jury should determine, not a single judge. You would have to ventilate your evidence in front of the judge and the defence would know what it was, and that would be disastrous for alibi cases. That is just one example. Prosecutors have a deep knowledge about the cases may prepare. Really and truly, prosecutors may not be the most popular people in the world they are a pretty professional outfit. I have been at some pains in my submission to mention the standards we need to comply with, and they are rigorous, they really are rigorous. I have been teaching this course—I am not doing it now—for the past couple of years, a Masters in Criminal

Prosecution down at Wollongong; training people who earnestly want to be good prosecutors and do things ethically and correctly. We are a profession and we have some unique functions to perform, and I do not think any of these submissions have raised that issue. I think it is really important as a prosecutor of many years that that was an important point to make.

Ms SYLVIA HALE: In your evidence and submission you say that the prosecutor represents the public interest. But underlying that seems to be an assumption that the prosecution of the public interest is consistent and would be consistent throughout in determining whether or not to veto judge-alone trials. But when the judge-alone trials were introduced, the then Director of Public Prosecutions, Judge Blanch, as he is now, said the assumption should be that normally any request for judge-alone trials should be acceded to, whereas when Nicholas Cowdery took up the position he completely reversed that, so much so that judge-alone trials seem to be the exception now because the rate of rejection has been such that many public defenders, the defence, do not even bother to apply. It seems to me you have got from the position of the prosecution a flip-flop and possibly when Nicholas Cowdery is replaced there will be a further development, so to suggest that somehow they have this ongoing public interest seems to me, in the face of reality, to be shifting grounds?

Mr HOWARD: People come at this from very different directions. I think probably those two gentlemen had slightly diverging views as to the proper way to come at it. One might say that one view is more cost efficient and the other is more expansive in terms of keeping the community involved. You really have to go to a deeper level of what was motivating those changes in the guidelines. I have read Judge Blanch's guideline which was annexed to the letter he wrote to the Committee and I recall that guideline, in effect, from when I first started prosecuting when I was a Crown prosecutor. It does not say categorically in its terms that the prosecution must consent. Certainly the legislation does not say that. The legislation requires the consent of the prosecutor before a judge-alone trial can be had. I think the legislation was certainly open to the interpretation Mr Cowdery put on it, and there are lots of other jurisdictions, for example, in Canada—and perhaps I should table this, their criminal code section 568, which provides that any indictable matter which carries more than five years imprisonment, the Attorney General through his or her prosecutors may require a jury trial.

They can refuse a judge alone. It happens to be the case in Canada that most trials are done by a judge alone but the right of the prosecution, if it is a serious matter and carrying more than five years, the right of veto is still there. There are a number of jurisdictions in Australia where we have no judge-alone trials at all. Minds differ about this, but to my mind it comes back to we have an adversarial system, you need equality of arms, both parties need to have equal procedural rights, and the prosecution represents the community, the judge does not. So, in that adversarial system we put in both sides of the argument to achieve hopefully the best outcome by balancing the adversarial viewpoints, I think the prosecutor is performing a very important role on behalf of the community.

Ms SYLVIA HALE: If you have a prosecutor opposing a judge-alone trial on one set of grounds and another prosecutor opposing it for an entirely different set of grounds, which are not necessarily consistent—one may be more interested in efficiency and the cutting down of costs and the other may want to ensure there is a trial by jury—given the diversity and the potentially conflicting interests, do you not think that it evens out from the point of view of the accused person to say I wish to nominate a judge-alone trial because I feel this will enhance my opportunities of being acquitted, and that given the whole weight of the legal system that often that person has to counter, that they should be given that ability?

Mr HOWARD: But that is at the cost of the community having the right to insist on a jury trial.

Ms SYLVIA HALE: But what is the community's interest when one set of prosecutors says the community's interest is this and another says the community's interest is that?

Mr HOWARD: I understand what you are saying. I think that is where the prosecution guidelines are important. It may be that the prosecution guidelines should be streamlined or made more comprehensive. I think, like any profession, prosecutors need continuing professional development. For a few years I was engaged in professional development for Crown prosecutors, and that is really important. But I think consistency, which I think is where you are coming from, is clearly important. If two different prosecutors have seen the same brief and have different views about it, I think that there should be a process for them to discuss it and perhaps take it to a third senior prosecutor to decide what is the public interest, what is the community's interest in this case. I think if it was made on the basis of some flippant prejudice of an individual prosecutor that would be outrageous. But, again, this comes back to the professionalism of the prosecution service, and that is not something to be scoffed at or forgotten. In my experience, most Crown prosecutors take their jobs very

seriously. They need to sleep well at night. But maybe that is an area where more comprehensive guidelines and proper continuing professional development for prosecutors would have a role to play.

