

## CLAUSE NOTES

### *Criminal Code Amendment (Judge Alone Trials) Bill 2021*

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| Clause 1 | <b>Short title</b><br>Specifies the name of the proposed Act.  |
| Clause 2 | <b>Commencement</b><br>Provides that the Act commences on proclamation.  |
| Clause 3 | <b>Principal Act</b><br>Provides that the Principal Act that is being amended is the <i>Criminal Code 1924</i> .   |
| Clause 4 | <b>Principal Act amended</b><br>New section 36IAA 'Trial by judge alone' inserted into Schedule 1 of the Principal Act. This new section: <ul style="list-style-type: none"><li>• provides that an application for an order to have a criminal trial by a judge alone without a jury can be made by a party to the proceedings, that is the accused person or the prosecution. Where there are multiple accused, each accused person will need to make an application;</li><li>• specifies in subsection (2) that when making an application for an order for a trial by judge alone the following apply:<ul style="list-style-type: none"><li>○ it is to be made within three months immediately from when the accused person is committed to the Supreme Court for trial; and</li><li>○ it can only be made by the prosecution if:<ul style="list-style-type: none"><li>▪ the accused person has consented (that is, the accused has given their informed consent) to the proposed order; or</li><li>▪ as part of the application, the prosecution specifically ask for the Court to make an order without the consent of the accused person on the basis that the prosecution believes there is a basis for the Court to be satisfied that, in accordance with subsection (8), there is a significant risk that an offence under s63 "Influencing or threatening jurors" of the <i>Juries Act 2003</i> may occur if the accused person is tried by a jury; and</li></ul></li><li>○ it cannot be made for an offence against a law of the Commonwealth;</li></ul></li><li>• provides in subsection (3) that an application for an order may be considered by the Court if it is outside of the prescribed three month period from the date of committal. The Court is to be satisfied that the applicant has a reasonable explanation for the delay in making the application. For example, an accused person needs to show that they have a reasonable excuse for not having made the application within the specified time period.</li></ul> |

- affords in subsection (4) the Court a broad discretion so that the Court may inform itself in any way it considers appropriate when determining whether to make an order for a trial by judge alone;
- specifies at subsection (5) the factors that the Court must be satisfied of to be able to make an order for a trial by judge alone:
  - the accused person has given informed consent to the proposed order;
  - that it is in the interests of justice for the order to be made;
  - where an accused is charged with two or more charges that are to be tried together the order is to be made for all of the charges; and
  - where there are multiple accused to be tried together, each accused must have made an application and given their consent (their informed consent) to the proposed order;
- details the consent requirements in subsection (6) for the Court to be satisfied that the accused person has provided informed consent to a proposed order for a judge alone trial, including:
  - that the accused person understands the nature of the proposed order and the implications of an order if it is made;
  - that the accused person:
    - has received legal advice in respect of the effect of the proposed order if it is made by the Court; or
    - was offered or advised to obtain legal advice but refused the legal advice; and
  - that the legal practitioner who provided the legal advice to the accused person has certified, in writing, that this advice has been provided to the accused and their belief as to whether the accused's persons consent is being given freely.

A legal practitioner providing legal advice to an accused person about a proposed order only has to attest to giving the legal advice, not the nature of the advice. This protects legal professional privilege in the advice;
- provides in subsection (7) that when the Court determines whether it is in the interests of justice to make an order for a trial by judge alone the Court:
  - is to take into account whether the crime (to which the order relates) concerns an element or question of fact that is more appropriately determined by a jury to ensure that community standards and opinions are reflected. The community standards include, but are not limited to, questions of reasonableness, dangerousness, indecency, negligence or obscenity; and
  - has discretion to take into account any other matters considered relevant. For example, the Court may determine that having considered a factor such as adverse publicity that is prejudicial to a

fair trial, that it would be in the interests of justice to make an order for trial by judge alone;

- provides at subsection (8) that if the Court is satisfied that there is a significant risk that an offence under section 63 'Influencing or threatening jurors' of the *Juries Act 2003* may occur if the accused person is tried by jury, then the Court does not have to be satisfied of the requirement for the accused person to give their informed consent when deciding whether to make an order. This includes circumstances where there is more than one accused being tried together for the crime, and that the risk of the offence arises from one or more of the accused;
- specifies in subsection (9) that references in the *Criminal Code* or any other Act to a trial by jury include a reference to a trial by a single judge to ensure consistency;
- subsection (10) states that unless exceptional circumstances exist, only one application for an order can be made for a crime; and
- provides in subsection (11) that the Court can revoke an order for trial by judge alone if there was false or misleading information that formed the basis of an application or the Court has reasonable grounds to revoke it. An applicant will have to apply for a revocation as there is no power for the Court to unilaterally revoke the order.

New section 361AB 'Appeal to Court of Criminal Appeal in respect of application for trial by judge alone' inserted into Schedule 1 of the Principal Act.

This new section provides:

- that an accused person or the prosecution may appeal a decision of the Court to make or refuse to make an order for trial by judge alone;
- an accused person's ability to appeal where the Court has made an order is limited to where the order was made without the consent of the accused person. This reflects that an order made with the person's consent has no need for appeal provisions by that person; and
- any appeal under the new section 361AB is to be heard by way of a new hearing.

New subsection (6) is inserted in section 383 'Verdict' of the Principal Act setting out the law and procedure applying in a trial by judge alone. New subsection (6) provides that where an indictment is tried by a single judge:

- a judge may return any verdict or make any finding that a jury may have made if the indictment was tried by a jury;
- before returning a verdict or making a finding, a judge is to take into account any warning that would be given to a jury, and use the same principles of law and procedure used by a jury when returning the verdict or making the finding; and

- if the judge returns a verdict or makes a finding, a judge is to record in the judgement for the trial the principles of law applied, and the findings of fact relied on, by the judge when returning the verdict or making the finding.

Inserting new paragraph (bb) in section 401(2) of the Principal Act to:

- expand the appeal rights of the Crown for a trial by judge alone to enable an appeal to be made against:
  - a decision of a question of law or a question of fact; or
  - a verdict, on the ground that it is unreasonable or cannot be supported having regard to the evidence; and
- unlike in a jury trial, a trial by judge alone requires the judge to provide reasons for their verdict or findings. If, for example, there is an error of fact that results in a miscarriage of justice then the Crown can make an appeal to address it.

Inserting new section 464A 'Application of the *Criminal Code Amendment (Judge Alone Trials) Act 2020*' in the Principal Act:

- this new section provides, provided a jury has not been empanelled for a trial for the crime, that an application could be made by a party to the proceedings for an order for a trial by judge alone for a crime that was committed before these provisions commence.

## Clause 5

### Repeal of Act

This automatically repeals the amending legislation after the Act commences. The provisions that the amending legislation inserts into the Principal Acts still remain in force after the repeal of the Amending Act.