

Principles on Jury Trials in the Context of COVID-19

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Law Council
OF AUSTRALIA

This document intends to outline the principles to inform decision-making about design and implementation of measures relating to jury trials in the context of the COVID-19 pandemic.

The Law Council acknowledges the input of members of its National Criminal Law Committee in the formulation of these principles and protocols.

PRINCIPLES

The jury is a fundamental part of the system of criminal justice in Australia, whereby the community plays an important and direct role in the administration of justice. Jury trials provide a safeguard against the exercise, or the apparent exercise, of arbitrary power by the State. They also allow for impartiality to be observed.

Likewise, jury trials help ensure that criminal proceedings are conducted in a manner which is comprehensible to the general public and that the outcomes ultimately achieved are regarded as legitimate and impartial.

The existence of jury trials protects both actual justice for an accused and the perception of justice being administered. Therefore, any laws that modify or interfere with an accused's right to a trial by jury should be constrained and carefully considered.

The Law Council believes that the right to trial by jury for offences on indictment must continue to be observed unless the accused consents to trial by judge alone.

The right to a fair trial, whether by jury or judge alone, is another fundamental part of the system of criminal justice in Australia. There are various important aspects of the right to a fair trial including:

- the right of an accused, with certain limitations, to legal representation of his or her choosing; and
- the right, subject to gross misbehaviour, of an accused person to be physically present in court at his or her trial.

The Law Council recognises the legitimate role of governments in ensuring public health and safety. However, governments must make every effort to secure the right to a fair trial by jury while ensuring public health and safety of all involved.

The right of an accused to trial by jury for a criminal offence must be retained for all offences prosecuted on indictment. Where offences prosecuted on indictment may be tried by judge alone, that should only occur with the consent of the accused.

The right of an accused person to a fair trial must be maintained. In a criminal trial, the accused and/or his or her legal representatives should always appear physically in court other than with the consent of the accused to not do so.

Cost savings and convenience to authorities should only be a factor where they do not affect the above rights and principles. Appropriate funding should be provided to Courts and corrective services providers to enable the modification of court rooms to enable social distancing between all court users and safe arrangements for transporting accused persons between courts and prisons

Technology (e.g. appearance by counsel and evidence by witnesses over audio/visual links) should be used to facilitate the progress of matters, but only to the extent it preserves the above principles.

BACKGROUND

In response to the outbreak of the SARS-CoV-2 coronavirus, declared a pandemic by the World Health Organisation on 11 March 2020, heads of jurisdiction of state and federal courts have implemented restrictions on the conduct of trials in their courts and state, territory and federal governments have passed laws in order to avoid the spread of the virus to court staff and users and to enable courts to facilitate the resolution of matters to the extent possible.

All Australian states and territories have suspended the commencement of jury trials for at least some period of time.

In the Australian Capital Territory, the *COVID-19 Emergency Response Act 2020* (ACT) permits a judge to order an accused to be tried for a criminal offence by judge alone irrespective of the wishes of the accused between 16 March 2020 and 31 December 2020.

In Victoria, which previously only had the option of trial by jury where a direct indictment was filed against an accused, the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) has temporarily given courts the power to order that one or more charges in an indictment be tried by the trial judge alone if each accused consented to the making of the order.¹

Some jurisdictions, such as South Australia and New South Wales, already have the option of judge-alone trials. Some jurisdictions, including Tasmania and the Northern Territory, do not.

The right to trial by jury is a longstanding right in our legal system. Whilst Article 39 of Magna Carta 1215 provided 'no freemen (sic) shall be taken or imprisoned except by the lawful judgment of his peers or by the law of the land', the right had been observed even earlier.

¹ This power will be repealed six months after its commencement. See, Criminal Procedure Act 2009 (Vic) s 420ZN.

In the High Court the significance of trial by jury has been consistently observed. In *Kingswell v R*², Deane J described it as a 'deep seated conviction of free men and women about the way in which justice should be administered in criminal cases. That conviction finds a solid basis in an understanding of the history and functioning of the common law as a bulwark against the tyranny of arbitrary punishment.' His Honour added a jury trial was part of the 'structure of government and distribution of judicial power adopted by, and for the benefit of, the people of the federation as a whole'.

Similarly, Brennan J in *Brown v The Queen*³ described trial by jury as 'the chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice'.

More recently in *Alqudsi v The Queen*⁴ the High Court has considered the history of the right to trial by jury and the place of trial by Judge alone. Significantly, the history set out within that decision reflects that trial by jury is a right and trial by Judge alone must be understood as a waiver of the right; the waiver being a waiver by the accused.

² 1985) 159 CLR 264 at 298

³ 160 CLR 171 at 197

⁴ [2016] HCA 24.