NSW Bureau of Crime Statistics and Research

This bulletin has been independently peer reviewed.

CRIME AND JUSTICE BULLETIN

NUMBER 264 | MARCH 2024

The effect of judge-alone trials on criminal justice outcomes

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AIM

To estimate the association between judge-alone trials and the probability of acquittal, trial length, and sentence severity.

METHOD

We compared 5,064 jury and 805 judge-alone criminal trials finalised in the NSW District Court and Supreme Court between January 2011 and December 2019, excluding cases where the defendant entered a guilty plea to their principal offence or had a special verdict of "not guilty by reason of mental illness" (under s. 25 of the *Mental Health (Forensic Provisions) Act 1990* (NSW)). Entropy balancing was used to match judge-alone cases with jury cases on available covariates. We then estimated the association between trial type (judge-alone vs jury) and four criminal justice outcomes, adjusting for relevant observable factors. The analysis was repeated for two subsets of offences: violent offences and offences with a higher likelihood of having prejudicial elements or complex evidence *(prejudicial and complex offences)*. We also interviewed 12 legal practitioners, including District and Supreme Court judges, prosecutors, and defence lawyers, to identify factors motivating judge-alone applications that may be correlated with the outcomes of interest.

RESULTS

We estimated that compared to jury trials, judge-alone trials are associated on average with a statistically significant nine percentage point increase in the probability of acquittal and a shorter prison sentence by 7.6 months. Within *prejudicial and complex offences*, we found that judge-alone trials were associated with a statistically significant decrease in average trial days. Judge-alone trials were also associated with a statistically significant decrease in prison sentence length for the *violent offences* subgroup. Interviewees suggested that increased use of written submissions may influence both shorter trial length in judge-alone matters and reduced prison sentences (i.e., via discounts from efficiencies resulting from pre-trial cooperation or time saved by submitting tendered evidence). Interviewees stated that judge-alone applications in NSW are mostly made in cases with prejudicial elements (e.g., evidence that cannot be separated from prior proven offending) or complex evidence (e.g., cases with substantial scientific or financial evidence).

CONCLUSION

Judge-alone trials are associated with an increased probability of acquittal, shorter trials, and a shorter prison sentence. However, we cannot determine whether these differences are driven by confounding factors (such as strength of the prosecution's case) and/or causal factors.

KEYWORDS

Court statistics | Judicial decisions | Convictions | Court processes | Sentencing | Juries

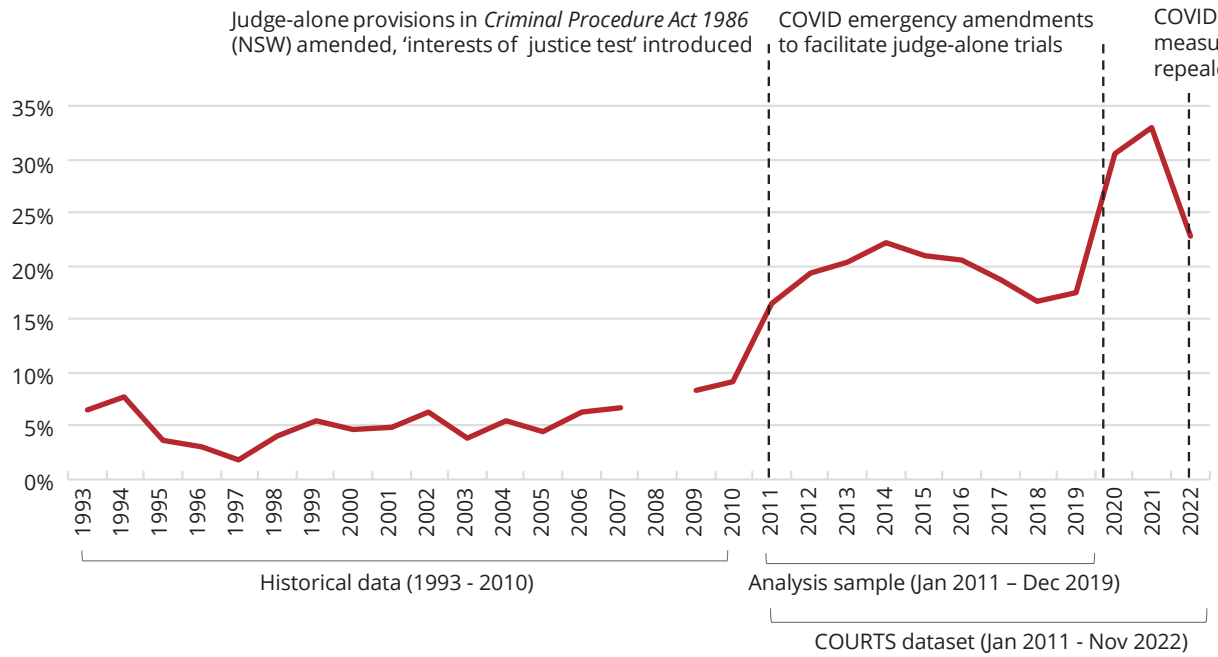
Suggested citation: Gu, Jonathan. (2024). *The effect of judge-alone trials on criminal justice outcomes* (Crime and Justice Bulletin No. 264). Sydney: NSW Bureau of Crime Statistics and Research. Full report available at www.bocsar.nsw.gov.au

INTRODUCTION

In New South Wales (NSW), criminal matters committed to trial in the District or Supreme Court (higher courts) can be heard before a jury or a judge sitting alone.[1] In jury trials, 12 laypeople collectively decide the verdict based on the arguments and evidence presented by the prosecution and defence. By contrast, in judge-alone trials,[2] a single judge acts as the "tribunal of fact" who determines the verdict. All Australian states and territories except Victoria[3] and the Northern Territory have implemented a partial role for judge-alone trials, including for serious criminal offences.[4]

Between 2011 and 2019, judge-alone trials comprised about 13.7% of trial proceedings (Figure 1) in NSW, with 14.1% of trials in the District Court and 8.8% of trials in the Supreme Court being judge-alone matters.[5] Since 2005, judge-alone trials have increased significantly as a proportion of cases in the NSW higher courts, rising from about 6% of all matters finalised in these jurisdictions to just under 18% (see Figure 1). The biggest increases took place following amendments to the *Criminal Procedure Act 1986* (NSW) in 2011 and 2020. The 2011 amendments allowed judges to apply an "interests of justice" test to resolve disagreements in cases where the defence had applied for a judge-alone trial, but the application was not supported by the prosecution (discussed further below). This replaced an older regime where the prosecution could block most judge-alone applications (Ierace, 2011, p. 2). The 2020 COVID-19 emergency amendments further facilitated judge-alone trials in NSW.[6] These emergency measures temporarily expanded the role of judge-alone trials during the pandemic because the public health restrictions introduced to minimise the spread of infection (e.g. stay-at-home orders, social distancing, self-isolation) had made jury trials extremely challenging to manage.

