DRAFT SECOND READING SPEECH

HON ELISE ARCHER MP

Criminal Code Amendment (Judge Alone Trials) Bill 2021

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Mr Speaker, I move that the Bill now be read a second time.

This Bill will amend the *Criminal Code Act 1924* (the *Criminal Code)* to provide for the option of criminal trials to be held without a jury in the Supreme Court of Tasmania.

Tasmania does not currently have the option of trial by judge alone. Unless an accused person pleads guilty to an indictable offence (crime), they are entitled to be tried by a jury in the Supreme Court, with the jury determining whether they are guilty or not of an offence.

Mr Speaker, the right to trial by jury is a cornerstone of our legal system. Although trial by jury is the established and familiar method of trial for crimes in Tasmania, trial by judge alone provides an alternative option to a trial by jury, in appropriate cases, but importantly, not as of right for either the accused person or the prosecution.

This Bill contains significant reforms that will play an important role in Tasmania's criminal justice system and align Tasmania with several other Australian states and territories that have had legislation allowing trial by judge alone for many years.

Judge alone criminal trials were introduced into South Australia in 1984, New South Wales in 1990, the Australian Capital Territory in 1993, Western Australia in 1994 and Queensland in 2008. More recently, Victoria has allowed for trial by judge alone as a temporary measure in response to the COVID-19 pandemic.

Mr Speaker, the Bill inserts a new section 361AA into the *Criminal Code* to provide for a party to the proceedings, that is the accused person or the prosecution, to apply for an order for trial by judge alone within three (3) months of the date the accused was committed to stand trial.

The timeframe within which a party to proceedings is to make an application for trial by judge alone is linked to when the accused person is committed to stand trial in the Supreme Court.

The decision as to when to start the timeframe was arrived at after consideration of stakeholder views and other jurisdictions. On the one hand, other jurisdictions such as Queensland and Victoria do not specify a timeframe other than requiring the application to be made before trial. However, this may create concerns about uncertainty in the planning for a trial, leading to potential risks around the potential for 'judge shopping', delays and unnecessary use of resources if applications are made at the last minute.

Another option considered was to start the timeframe from the service of Crown papers. However, there is no legislative basis for the service of Crown papers, so this option is considered unworkable.

The decision to start the timeframe from committal is a workable option that provides transparency and certainty as to when the timeframe commences, and avoids the potential

adverse consequences of unfettered right to apply at any time. In response to consultation, the timeframe within which to apply for an order was extended from two to three months from the date of committal.

This time period in which to make an application under this Bill aligns with the new preliminary proceedings processes that recently came into effect in Tasmania. The *Justice Miscellaneous (Court Backlog and Related Matters) Act 2020* (the Court Backlog Bill) amended the *Justices Act 1959* and the preliminary proceedings processes concerning the committal of a defendant to the Supreme Court. These changes provide for magistrates to deal with applications for preliminary proceedings orders prior to the committal of matters to the Supreme Court (the Court).

If an applicant does not make an application within this timeframe then, providing that the applicant can satisfy the Court that they have a reasonable explanation for the delay in making the application, an out of time application may be considered. This provision is important for circumstances where an applicant later decides to apply for a trial by judge alone, for example, because other information later came to light, or due to an unavoidable or unexpected circumstance such as a medical emergency.

No limitations are placed on the types of Tasmanian crimes that could be heard by a judge sitting alone.

The Bill provides that the prosecution's application for a judge alone trial order requires the consent of the accused to the proposed order. This is subject to an important exception I will turn to after outlining the key elements of the framework. Importantly, this Bill provides that the Court must not make an order unless it is satisfied that it is in the interests of justice for the order to be made.

As has been done in other jurisdictions, this Bill provides that trial by judge alone will not be available where an accused person is charged on indictment for a Commonwealth offence. This is because section 80 of the Commonwealth Constitution precludes Commonwealth trials from being conducted by a judge alone.

This Bill makes it clear that an order for trial by judge alone must not be made unless the Court is satisfied of the following factors.

First, that accused person has given informed consent. The Court needs to be satisfied that the accused understands the nature of the proposed order and the implications of an order, if made.

Second, that the making of such an order is in the interests of justice.

Third, 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 if there is more than one accused, each accused must have made an application and given their consent to the proposed order.