Ms SYLVIA HALE: If those guidelines were available, surely they should also be available to the defence to argue the case why they want to go to jury or to judge alone, hence these criteria and therefore that is how the trial should proceed?

Mr HOWARD: There will be cases that do not have the community standard such as reasonableness or ordinary person. There will be many cases of the kind I mentioned before where the prosecutors, for reasons they cannot necessarily even articulate for fear of prejudging them, would prefer a trial by jury, and the other examples I give such as where experts are involved or there is an alibi case. You cannot disclose those things to the defence. To have a voir dire before a judge to argue the issue that would result in their disclosure would be a seriously backward step to justice.

The Hon. LYNDA VOLTZ: I am wondering, because it is the second time you have raised an alibi case, if you have a record of interview by the police where someone has given an alibi and you have a closed circuit television showing they were at the scene of an offence, why is that such an issue given the record of interview and the closed circuit television will show exactly that anyway, that someone has given a record of interview saying they were at this spot and the closed circuit television shows they were. Do offences not rest on the proof the prosecution presents before the courts?

Mr HOWARD: Certainly. Closed circuit television is probably not the best example but let us say there was another witness the defence was going to call who said, "I was with him and he was with me at my place," and you have closed circuit television of that witness elsewhere at the time, that is the sort of material the prosecution would not be required to disclose. We would be required to disclose closed circuit television showing the accused at the scene of the crime, so perhaps my initial example was not correct.

The Hon. LYNDA VOLTZ: But would they not also have the witness statements? Do you not provide witness statements?

Mr HOWARD: You provide witness statements but if it is a witness the defence indicated they would be calling in support of an alibi, the prosecution is not obliged to disclose other evidence that undermines the alibi witness's testimony. In other words, we can keep that in reserve to cross-examine that person with.

The Hon. LYNDA VOLTZ: With regard to your debate about the ethnicity and the breadth of the judiciary, it seems to me the main point we are discussing here is whether the Director of Public Prosecutions decides whether it should go to a judge alone or whether the judiciary—I am not sure there is a difference between the ethnicity and make-up of the judiciary and the Director of Public Prosecution's office?

Mr HOWARD: That would be a hard one for me to answer. I know the Director of Public Prosecutions has a very solid and equal employment opportunity policy, and really we do not have a public process for the appointment of judges beyond them being appointed by the executive in New South Wales. I think that is a problem, I do. That is another issue, but that is a problem.

The Hon. LYNDA VOLTZ: But in terms of breakdowns of the two groups, you would not be aware whether there is a diversity in the make up?

Mr HOWARD: I have never seen a study or a survey done but from my own first-hand observation I would say the Director of Public Prosecutions has lots of different ethnicities, especially if you include the spectrum of solicitors who are involved in instructing Crown prosecutors in trials, and they also would play a part in proceedings for trials by judge alone. It has a good variety.

The Hon. LYNDA VOLTZ: But they have all come through the legal profession?

Mr HOWARD: Obviously they are practising lawyers, they would have, yes.

The Hon. LYNDA VOLTZ: So they have all generally got—I mean you do have a diversity amongst the judiciary as well, do you not? Not as much as I would like to see.

Mr HOWARD: Yes, that is the only point I am making too. It tends not to be that diverse a group.

Again, I make no criticism of any individual.

The Hon. LYNDA VOLTZ: The only reason I was wondering about it was because you had raised Fiji and Pakistan and it is an issue that I raised earlier with Nicholas Cowdery in relation to the imprisonment rates and what communities those people actually come from and high incidences in certain communities. Yet you go to a jury that may not necessarily be reflective of the community in which those people grew up. I know Mr Cowdery said tongue in cheek that if you go to a jury at Campbelltown, probably they all get off, and it may be reflective of that community as opposed to anything else.

Mr HOWARD: That can be a problem. I appeared at Campbelltown for a couple of years and it struck me that that may well have been a problem. I know when the jury pool was short they used to include people from an adjacent shire in the time I was there and the results started to change, but those I think are issues of expanding the jury and I think the recent amendments to the Jury Act are a move forward in doing that.

The Hon. LYNDA VOLTZ: Would you say that is their peers, if you are moving to take in a different shire and it noticeably changes the nature of the juries that you are getting?