Figure 1. Percentage of trials held judge-alone at the NSW higher courts



1 *Criminal Procedure Act 1986* (NSW), s. 131.

2 Judge-alone trials have also variously been referred to in the literature as "judge only trials", "jury-less trials", "trial by judge" and "bench trials" (in the United States) (Scottish Government, 2023). For consistency with the case law in NSW, this study uses the phrase "judge-alone trial".

3 The Victorian Government introduced judge-alone trials in July 2020 as an emergency measure in s. 32 of the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic), but were eventually repealed in April 2021 (*COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020* (Vic), Pt. 4, Div 6). Judge-alone trials were then re-introduced for one year by the *Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Act 2022* (Vic) to help Victorian courts cope with case backlogs in March 2022, but the relevant legislation was repealed in March 2023.

4 Following reforms in 2011, the Australian Capital Territory limited the ability of the accused to have judge-alone trials for serious offences including murder, manslaughter, and sexual offences (*Supreme Court Act 1933* (ACT), s. 68B(4), Sch 2, Pt 2.2). However, some serious offences have not been excluded, such as those relating to illicit drugs.

5 This percentage figure excludes cases that concluded with a mental health outcome (such as "act proven but not criminally responsible because of mental health impairment or cognitive impairment") and cases where the accused pled guilty to the principal offence, thereby avoiding a trial and proceeding straight to a sentencing hearing. Figure 1 excludes trials in 2008, for which data was missing due to courts transitioning to the JusticeLink IT system.

6 *Criminal Procedure Act 1986* (NSW) s. 365(1)-(3), as at 14 May 2020. These provisions were introduced by the *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Act 2020* (NSW) and have since been repealed following the expiration of a temporary extension by the *COVID-19 Legislation Amendment (Stronger Communities and Health) Act 2021* (NSW) Sch 1.15.

Despite the growth in judge-alone trials, there is surprisingly little research examining the differences between judge-alone and jury trials in terms of outcomes for defendants and efficiencies for the court. Instead, most scholarly attention has focused on understanding the circumstances in which judge-alone trials are most appropriate (Hanlon, 2014; McEwen et al., 2018; O'Leary, 2011).

Judge-alone and jury trials

In NSW, juries generally serve as finders of fact during trials in the higher courts. This involves weighing up all evidence presented during the trial to determine whether the prosecution has established, beyond reasonable doubt, that the accused is guilty of an offence. Trial by jury for federal offences on indictment[7] is one of the few explicit rights enshrined in the Australian Constitution (s. 80), and there remains a general expectation that this right extends to serious state-level criminal offences (Standing Committee on Law and Justice 2010, pp. 39-40).

There are three purposes attributed to juries (Priest, 2020). First, they are said to protect the rights of the accused "from the rash judgment and prejudices of the community itself" by being a randomly selected and impartial group of community members, isolated from external influence (Priest, 2020, p. 2). Second, juries offer community members the opportunity to directly participate in the administration of criminal justice. Third, laypeople juries determine verdicts with community standards and values, which arguably provides legitimacy to trial outcomes.

Despite the key role of juries, the option to "go judge-alone" has been described as a measure that helps ensure fair trials amid extensive pre-trial publicity or other prejudice that can threaten jury impartiality or integrity, and could safeguard the proper administration of justice amid complex evidence (Hanlon, 2014, p. 143; O'Leary, 2011, p. 3). Indeed, pre-trial publicity and susceptibility of jurors to prejudice were original rationales raised by the NSW Law Reform Commission[8] and Law Reform Commission of Western Australia[9] when recommending the introduction of judge-alone trials in their respective states.

Judge-alone trials in NSW

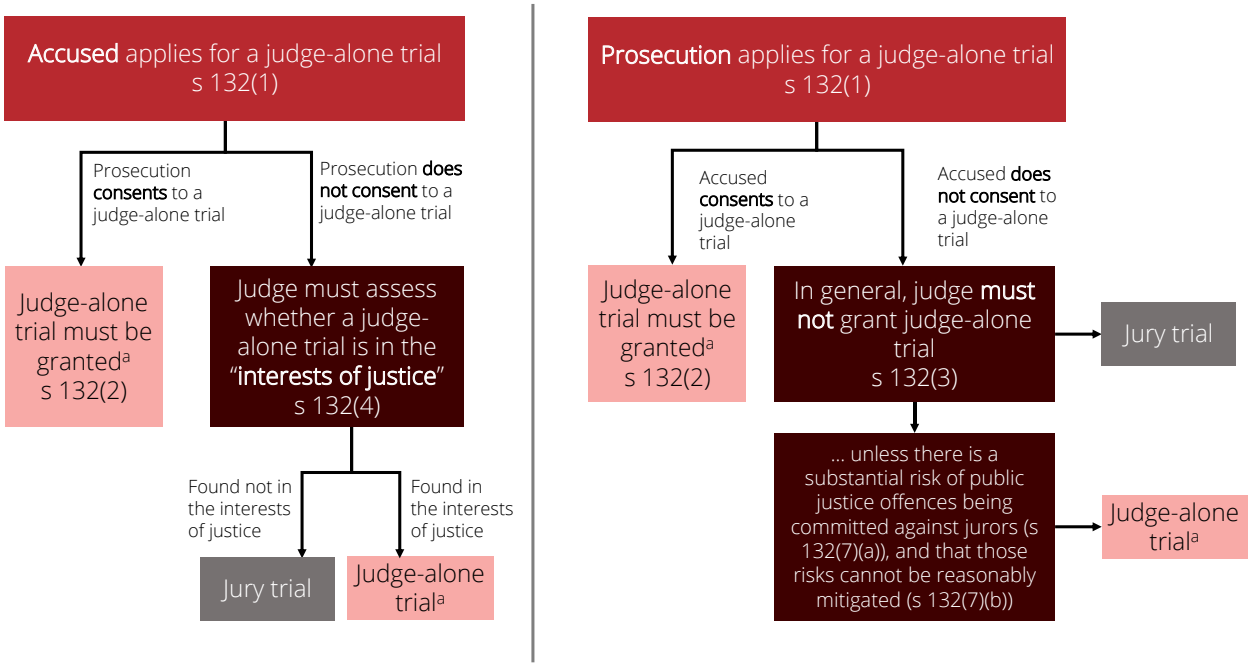
Under the *Criminal Procedure Act 1986* (NSW), either the accused or prosecution can make an application for a judge-alone trial (Figure 2).[10] A judge-alone trial application must be made "not less than 28 days before the date fixed for the trial",[11] a requirement that may be "waived by the leave of the court".[12] The court must not grant a judge-alone trial unless it is satisfied that the accused has received advice from a qualified Australian legal practitioner about the effect of a trial by judge order.[13] In addition, in a joint trial, a judge-alone application must not be made unless all other defendants apply for a judge-alone trial and "each application is made in respect of all offences" that defendants are being proceeded with in the trial.[14]