The requirements in this Bill to satisfy the Court that an accused person has given informed consent to a proposed order provide an important safeguard. The Court is to be satisfied that:

- the accused person understands the nature of the proposed order and the implications of an order, if it is made by the Court;
- the accused person has received legal advice as to the extent of the implications of the proposed order if made, or that the accused person has been offered advice but has refused legal advice that has been offered; and

- where an accused person has obtained legal advice on the implications of a proposed order, the accused person's legal practitioner certified in writing as to the legal advice so provided and whether they believe that the accused person's consent has been freely given.

Importantly, under this Bill 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.

This Bill provides that in determining whether it is in the interests of justice to make an order, the Court is to take into account whether the crime to which the proposed order relates concerns an element or question of fact that is more appropriately determined by a jury by reference to community standards. That includes, but is not limited to, questions of reasonableness, dangerousness, indecency, negligence or obscenity. This recognises the important role juries play in Tasmania's criminal justice system. The Court may refuse to make an order if it considers the trial will involve an element or a question of fact that requires the application of community standards.

Whether a crime involves an element or a question of fact that is best determined by a jury by reference to community standards requires the Court to balance a range of relevant factors. The Court may also take into account other matters or circumstances depending on the particular context of the case. The Bill affords the Court a wide discretion to take into account factors that it considers 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.

The inclusion of objective community standards in the Bill was determined after consideration of stakeholder views and other similar provisions in other jurisdictions, such as Queensland, New South Wales and Western Australia. The formation of this Bill draws on the successful legislative approach taken by these jurisdictions.

Importantly, juries are best placed to determine what conduct is considered reasonable, dangerous, negligent, indecent or obscene in the eyes of the community. The use of juries to set such standards also means that they adapt in line with changing community views. For example, in relation to the crime of dangerous driving contrary to section 172A of the *Criminal Code*, what is considered 'dangerous' driving is determined by reference to community standards. It is highly likely that the community's perception of what amounts to 'dangerous' driving has changed significantly over time. By these standards being set by juries, they appropriately reflect the community's views at any given time, thereby increasing public confidence in the criminal justice system.

Mr Speaker, in circumstances where 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 person is tried by jury, the Court does not have to be satisfied of the requirements of informed consent when determining whether to make an order. This includes the scenario of more than one accused being tried together, and the risk of the offence under section 63 arises from one or more of the accused. For example, an accused person could be compelled to have a trial by judge alone without their consent where there is a very high risk of jury interference or tampering, and all other means reasonably available to the Court cannot mitigate that significant risk.

This Bill provides that unless exceptional circumstances exist, only one application for an order can be made in respect of a crime.

In view of the time period within which an application for a trial by judge order is to be made, the Bill provides that an order for a judge alone trial may not be revoked unless the Court is satisfied that the information on which the order was made was false or misleading, or otherwise considers that there are reasonable grounds to revoke it. An accused person should not be able to change their mind and opt for a jury trial to avoid trial by a particular judge without a jury – an scenario known as 'judge shopping'.

The new section 361AB provides that an accused person or the prosecution may appeal the making or refusal to make an order for trial by judge alone. In relation to an accused person's ability to appeal where the Court has made an order, the Bill limits that 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.

The Bill also contains amendments to set out the law and procedure to be applied in a trial by judge alone, including in relation to returning any verdict or making any findings.

Lastly, the Bill expands the appeal rights of the Crown in relation to judge alone trials at section 401(2) of the *Criminal Code*. This has been provided for in the Bill as, 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 lodge an appeal to address this error.

Public and targeted stakeholder consultation was undertaken on a draft version of this Bill and I personally wish to thank those who made comments in response to the draft legislation. In addition, my Department of Justice has worked closely with key stakeholders in the development of this Bill, including the Office of the Director of Public Prosecutions and I thank them for their thorough work in this regard.

Mr Speaker, this is an important Bill for our criminal justice system. The proposed legislative reforms provide a fair method of applying for and determining orders for trial by judge alone. This Bill seeks to improve Tasmanians' options in the criminal justice system by conferring on an applicant an opportunity that they did not previously have – the option to apply for trial by judge alone in certain circumstances.

The introduction of trial by judge alone in Tasmania will provide an alternative to jury trials for an accused and may assist in helping to reduce criminal court backlogs, along with a range of our Government's important reforms that have already passed through the Parliament including the Magistrates Court (Criminal and General Division) reform package and, more recently, the Court Backlog Bill.

In conclusion, our criminal justice system has experienced significant challenges due to the COVID-19 pandemic. Our Government has put in place measures to respond to the pandemic and to support Tasmanians. This Bill seeks to improve access to justice within our criminal justice system not only due to COVID-19 but other circumstances as I have outlined.

Mr Speaker, I commend this Bill to the House.