Mr HOWARD: I think a peer group in our society these days does not have to be from their locality. It can be someone from the broader metropolitan area, with newspapers and information and the pretty good standard of education that we have in New South Wales.

The Hon. LYNDA VOLTZ: But the reality is in New South Wales, and the My School web site is indicative of this, they group people socio-economically based on education levels and incomes as opposed to geographic levels of where people live because they see them as like communities.

Mr HOWARD: I think there may be arguments for drawing juries more broadly from different communities in the metropolitan area, for example, and bring them into the Downing Centre for jury trials. I am all in favour of having as wide a ranging jury pool as possible. Indigenous people are very much under represented. The Bar Association made a submission that I had a hand in to the Law Reform Commission about that. In Western Australia indigenous persons comprise about 75 or 78 per cent of people in juvenile detention.

The Hon. LYNDA VOLTZ: Yes, but you could hardly have a person who has grown up in Moree, that a person from Cronulla could understand what their situation has been. In terms of full depth of understanding, to some extent judges at least have seen cases over a number of years and have prosecuted or defended for a long time and have some understanding of the history of cases that come before the court.

Mr HOWARD: What you are losing though is the community sense of participation in the process. I come back to the victim and the family, and it is interesting that the two submissions that have been made by victims groups are against this proposal. Submissions have been made by plenty of other groups that when you think about it—let me put it this way, if all I ever did was defence work and I did not really care about anything but the result that I got for my client, then of course I would want this amendment to come in, because it would mean I could always choose—

The Hon. LYNDA VOLTZ: The Department of Public Prosecutions approved 46 trial by judge alone cases last year.

CHAIR: In 2007.

The Hon. LYNDA VOLTZ: Sorry, in 2007. So obviously the Department of Public Prosecutions themselves are approving trial by judge alone. What we are doing is shifting from whether they should be able to decide the procedure or whether a judge should arbitrate on that.

Mr HOWARD: I am not sure I understand your question.

The Hon. LYNDA VOLTZ: What I am saying is: your original concern with the judges doing it was about the diversity of judges as opposed to the current process where the Department of Public Prosecutions is actually the arbitrator of whether a judge-alone trial will go ahead. I am sorry, I know we diverted a bit in terms of juries but—

Mr HOWARD: Sorry, we are confusing two things here. I think my concern about lack of diversity in

judges is not on determining the question of judge alone, so much as actually hearing the trial. In other words, I think juries should generally be the position that we adopt in jury trials. Does at that clear that up?

The Hon. GREG DONNELLY: Just one question that I had. We have had various witnesses today saying or reflecting on this notion of who reflects the community in this process. There is a view that judges do that. There is a sense that the prosecutor represents the community. The jury itself, it has been put, represents the community. For my interest, from a theoretical point of view, what is taught in jurisprudence in law schools about who actually represents the community in our criminal justice system, just so I understand? I am not clear who in fact is representing the community. Is it in fact an amalgam of all three or is it in fact one that particularly has that role of representing the community?

Mr HOWARD: Certainly in my career I have always regarded it as being the role of the prosecutor and that is what I have certainly taught in the courses that I have taught. It has been in my discussion and understanding that I have had with colleagues over the years, that it is the prosecutor who represents the community. The Department of Public Prosecutions has a witness assistance service. We are the ones who have to deal with the victims and the witnesses and we know a lot more about them than a judge would know on a voir dire, determining the question of whether the matter should be judge alone or not, and that is because it is an adversarial system and you need somebody to champion the community and the victim, in total fairness of course to the accused. That is a huge part of our prosecutorial message. All the accused and his lawyers are going to be concerned about is getting him or her off. That is all that matters. They do not care about the broader community in the process, whereas prosecutors are ministers of justice, which is a phrase often referred to in the context of prosecutors. Really, most prosecutors I know take that responsibility very seriously.

The Hon. GREG DONNELLY: Can I take you to question number 4 on notice of our questions and perhaps invite you to make some reflections on it. I will just read the first part:

> The proposed model states that, when considering the interests of justice, the courts may refuse an application for a judge-alone trial if the trial will require the application of objective community standards, such as reasonableness, negligence, indecency, obscenity or dangerousness.

Would you like to comment on that?