7 The meaning of "on indictment" in s. 80 of the Australian Constitution has been construed narrowly by the High Court in successive majority decisions, leaving it to the Federal Parliament to legislate on whether an offence is to be tried on indictment and leading some to describe s. 80 as conferring a "weak right" (Castan & Joseph, 2019, p. 465). In *R v Archdall and Roskruge* [1928] HCA 18, Higgins J stated that "if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment". This view was upheld by the majority in *Kingswell v The Queen* [1985] HCA 72, where Gibbs CJ, Wilson and Dawson JJ stated that "the section applies if there is a trial on indictment, but leaves it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily" [10]. Similarly, in the majority decision in *Cheng v The Queen* [2000] HCA 53, McHugh J stated that "Section 80 is not a great guarantee of trial by jury for serious matters. It guarantees trial by jury only when the trial is on indictment" [143]. For more discussion, see Melissa Castan and Sarah Joseph, *Federal Constitutional Law: A Contemporary View* (Thomson Reuters, 5th ed, 2019) at [12.62].
8 NSW Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial,* Report No 48 (1986), see [7.3]-[7.7] and Ch 10.
9 Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia (Final Report)*, Project No 92 (September 1999), s. 30.9-30.10.
10 *Criminal Procedure Act 1986* (NSW), s. 132(1).
11 *Criminal Procedure Act 1986* (NSW), s. 132A(1).
12 *DPP v Farrugia* [2017] NSWCCA 197, [12]. See also *Criminal Procedure Act 1986* (NSW), s. 132A(1).
13 *Criminal Procedure Act 1986* (NSW), s. 132(6).
14 *Criminal Procedure Act 1986* (NSW), s. 132A(2)(a)-(b).

The level of judicial discretion to grant a judge-alone trial varies depending on the consent of the accused and prosecution. Where both the accused and prosecution consent to a judge-alone trial, the judge must grant a judge-alone trial.[15] Where the prosecution applies for a judge-alone trial without the agreement of the accused, the judge must not grant a judge-alone trial[16] unless there is a substantial risk of a public justice offence being committed against jurors,[17] and that those risks cannot be reasonably mitigated.[18] This jury tampering exemption for judge-alone trials was introduced as a precautionary measure in 2010. However, at that time, jury tampering was not seen as a problem in NSW (Standing Committee on Law and Justice 2010, pp. 84-85), and it was "not anticipated that this particular aspect of the provision will be used frequently, if at all" (Musgrave, 2010, p. 4). This study was unable to identify any cases where a judge-alone trial was granted based on jury tampering provisions,[19] nor where the prosecution applied for a judge-alone trial without the consent of the accused.

If the accused applies for a judge-alone trial without the consent of the prosecution, the judge must assess whether a judge-alone trial is in the "interests of justice".[20] This is a multifactorial test requiring the balancing of multiple interests, including "the interests of the parties, larger questions of legal principle, the public interest and policy considerations" (Smith & Wheeler, 2018, pp. 21-22).[21]

Figure 2. Simplified diagram of the process of applying for a judge-alone trial for a sole accused (not in a joint trial) through the Criminal Procedure Act 1986 (NSW)



a This diagram assumes that the accused sought and received advice about the effect of a trial by judge order from an Australian legal practitioner. If the accused has not sought and received legal advice, the court must not make a trial by judge order (s. 132(6), *Criminal Procedure Act 1986* (NSW)). This diagram also assumes that there is only a single accused at trial. If there is a joint trial with multiple co-accused, then all accused must apply for a judge-alone trial to proceed for all offences proceeded with at trial (s. 132A(2), *Criminal Procedure Act 1986* (NSW)).

15 *Criminal Procedure Act 1986* (NSW), s. 132(2); *R v Johnson* [2019] NSWSC 118, [4]; *R v Settree* [2016] NSWSC 1028, [5].
16 *Criminal Procedure Act 1986* (NSW), s. 132(3).
17 *Criminal Procedure Act 1986* (NSW), s. 132(7)(a).
18 *Criminal Procedure Act 1986* (NSW), s. 132(7)(b).
19 Based on searches through CaseLaw NSW, WestLaw AU or LexisAdvance as of January 2023, there are no publicly available decisions where a judge-alone trial was granted on the grounds of s. 132(7)(a)-(b) jury tampering provisions. See also Ierace (2011, pp. 6-8).
20 *Criminal Procedure Act 1986* (NSW), s. 132(4).
21 See also *R v Belghar* [2012] NSWCCA 86 at [110]-[112], *DPP (NSW) v Farrugia* [2017] NSWCCA 197 at [11], *Redman v R* [2015] NSWCCA 110 at [16], *R v Qaumi & Ors (No 14) (Judge alone application)* [2016] NSWSC 274.

Factors that can be considered in the interests of justice test

Two factors that are often discussed in case law in relation to the interests of justice test are the nature of pre-trial publicity and court efficiency.[22] For adverse publicity to justify a judge-alone trial, it must either be extraordinary,[23] egregious[24] or of such an "emotive"[25] nature that it threatens the prospects for a fair trial.[26] This is a threshold that many cases fail to meet despite receiving substantial amounts of publicity. For example, high profile cases involving "very public gang warfare" in Sydney and politician misconduct have been denied judge-alone trials (Smith & Wheeler, 2018, p. 23). However, in country courts that serve smaller communities, there are unique challenges related to prejudicial publicity or adverse local knowledge. Ierace (2011, p. 11) noted that in country courts:

> *If a serious offence attracts considerable local publicity that is adverse to the accused or a key prosecution witness, or either is otherwise well-known locally in an unfavourable light, so that at least some members of the jury panel drawn from that same area would inevitably have this adverse local knowledge, the availability of [judge-alone trials] may be especially attractive to the relevant party, and more convenient to the court and witnesses for both sides than the alternative, of seeking a change in venue.*

In NSW, increased trial efficiency, when considered as part of other case-specific issues, is an additional factor that can influence a decision to grant a judge-alone trial.[27] There is a general assumption that without the need to convene a jury, and the avoidance of hung juries or other jury misadventures, judge-alone trials tend to be shorter and less prone to disruption (Percy & Barns, 2020, p. 22). Efficiency was a particularly strong consideration at the height of the COVID-19 pandemic. As discussed above, the *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Act 2020* (NSW) temporarily inserted provisions to facilitate more judge-alone trials, as they were seen to have the "least chance of interruption and delay".[28]

