JURIES: WHO NEEDS THEM?

In the dying days of 2011, it was announced that former Commonwealth prosecutor (and of course, former NT Chief Justice) Brian Martin QC will preside over the murder trial of former WA prosecutor Lloyd Rayney. Martin (BR) J looks set to complete an extraordinary and perhaps unprecedented trifecta: three "trial of the century" cases in three jurisdictions. But unlike the Snowton and Falconio matters, this time Martin (BR) J will sit unassisted – or, if you like, unencumbered – by a jury.

In four Australian jurisdictions (NSW,[1] ACT,[2] SA[3] and WA[4]), provisions exist for the trial of serious offences by judge alone. Is it time the Northern Territory joined with the plurality?

Although the details vary, judge alone trials in Australia are typically regulated as follows:

- The right to a trial by jury is not impaired: judge alone trials can only proceed if, after obtaining legal advice, the accused (and, in a joint trial, all the accused) so consent.
- Procedural rules apply to prevent the practice or appearance of "judge-shopping".
- If the court considers it is in the interests of justice to do, it may allow an application by the accused for a trial by judge alone despite the crown's opposition.
- The court may refuse to make an order for a trial by judge alone if it considers that the trial will involve a factual issue that requires the application of objective community standards.

Following recent amendments to the NSW legislation which removed the pre-existing right of the crown to veto an application for a judge alone trial, there has been some lively judicial commentary on these issues. District Court Judge Berman QC, in allowing a contested application for a judge alone trial, observed:[5]

> [6]… It has to be said that most judges do not like the idea of trials by judge alone, but they are – and have proved to be – an efficient way of determining guilt or innocence. I do not understand there to be any challenge to the proposition that a judge alone trial is quicker and more efficient and more flexible before a jury.
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> [7]… Not only do judges tend to understand points the first time they hear them, they have the ability to say to an advocate "*I understood that the first*

[1] *Criminal Procedure Act 1986* (NSW), ss132, 132A.
[2] *Supreme Court Act 1933* (ACT), s 68B.
[3] *Juries Act 1927* (SA), s 7.
[4] *Criminal Procedure Act 2004* (WA), s 188.
[5] *R v Markou* [2011] NSWDC 25.

> *time*". I use that as a simple example of how a judge alone trial tends to be quicker.

Berman J also noted that the verdicts of judges sitting alone must be supported by reasons (and are, in contrast to jury verdicts, scrutable), which he found enhanced the interests of justice.[6] However, the unpopularity of judge alone trials with the judiciary is commonly attributed to this very feature, for two reasons. Firstly, the business of writing the judgment can be onerous, particularly if time has not been allowed to a busy judge to undertake this task by the powers that be. Secondly, there is a concern that the giving of reasons may lead to a flood of appeals and retrials.

Nevertheless, there are some powerful arguments to the contrary. The 2011 trials of gynaecologist Graeme Reeves, salaciously dubbed by the media as "the Butcher of Bega", exemplify how a judge alone trial can be an effective remedy in a case affected, as that one was, by extremely "malignant pre-trial publicity".[7] Judge alone trials can avoid the problems of a jury being distracted or prejudiced by either particularly revolting and shocking evidence, or particularly technical and abstruse evidence. The WA provisions spell this out, providing that the court may order a judge alone trial if it considers "that the trial, due to its complexity or length or both, is likely to be unreasonably burdensome to a jury".[8]

Recently in Alice Springs, two men jointly charged with murder unsuccessfully applied for a change of venue because of adverse pre-trial publicity.[9] Had the option of a judge alone trial been open, this would have been a far more expedient and economical remedy for the mischief they were seeking to address. Indeed, the availability of judge alone trials in Alice Springs, where there are facilities for only one jury to sit at a time, would provide a significant opportunity to reduce our chronically clogged court lists.

Former NSW DPP Nick Cowdery QC has been associated with a tendency which developed amongst NSW prosecutors to oppose applications for judge alone trials.[10] But what if he (like Lloyd Rayney) found himself in the dock, instead of at the crown end of the bar table?

> 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.[11]

Fair enough.

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[6] Ibid, at [9].
[7] *R v GSR (1)* [2011] NSWDC 14 at [26] per Wood J.
[8] *Criminal Procedure Act* 2004 (WA), s 188(5)(a).
[9] *Woods & Williams v The Queen* [2010] NTSC 36.
[10] Mark Ierace QC, "Trials in NSW by Judge Alone: Recent Legislative Changes", Conference Paper presented at "Criminal Justice in Australia and New Zealand: Issues and Challenges for Judicial Administration" (Australian Institute for Judicial Administration, Sydney, 9 September 2011), accessed at http://www.aija.org.au/Criminal%20Justice%202011/Papers/Ierace.pdf. Most of my NSW citations are drawn from this paper.
[11] Report of Proceedings before Standing Committee on Law and Justice, "Inquiry into Judge-Alone Trials under Section 132 of the *Criminal Procedure Act 1986*", Sydney 11 August 2010, p. 17; cited in Justice Peter McClellan, "Looking Inside the Jury Room", *Law Society Journal* (May 2011), 69.