Mr HOWARD: Yes, I think that is a large question. There would be other issues that should be considered. These are community standards. The question seems to be focussing on different community standards, ordinary proof and reasonableness, et cetera, but I think if a model were to come in, it might also be important to single out certain types of cases - again, I am not advocating this for one minute - certain types of cases that should presumptively be before a jury. For example, child sexual assault is not covered in any of those. Well, "indecency" I suppose could cover it. "Indecency" is more a legal definition of what is an act of indecency. It would not necessarily come into a legal definition of whether a child had been penetrated in a sexual assault. Those are cases where the interest of the victim to have the community decide an issue can at times be incredibly important. I think there would be classes of cases, not just objective community standards to which you could put a word like "reasonable" or "ordinary", particularly classes of cases in which there should be, if this were to be brought in, a presumption against it being done any way other than by a jury trial. That is an attempt to answer part a.

"Offences that are more suited to judge-alone trials": I think historically when judge-alone trials were first brought in, it was thought that—if you look at the Law Reform Commission paper at the time in 1986, they were talking about cases that were really just dry old matters of law. There was no real issue of hard fact or conflict of versions or credibility to be determined. That was one area that they thought was clearly suited to a judge alone, and indeed, I think those were cases that usually there would be a consensus by the prosecution. I do not believe that cases that are complex because of expert issues, like DNA or complex accounting issues, should be removed from juries. I think it is very important that the legal process is able to remain in touch with the community. It has to work at making the process comprehensible to the community. Once we lose touch with the real people out there by having too many judge-alone trials, we will lose touch with them, and I think the law will lose respect.

The Hon. GREG DONNELLY: Question number 5, perhaps in some sense you have touched on it:

> What would be the impact of the proposed model on the community's perception of the fairness of the judicial system, particularly if there was an increase in the number of judge-alone trials?

Mr HOWARD: I feel strongly that the community would sense that it was abandoning its right to a jury trial, its absolute right to jury trial. The example I gave earlier of the sexual assault victim who wanted a jury trial but got a judge alone and the accused was acquitted, feeling like they did not really have a fair shake of the full community hearing the case. The perception would be that they were not having a fair participation in the system. I think that is why you have got these victims homicide groups and the victims groups against this proposal. They know what it is like to be on that—

Ms SYLVIA HALE: You do not think their motivation is just to lessen the rights of the accused, that they have a self interest in constraining the extent to which the accused can put their case or argue it?

Mr HOWARD: I do not read their submissions that way. One might argue that some people in some of those groups feel very strongly that the accused should have less rather than more rights. I am not singling out any group or any individual, but I think that the submissions they have made are very heart-felt and very realistic in terms of people who have had actual contact with victims or the family of a victim wanting there to be a say by the prosecutor, and they support Nicholas Cowdery's position, support the prosecutor, know that the prosecutor would listen to them and consider them at least and still have regard to the details. Otherwise there will be a sense that it is going too far the accused's way. Again, without singling out any single submission, it does not surprise me that a number of submissions that come more from people who would be more likely to defend are more supportive of this proposal, because they have got nothing to lose.

The Hon. DAVID CLARKE: Mr Howard, you support the DPP's present right to veto a defendant choosing to have a judge only trial.

Mr HOWARD: Yes, I do.

The Hon. DAVID CLARKE: But the DPP also favours that, under the proposed model, the DPP should be able to apply for a judge only trial with no power for the defendant to object. Do you support the DPP on that as well?

Mr HOWARD: I do not. I do not support that. Again, coming back to the procedural equality of the two sides of our adversarial system, which is fundamental to criminal justice, if the DPP has a right of veto, so should the accused—no questions asked around that, as far as I am concerned.

The Hon. DAVID CLARKE: The Hon. John Ajaka referred to the two golden threads that go through the system of justice. If what the DPP has agitated for were to happen, in a way that would be a destruction of one of those golden threads, would it not?

Mr HOWARD: I think it probably would be; which is why I feel that if the defence wants a jury trial, he or she should have it. Heaven forbid that if any of us would be facing a trial, but we would want that option. I can see where he is coming from, though. He mentioned one case that happened quite recently which was, I gather, an appalling case that included some horrendously confronting, offensive material. I can see where he is coming from, but when it comes down to procedural equality, if the accused wants a trial, the accused to gets a trial, in my view.

The Hon. DAVID CLARKE: Thank you. There has been some discussion today on who represents the community. You come down on the side that the prosecutor represents the community. If that is the case, whom does the jury represent?