In country court settings, the District Court faces additional logistical challenges such as long travel time for jurors/witnesses and limited judicial resources, which can also influence whether a judge-alone trial is granted. For example, Colefax DCJ granted a judge-alone trial in *R v CE*,[29] emphasising logistical challenges encountered by the District Court in Queanbeyan. As his Honour observed:

> *The factor which ultimately prevails in this application is that of practical utility. The Court is here in Queanbeyan for a very short period of time. There are competing demands on the Court's time. If this application had been made in metropolitan Sydney, I would have rejected it. But in order to facilitate not only this trial, but other matters in the list (including the trials for next week which are of considerable concern to the Court given that they are the third trial dates for those accused who have been refused bail and also by reference to the other short matters which are in the list, including some highly contentious conviction appeals which have already been adjourned a number of times but which I am determined to deal with in these sittings), I shall grant the order sought by the applicant.*[30]

22 See also Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-050], September 2023 <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/judge_alone_trials.html#p1-050>
23 *R v Qaumi & Ors (No 14) (Judge alone application)* [2016] NSWSC 274, [76]-[82].
24 For example, in *R v Dawson* [2022] NSWSC 552, Beech-Jones CJ at CL accepted a motion for a judge-alone trial largely due to "egregious" pre-trial publicity generated by the "Teacher's Pet" podcast which explored the murder of Lynette Dawson with Chris Dawson as a key suspect. In 2018, the podcast reached "number one" in Australia, the United States, the United Kingdom, Canada and New Zealand, and had been downloaded over 28 million times (Cockburn & Sas, 2018; Walkley Foundation, 2018). The podcast was also critiqued for containing a lack of new admissible evidence about the murder of Lynette Dawson (Gans, 2018). See remarks by Beech-Jones CJ at CL at [42].
25 *R v Qaumi & Ors (No 14) (Judge alone application)* [2016] NSWSC 274, [77].
26 *R v Dawson* [2022] NSWSC 552, [10]; *R v Belghar* [2012] NSWCCA 86, [102].
27 *R v Belghar* [2012] NSWCCA 86, [110]-[111]; *R v Qaumi & Qaumi* [2016] NSWSC 1473, [24], [66]. See also the case of *Gittany* [2013] NSWSC 1503 at [43]-[44], where a judge-alone trial was granted after the longer length of a jury trial was seen as harming access to justice. This was due to a specific combination of the accused being unable to pay for legal counsel for a full-length jury trial and a narrow timeframe where a crucial witness was available to testify without creating substantial disruptions to their life. However, in most cases, efficiency is considered "of little weight in assessing where the interests of justice lies". See *R v Abdaly; R v Hosseinishoja (No 3)* [2022] NSWSC 1511 at [21] (10). See also ; Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-050], September 2023 <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/judge_alone_trials.html#p1-050>
28 *R v Jaghbir (No 2)* [2020] NSWSC 955, [31], [22]-[25]; see also *Regina v BD (No 1)* [2020] NSWDC 150, [17]-[19]
29 [2018] NSWDC 220.
30 Ibid, [11].

Judges have also been willing to grant judge-alone trials where there are likely disruptions to proceedings due to an accused having significant health problems[31] or cognitive impairments,[32] and where the case contains evidence of a highly distressing nature.[33] The judge must also consider whether the trial involves a factual issue that requires the use of objective community standards,[34] such as whether an alleged offence committed in self-defence was a reasonable response to the circumstances that the accused faced.[35]

Australian legal commentary on judge-alone trials

Legal commentary on judge-alone trials in Australian jurisdictions has focused on understanding the grounds upon which judge-alone trial applications are successful, and have identified factors similar to those mentioned above as being relevant to the interests of justice test. For example, O'Leary (2011, pp. 21-25) examined judge-alone applications in Western Australia and Queensland, finding that most were made based on adverse pre-trial publicity, other prejudice (usually in relation to graphic evidence in sex offences or murder), technical legal issues and the potential for lengthy jury trials. Krisenthal (2015) provided an overview of practical considerations for defence lawyers when making judge-alone applications. This included the divergences in judicial views about the scope of the objective community standards in s. 132(5) of the *Criminal Procedure Act 1986* (NSW), challenges with extreme publicity and how judges could be exposed to inadmissible evidence in judge-alone trials. He also argued that judge-alone trials should not be the default option for serious criminal matters (Krisenthal, 2015, p. 20).

Other Australian legal commentary on judge-alone trials has noted risks in moving towards judge-alone trials but accepted that they may have a role amid intense prejudicial publicity and other exceptional circumstances, such as the COVID-19 pandemic. McEwen and Eldridge (2016) cautioned against moving towards judge-alone trials given a small body of psycholegal research showing that judges and jurors similarly struggle to "disregard the unconscious biases generated by prejudicial publicity". However, McEwen et al. (2018, p. 140) acknowledge that the research is too underdeveloped to make any recommendations, other than to increase scrutiny of principles underpinning support for judge-alone trials. On the other hand, Percy and Barns (2020) concluded that in the aftermath of the acquittal of Cardinal Pell and the social distancing requirements during the COVID-19 pandemic, judge-alone trials have a clear role in the Australian legal landscape. Similarly, Priest J of the Victorian Supreme Court supported introducing judge-alone trials in Australian jurisdictions that did not currently offer them, arguing that "the proliferation of social media has made it virtually impossible for a trial judge to monitor potential sources of prejudicial material to which a jury may have been exposed" (Priest, 2020, p. 111).[36]

Prior research related to outcomes in judge-alone trials

Robust Australian research on the association between judge-alone trials and court outcomes is scarce.[37] Most studies tend to compare average acquittal rates for jury and judge-alone trials without controlling for systemic differences between cases.

31 In *R v Forrest* [2014] NSWSC1684, the accused was "seriously ill" with cancer, prone to nausea, bleeding, and discomfort [2]-[7]. A judge-alone trial was subsequently granted due to likely disruptions from regular breaks and shorter sitting hours creating an "unacceptable burden upon a jury" [16].
32 In *R v Blake* [2021] NSWDC 536, an expert psychologist recommended accommodations for shorter presentations of information and regular rests due to the accused's impaired intellectual ability [33]-[37]. While this was not the sole determinative factor, Lerve DCJ agreed that these additional accommodations would be met more efficiently through a judge-alone trial [135]-[136].
33 In the murder case *R v Haydar (No 2)* [2017] NSWSC 131, the accused successfully applied for a judge-alone trial despite opposition from the prosecution, with Garling J acknowledging that crucial photographic evidence of stab wounds was "graphic", such that "many members of a jury, if not all of them, would find them horrific and distressing".
34 *Criminal Procedure Act 1986* (NSW), s. 132(5).
35 *Crimes Act 1900* (NSW), s. 418. See also *R v Katarzynski* [2002] NSWSC 613 at [22]-[23]; Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [6-465], September 2023 <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/self-defence.html>
36 At the time of Priest J's article, judge-alone trials were not available in Victoria, Tasmania and the Northern Territory (Priest 2020). Tasmania has since passed the *Criminal Code Amendment (Judge Alone Trials) Act 2022* (Tas), which introduced judge-alone trials through ss. 361A, 361AB and 464A in the *Criminal Code Act 1924* (Tas). Judge-alone trials were introduced in Tasmania with the intention of potentially reducing criminal court backlogs. See Tasmania Parliamentary Debates, House of Assembly, 23 November 2021, p. 84 (Hon Elise Archer, Attorney-General).
37 See also Scottish Government (2023) for a review of literature on single-judge and mixed judge trials, created as part of the Consideration of a Time-Limited Pilot of Single Judge Rape Trials Working Group.

Verdicts in judge-alone trials

Only one previous study has examined acquittal rates in judge-alone trials in NSW after the 2011 amendment. Krisenthal (2015) reported data from the NSW Bureau of Crime Statistics and Research (BOCSAR) showing that in NSW, acquittal rates were higher in jury trials compared to judge-alone trials from 2009 to 2014, reversing a pattern of higher judge-alone acquittal rates from 1993 to 2007. However, judge-alone trials from these periods were not consistently recorded by court staff and are therefore not comparable with the data used in this study, which were identified through manually-verified free text searches for "judge alone". An earlier South Australian study observed higher acquittal rates in judge-alone trials for sexual offences compared to jury trials in South Australia's Supreme Court between 1989-1993, based on a small sample of 20 judge-alone trials and 245 jury trials (Willis, 1998, p. 148). An Australian Capital Territory (ACT) Government review of judge-alone trials between 2004-2008 reported that they produced conviction rates of 0% for murder, 9% for sexual matters and 47% for all other offences, but did not disclose jury conviction rates.[38] These low conviction rates were used to justify restrictions on the availability of judge-alone trials in the ACT.[39]

In contrast, other common law jurisdictions have reported higher conviction rates from judge-alone trials. A sexual assault trial pilot in New Zealand found that the eight judge-alone trials studied had a substantially higher conviction rate of 88% compared to the 40% conviction rate for a sample of 30 jury trials, although this sample is too small to generalise (McDonald, 2022). Conviction rates were also found to be marginally higher for trials held between 1984 and 1986 in the non-jury Diplock courts[40] of Northern Ireland compared with jury trials in Northern Ireland (51% vs 49%). However, no attempts were made in this study to account for how the jurisdiction of Diplock courts was limited to terrorism and conflict-related offences (Shanahan, 2008, p. 171). A study in the United States (U.S.) examined bench trials (the U.S. term for judge-alone trials) for police officers charged with a criminal offence, finding that bench trials had "no noticeable difference in conviction rates" than jury trials (Sager, Stinson, & Wentzlof, 2022, p. 30). However, once again selection bias likely affects these results as bench trials are often limited to "misdemeanour cases or particularly gruesome cases" and these factors were not accounted for in their analysis (Sager, Stinson, & Wentzlof, 2022, p. 29).

An alternative indirect approach used by researchers to examine judge-alone trial outcomes involves surveying trial judges about jury trials they just oversaw and asking how they would have decided the case in the absence of a jury, as well as any reasons why they disagreed with the decision. Across three U.S. studies that used this approach, judges and jurors agreed on outcomes in 73-78% of cases (Eisenberg et al., 2005; Heuer & Penrod, 1994; Kalven & Zeisel, 1966). Where they disagreed, jurors were generally more likely to acquit than judges, although judges were more likely to acquit than juries when they considered the prosecution's evidence to be weak (Eisenberg et al., 2005; Kalven & Zeisel, 1966). However, as these were responses to a questionnaire, it is not certain that the judges would have followed their responses in deciding to acquit or convict in bench trials, and it is unclear whether the cases asked about represent the misdemeanour matters generally subject to U.S. bench trials. The studies also did not simulate the additional obligations that come with judge-alone trials, which could include providing detailed reasons (that can be subject to appeal) for judge-alone verdicts as occurs in NSW.

While jury systems are relatively prevalent across most common law jurisdictions, many countries with other legal traditions have implemented some form of lay participation, either in the form of jury trials or lay judge systems (Kutnjak Ivković & Hans, 2021, p. 334). Since the 1990s, non-common law jurisdictions such as Japan, South Korea, Russia and Spain have all introduced some form of jury trial or lay participation for a subset of criminal cases that were previously decided entirely by professional judges. Studies of criminal courts in Japan, South Korea and Russia indicate that these jury or lay judge systems

38 Australian Capital Territory Parliamentary Debates, Legislative Assembly, 17 February 2011, p. 256 (Hon Simon Corbell, Attorney-General).
39 Ibid.
40 Non-jury trials were held from the 1970s to 2007 as part of the "Diplock courts" in Northern Ireland, which were formed against the backdrop of political violence during 'The Troubles' in Northern Ireland in the late 1960s-1980s (Jackson 2009; Quirk 2013; Quirk 2021). The Diplock courts were developed "to try defendants accused of terrorism offences and avoid intimidation of jurors by paramilitary groups and obviate the potential bias of juries which were more likely to be constituted by Protestants than Catholics" (Scott 2017, p. 162).

tend to be more likely to acquit a defendant in a criminal case than judges (Khodzhaeva, 2023, pp. 229-230; Park, 2021, p. 96; Reichel & Suzuki, 2015, p. 252). In contrast, the Spanish jury system produced a higher conviction rate than judges (Jimeno-Bulnes, 2021, pp. 117-118). The outcomes from these studies are discussed in more detail in Appendix A. Comparisons between international jurisdictions and Australian jurisdictions are challenging due to differences in each country's jury or lay judge system, judicial powers and standard of proof for determining guilt. These studies also did not control for case, defendant or court characteristics.

Efficiency of judge-alone trials

Studies on trial efficiency have found that judge-alone trials are likely to be shorter in duration than jury trials. A New Zealand study of sexual assault trials found that, from opening statements to summing-up, the average length of 30 jury trials was about 4.5 days, compared with two days for the eight judge-alone trials studied (McDonald, 2022, pp. 58-61). The total length of time spent on the complainant's evidence was on average about 14% shorter in judge-alone trials compared to the jury trials studied, with complainant cross-examination 30% shorter in length (McDonald, 2022, p. 59). The study also found that judge-alone trials minimised the time between the alleged offence and the trial, and reduced the amount of pre-trial procedural complexities compared to jury trials. Similarly, a U.S. survey of 1,460 legal professionals, including judges, prosecutors and defence lawyers, found that they generally viewed bench trials to be more predictable, faster and cost-effective than jury trials (Diamond & Salerno, 2020, pp. 140-141). However, jury trials were seen as being overall fairer by 67% of judges, 56% of prosecutors and 84% of defence lawyers.