Mr HOWARD: The prosecutor represents the community in presenting the charges in the interests of the community and in fairness to the accused. The jury is the community, but the difference is that we are just presenting their case: they are deciding it. That is the division of labour. I think that function—of society participating in the criminal process of serious matters that will result in incarceration of people—is just so important; so important.

The Hon. DAVID CLARKE: In a way, the judge represents the community because he represents that the system of justice should be applied as it is meant to apply. In a way, all three, in different aspects, represent the community.

Mr HOWARD: Over centuries they have acquired very distinct roles. There is the prosecution role, there is the defence role, and both officers of the court have a duty to the court to be fair, to be truthful, and not to cite bad law.

The Hon. JOHN AJAKA: Not to mislead.

Mr HOWARD: Not to mislead. But the jury is just there to make a decision on the facts and to follow the judge's directions of law.

The Hon. DAVID CLARKE: But you also referred to the prosecutor being there to champion the victim.

Mr HOWARD: I think I might have corrected myself when I said that because they are not our clients. The victim is not the prosecutor's client. The victim is a witness in a case.

The Hon. DAVID CLARKE: So what word would you use in place of "champion"? In other words, if you wanted to say something about the connection between the prosecutor and the victim, how would you state that?

Mr HOWARD: I think the best way to put it is that the victim is a primary witness of the prosecution. There is obviously some important relationship there, but it is not one of client and lawyer at all. That is where this concept arises of a prosecutor as a minister of justice. If you look at cases about, or textbooks about, prosecution and the role of the prosecutor, that phrase comes up quite a bit. The prosecutor has a role to be fair as a minister of justice.

The Hon. LYNDA VOLTZ: In the Victims of Crime Assistance League [VOCAL] submission, they say that the guidelines make specific provision for the welfare of the victims of the offence.

Mr HOWARD: I am sorry, what do they say?

The Hon. LYNDA VOLTZ: The Crown, in determining when it is appropriate to seek a judge-alone trial, made specific provision in the guideline for the welfare of the victims of the offence. Would you say that was a correct interpretation of the Office of the Director of Public Prosecutions position?

Mr HOWARD: Not exactly. In relation to welfare, the DPP has a witness assistance service, which makes sure that they are not traumatised anymore than necessary by the process and that they understand what is expected of them as a witness. But in terms of suggesting what their evidence might be—

The Hon. LYNDA VOLTZ: No, I was not considering that at all. I was suggesting that in particular offences, the welfare of victims may be better served by not having to discuss the issue in front of 12 people, but before one person as a judge sitting alone.

Mr HOWARD: I see. If you have a victim who was going to be traumatised by that process, that would be a very strong reason for the prosecution to want a judge-alone trial. The prosecution does not have a right to a judge-alone trial, but you might well say to the accused's counsel, "Look, would you consider a judge alone in this case?"

For traumatised victims, there is a lot of improved procedure with closed-circuit television, the use of statements as evidence-in-chief, and cross-examination occurring from a remote location via closed-circuit television in sexual assault cases. There have been a lot of procedural improvements over the last few years within that area. Sure, somebody has to take the welfare of the victim into account, but welfare not in the sense of doing everything to win the case at all costs. The welfare of the victim is making sure that they are comfortable with the procedure and with the process, and they are not traumatised by it.

CHAIR: Ms Hale, whatever your question is, you will put it on notice.

Ms SYLVIA HALE: On notice, you clearly have an interest in people with psychiatric problems who appear before the courts.

Mr HOWARD: Yes.

Ms SYLVIA HALE: Would you say, when the prosecution is not necessarily aware an accused person has those problems but the defence knows that if the defendant has to sit through a prolonged court case their demeanour or their behaviour could really prejudice the jury's view of their guilt or innocence, that there would be a very strong argument for a judge-alone trial, should the defence think it is in the best interests of the accused?

CHAIR: That will be documented and posted to you, with questions on notice.

Mr HOWARD: All right.

CHAIR: You offered to table a document. I would just like to say that on this specific issue this has been a very enlightening day for all of us, even those of us who have had massive experience of the law. You have certainly contributed to that, so thank you very much indeed for attending today.

The Hon. JOHN AJAKA: It was a great contribution, thank you.

CHAIR: Thank you very much. You will receive questions on notice, and we have allowed three weeks for you to respond.

Mr HOWARD: Thank you. I have a couple of jury surveys that you probably have seen.

CHAIR: It would be excellent if you could table those.

Documents tabled.

CHAIR: Thank you very much for your help, and thank you for your interest.

(The witness withdrew)

The Committee continued to deliberate.