As no Australian study has empirically examined how the length of judge-alone trials compares to jury trials, the extent of any benefits to trial efficiency are unclear. The most relevant empirical Australian study found that judge-alone trials in NSW had a lower likelihood of being aborted relative to jury trials (Baker, Allen & Weatherburn, 2002). Hanlon (2014) also argued that Australian judge-alone trials are likely to be shorter in length because of the increased likelihood of counsel submitting written witness statements (referred to hereafter as "tendered statements") rather than mostly calling witnesses to testify in-person, citing how judge-only inquisitorial systems largely rely on documentary and written evidence. In examining proposed amendments to the NSW judge-alone provisions, the Standing Committee on Law and Justice (2010, pp. 21-25) concluded that the extent of time and cost savings from judge-alone trials was not clear, based on a wide range of views among inquiry participants. Those who thought judge-alone trials were more efficient noted that judge-alone trials do not have the same sources of disruption from jury misadventures, the ease of delivering judicial directions without a jury, and the lower probability of retrials in judge-alone trials. However, other participants argued that efficiency gains from judge-alone trials are offset by increased legal arguments in court and potential appeals on the transparency of judge-alone verdicts.

Variations in how judges and juries interpret beyond reasonable doubt and expert evidence

There are several factors that are thought to influence the probability of an acquittal or conviction at trial, including how the concept of beyond reasonable doubt is interpreted and the fact-finder's comprehension of the law and evidence.

Firstly, the concept of beyond reasonable doubt has a central role in influencing the verdict in criminal trials. To secure a conviction, the prosecution must prove that the accused committed an offence beyond reasonable doubt. Beyond reasonable doubt is a concept that is deliberately left undefined by the law and juries enquiring about its definition are directed to the "ordinary English usage" of each word.[41] Any difference in what judges and juries believe to be the threshold of beyond reasonable doubt could have a direct impact on the likelihood of acquittal. Studies of U.S. criminal trials have found that judge-jury disagreements in trial verdicts are primarily caused by juries applying a stricter threshold for beyond reasonable doubt compared to judges. In other words, U.S. "juries require stronger evidence to convict

41 *R v GWB* [2000] NSWCCA 410, [44]. See also Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [3-600], September 2023 <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/onus_and_standard_of_proof.html>. Cf *Jury Directions Act 2015* (Vic), ss 63-64.

than judges do", making juries more likely to acquit at trial compared to judges (Eisenberg et al., 2005, p. 189; Kalven & Zeisel, 1966). In NSW, Trimboli (2008) surveyed 1,225 jurors about their understanding of judicial instructions in criminal trials and found that 55.4% believed the phrase beyond reasonable doubt meant "sure [that] the person is guilty", 22.9% believed the phrase to mean "almost sure", and the remaining 21.7% defined the phrase as "very likely" or "pretty likely [that the] person is guilty". Due to judges' exposure to case law and legal standards of proof, it is unlikely that they would have a similar variance in views. In addition, unlike juries which do not provide reasons for their verdicts,[42] judge-alone trials result in transparent verdicts that contain reasons that may be scrutinised on appeal (Hanlon, 2014, pp. 149-150).[43] The requirement to provide detailed reasons for the judgment that could be appealed may increase the strictness of how beyond reasonable doubt is applied.

Secondly, comprehension of evidence presented in trials and legal directions has been a persistent area of concern among legal practitioners because jurors' misunderstanding of expert evidence or legal directions could increase the probability of an erroneous verdict. A 2019 survey of 87 Australian judges found that most judges believe juries to experience some difficulty in understanding evidence at trial (75.2%) or the law (82.8%) (Clough et al., 2019, p. 53). This represented an increase from a similar survey undertaken in 2006, when a smaller share of judges perceived juries to experience some difficulty understanding evidence (15.4%) or the law (48.5%) (Ogloff et al. 2006, p. 34). On the other hand, Trimboli (2008) found that 94.9% of jurors self-report that they "understood completely" or "understood most things" in judicial instructions on the law, although Trimboli also recognises that jurors may have overstated their levels of comprehension. Concerns about juror comprehension have given rise to a substantial body of research and policy reform on legal directions and how complex expert evidence is presented (Clough et al., 2019; Goodman-Delahunty & Hewson, 2010; NSW Law Reform Commission, 2012; Queensland Law Reform Commission, 2009; Supreme Court of Victoria 2012; Victorian Department of Justice and Regulation 2015; Victorian Law Reform Commission 2009).[44]

How expert evidence is perceived by the fact finder can also be pivotal in decisions to convict. While studies generally indicate that juries are capable of logically evaluating many forms of expert evidence, juries are known to have difficulty in interpreting financial evidence or evidence involving statistical components (Hans, 2007). For example, research suggests that mock jurors overstate the importance of DNA evidence, partly due to misunderstanding the probability of errors that can produce false positive matches (Goodman-Delahunty & Hewson, 2010; Wheate, 2006). Further, interviews with jurors after trials have found that some proceed to convict despite admitting that they experienced difficulties in understanding the DNA evidence (Findlay, 2008). This finding is consistent with what has been referred to as the "white coat syndrome" where "jurors defer mechanistically to an expert because of their field of expertise" (Goodman-Delahunty & Hewson, 2010, p. 2) and may be one of the reasons why the presence of DNA evidence in jury trials has been found to be associated with increased conviction rates (see for example Briody, 2004, p. 242; Briody, 2002, p. 170).

The few studies on how judges interpret expert evidence in criminal trials indicate that while judges also have gaps in scientific literacy, they may be more sceptical towards expert analysis. One study surveyed 400 judges in the U.S. and found that they have a good understanding of processes surrounding the peer review and publication of scientific research (as methods through which scientific research gains credibility), but only about 4% of respondents demonstrated an understanding of key scientific concepts of falsifiability (i.e. whether the scientific methods have been tested) and error rates (i.e. the percent of false positives and false negatives detected by a scientific technique) (Gatowski et al., 2001). An Australian

42 In European jurisdictions such as Spain, efforts to compel layperson juries to provide reasons have produced mixed results. While reasoned jury verdicts could improve legitimacy, research indicates that laypeople often require legal assistance to draft any verdicts, which can undermine the independence and power of jurors while producing new sources of bias (Burd & Hans, 2018).

43 Under s. 133(2) of the *Criminal Procedure Act 1986* (NSW), judges are required to give reasons for their verdicts, which includes the principles of law applied and findings of fact that the judge relied on. For an outline of case law describing the judge's obligation to give reasons for judge-alone verdicts, see the Judicial Commission of NSW, *Criminal Trial Courts Bench Book* [1-060] <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/judge_alone_trials.html#p1-060>

44 For example, in Victoria, frequent amendments to criminal offences increased the complexity of jury directions, resulting in complicated and lengthy directions that were unlikely to be understood by jurors (Supreme Court of Victoria, 2012). This led to a reform process that culminated in the *Jury Directions Act 2015* (Vic). See also Victorian Department of Justice and Regulation (2015) and Victorian Law Reform Commission (2009).

experimental study found that magistrates and jury-eligible laypeople were both significantly more persuaded by high-quality expert opinion on forensic gait analysis compared with a low-quality expert opinion, but magistrates were significantly more sceptical of expert opinion than laypeople and sought information logically relevant to making a verdict (Martire & Montgomery-Farrer, 2020).

Cognitive effects of being exposed to inadmissible evidence

Another important consideration in judge-alone trials is how exposure to inadmissible evidence can affect the determination of guilt. In NSW judge-alone trials, the presiding judge has dual roles in determining the admissibility of evidence and the trial verdict. This contrasts with jury trials, where judges typically decide on the admissibility of evidence in the absence of jurors to prevent any inadmissible evidence from influencing the jury verdict. Exposure to inadmissible evidence can potentially have an unconscious influence on judge-alone verdicts despite the judge's training and legal expertise (Krisenthal, 2015). This is partially supported by research from the U.S., though the impact on decision-making appears to depend on the type of evidence being considered. For example, one experimental study which collected data through a survey of 257 judges at judicial education conferences found that judicial decision-making was affected when judges received inadmissible evidence such as information protected by attorney-client privilege, a rape victim's sexual history, a presumptively inadmissible prior criminal record of the plaintiff in a civil case, and information agreed to be excluded at trial by the prosecution (Wistrich et al., 2005). However, the judges appeared to be able to disregard information from an improperly obtained confession and an unlawful search by police. Other studies have found that judges can successfully ignore inadmissible evidence obtained without "probable cause" (which is a U.S. legal standard required for executing certain police powers; Guthrie, Rachlinski & Wistrich, 2007; Rachlinski, Guthrie & Wistrich, 2011). This contrasts with a meta-analysis of jury studies which found that jury decisions are meaningfully impacted by exposure to inadmissible evidence, even when a judge has instructed them to disregard that evidence (Steblay et al., 2006).

The current study

This study improves on past studies of judge-alone trials by producing quantitative estimates of outcomes for judge-alone trials compared to jury trials using a large dataset of District and Supreme Court trial proceedings, and controlling for observable characteristics that may affect outcomes. As previously noted, prior studies have compared acquittal rates without accounting for systematic differences in cases or have drawn observations about trial efficiency from a small sample of cases or the perceptions of practitioners. In addition, no studies to date have examined whether there is a qualitative or quantitative relationship between judge-alone trials and sentence lengths. To this end, this study examines the effects of judge-alone trials on several criminal justice outcomes, including:

1. probability of acquittal;
2. trial length; and
3. sentencing severity.

Subgroup analyses for *violent offences*[45] and offences that are more likely to be heard judge-alone (referred to as *prejudicial and complex offences*)[46] were also performed to test the robustness of the quantitative analysis to case characteristics.

Adding to the quantitative analysis of outcomes, this study also undertook interviews with 12 legal practitioners to identify factors that influence whether counsel apply for judge-alone trials and that could be correlated with the outcomes examined. Stakeholders were also asked about their views on the advantages and disadvantages of judge-alone trials in NSW.

45 Violent offences include 2011 ANZSOC divisions 01 ("Homicide and related offences"), 02 ("Acts intended to cause injury"), 03 ("Sexual assault and related offences") and 06 ("Robbery, extortion and related offences") (ABS, 2011).
46 The 2011 ANZSOC codes for these offence groups are 1021, 1022, 1031, 1112, 1121, 1122, 1123, 1561, 322 and 412. Discussed further below.

METHOD

Data

This study draws primarily on BOCSAR's COURTS data, which is an extract drawn from the JusticeLink platform. COURTS data contains details of all District Court and Supreme Court appearances finalised in NSW since 1994 and includes information on the demographic characteristics of defendants, as well as details related to offences and court appearances.

COURTS data was supplemented with additional variables from BOCSAR's Reoffending Database (ROD), such as the defendant's prior criminal history and whether they had previously been a victim of recorded crime. Judge-alone trials were identified by text scanning for the phrase "judge alone" in court outcomes recorded in JusticeLink. These cases were then verified by manually checking the free text against court papers.

Sample

The sample used in the main analysis was limited to matters finalised in the higher courts between January 2011 and December 2019, which predates the onset of the COVID-19 pandemic in NSW and the associated changes in court procedures in 2020 and 2021.[47] Further samples containing cases from January 2020 to December 2022 were analysed as part of robustness checks (see Appendix Table B1).

The sample was further restricted to only matters that were committed to trial, excluding any matters where the defendant entered a guilty plea after committal or where charges were withdrawn by the prosecution after committal. In addition, the primary analysis sample excludes 328 cases with an outcome of "not guilty by reason of mental illness"[48] (now referred to as "special verdict of act proven but the defendant is found not criminally responsible").[49] These cases were excluded as 99.3% were held judge-alone. Notably, once this exclusion criterion was applied, the study sample contained only 36 judge-alone trials finalised in the Supreme Court (from a total of 116 judge-alone trials finalised in the Supreme Court during the study period), casting doubt over the representativeness of the sample of judge-alone trials in this jurisdiction.

The final sample contained observations for a total of 5,869 matters finalised between January 2011 and December 2019, involving 5,593 unique defendants.

Variables

Outcome variables

The analysis considered the following outcomes.

1. **Probability of acquittal:** A variable equal to one if the defendant is found not guilty of the principal offence in their case, and zero if the defendant is found guilty of the principal offence.
2. **Court efficiency outcomes**

    - Trial length (days): The number of days over which the trial takes place before an assembled jury or judge. This variable is recorded in integers (i.e. whole days) and is only available for District Court cases.[50]

47 Above n 6.
48 *Mental Health (Forensic Provisions) Act 1990* (NSW) s. 25, as at 26 March 2021.
49 *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW), s. 3(1), ss 30-33.
50 This measure of trial days is manually recorded and provided by the District Court and is only available for cases finalised by verdict, not for cases where a guilty plea is entered after trial commencement. From 2011-2019, it was recorded for about 94% of District Court cases and 2% of Supreme Court cases.

3. **Sentencing severity for defendants found guilty**

    - Probability of imprisonment: A variable equal to one if the defendant receives a sentence of imprisonment, zero otherwise.
    - Sentence length (months): Aggregate custodial sentence length (total term) for defendants sentenced to imprisonment.

Explanatory variables

The model included several variables to control for sociodemographic factors, offence characteristics and fixed effects that could influence outcomes.

1. **Defendant characteristics**
   The following sociodemographic variables were included.

    - Age at finalisation: A defendant's age in years at the date when the case was finalised.
    - Sex: Whether the defendant was male or female.
    - Aboriginality: Whether the defendant has ever been identified as an Aboriginal and/or Torres Strait Islander person at any appearance in ROD.
    - Remoteness of residence: The ABS statistical remoteness area derived from the defendant's residential postcode.[51]
    - Socioeconomic disadvantage: Quartiles from Socio-Economic Indices for Areas (SEIFA), which is an index of relative disadvantage derived from the postcode of a defendant's residence.[52]
    - Number of proven prior offences before finalisation.
    - Indicator for having any prior mental health outcomes ever for previous offences.
    - Indicator for whether the defendant was a victim of any crime prior to contact.
    - Total number of charges (i.e. concurrent offences) that the defendant faces at the trial.
    - Total number of proven charges at trial (used only for models with sentencing severity outcomes).

2. **Offence characteristics**
   Several indicators were included for offence characteristics.

    - 2011 ANZSOC group code for principal offence.[53]
    - Bail status: Binary indicator equal to one if defendant was granted bail (or bail dispensed with), zero otherwise.
    - Child sex offence: Binary indicator equal to one if the defendant was charged for any sexual offences that were committed against victims under 16 years of age, discerned through identifying keywords in LawPart descriptions of offences with ANZSOC codes relating to sexual assault and related offences (Division 03).
    - Domestic violence offence: Binary indicator equal to one if the defendant was charged for any domestic violence offences committed against another person with whom they have or had a domestic relationship, as defined by s. 5 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).
    - Suppression orders or non-publication orders: Binary indicator equal to one if details of the case were subject to either a suppression order or non-publication order under s. 8(1)(a) and s. 8(1)(c) of the *Court Suppression and Non-Publication Orders Act 2010* (NSW).

51 Derived from the Australian Bureau of Statistics (ABS) Accessibility and Remoteness Index of Australia (ARIA+), remoteness area is organised into four categories based on relative access to services in each area (see ABS (2016a). Categories include Greater cities, Inner regional, Outer regional, and Remote or Very Remote.
52 SEIFA scores are coarsened into quartiles reflecting relative levels of advantage. See ABS (2016b) for more details.
53 All references to ANZSOC in this study refer to the 2011 ANZSOC classifications, which were the most recent available at the time this study was produced. For further details on 2011 ANZSOC offence categories, see ABS (2011).

- Participating in the Early Appropriate Guilty Plea (EAGP) program: Binary indicator equal to one if the defendant participated in the EAGP process for any charges related to their current appearance before the court (see Trimboli (2021) and Klauzner and Yeong (2021) for more about this program).
- Indicators for the court region where the trial took place. There are five court regions in NSW where District Court trials are held: Metropolitan, Greater Metropolitan, Illawarra/South, Hunter/North and West/South West. The Supreme Court is coded as a sixth court region.

3. **Judge leniency variable**

   This variable was a proxy for the leniency of the judge presiding over the matter and was included in the models to control for systemic differences between judges in their attitudes towards sentencing. It assumes that judges who are systemically less likely to issue custodial sentences may be more lenient towards the accused in other aspects of the trial, including deciding whether to convict or acquit in judge-alone trials, whether directions given in jury trials are favourable to the defence or prosecution, whether to allow or exclude evidence on the borderlines of what is considered admissible, or in deciding the length of custodial sentences. Ideally, judge leniency would be controlled for by including individual judge fixed effects, but this was not feasible due to the relatively small sample of judge-alone trials.

   The judge leniency variable was adapted from Arnold et al. (2018), Klauzner (2023) and Rahman (2019) and involved regressing a binary variable equal to one if the defendant was sentenced to prison, and zero otherwise, on fixed effects including finalisation year, Local Government Area where the defendant lives, court location, remoteness status of the defendant and the principal offence. Number of prior offences was also included as a control. These variables may have some impact on whether a custodial sentence is issued upon conviction, due to general court practices or offence-specific limitations on whether non-custodial sentences are available. The residuals from this first stage regression were then used to calculate a sentencing leniency index (see Appendix C).

   For cases where the defendant was convicted of the principal offence, leniency was calculated as a leave-one-out-mean for each judge. For each judge, this involves summing residuals from the regression, then dividing them by the number of decisions that the judge makes each year. We calculate this after removing all sentencing decisions relating to the defendant for whom the index is calculated, because we are interested in using a leniency measure determined by judicial attitudes towards other defendants. Leaving in the sentencing decisions relating to the defendant would bias the judge leniency measure.

   For cases where the defendant was acquitted of the principal offence, leniency was calculated as the sum of residuals for all sentencing decisions that the judge made in a given year, divided by the total number of sentencing decisions that the judge made in that year. Because the defendant was acquitted, there is no need to exclude them from the calculation as they were not subject to a sentencing decision and therefore do not impact the judge leniency measure.

4. **Year fixed effects**. These were included to control for potential time-invariant factors such as legislation that could have influenced outcomes.

Empirical approach

We estimate the average difference in our outcomes (the probability of acquittal, trial length, probability of a custodial sentence and sentence length) between judge-alone trials and jury trials. For the difference in outcomes to reflect a difference caused by going judge-alone, all relevant factors influencing acquittal, trial length and sentencing severity would need to be comparable, on average, across the judge-alone and jury trials. We adjust for all observable differences between cases using an entropy balancing matching approach and Ordinary Least Squares (OLS) regression. However, there are likely to be several unobserved differences between cases that we have not accounted for. For example, cases could be selected into judge-alone trials based on the strength of the prosecution's case (discussed in the

interviews below), which is not captured by variables in the model. This means our estimates cannot be interpreted as solely causal. Omitted variable bias might also influence the size of our estimates, as this study is unable to account for factors such as juror and judge characteristics, the visual appearance of the accused, the quality of witness testimonies and cross-examination, and the extent of admissible evidence. The magnitude of estimates generated from this analysis must therefore be interpreted with caution.

Matching for counterfactuals

We compare the treatment group with a matched comparison group constructed using an entropy balancing approach.[54] In this study, entropy balancing involves creating a doubly-robust set of matching weights that are designed to force the means of all control variables to match as closely as possible (Hainmueller, 2012; Zhao & Percival, 2016), with the goal of identifying a set of jury trials that are most comparable to judge-alone trials. There are two key advantages to using entropy balancing compared to propensity score matching, which is another commonly used matching technique (Boiteux & Teperski, 2023; Hainmueller, 2012). These include producing a balance in observables that is as good as or better than propensity score matching, and reducing modelling bias by eliminating the need for manual iteration between different propensity score models for balance.

Matching was implemented using the control variables listed above, which are likely to affect the outcomes of interest but do not directly impact the likelihood of a judge-alone trial taking place.[55] Appendix Figures D1 and D2 show the standardised difference in mean from the unmatched and matched methods. After matching, the standardised difference in means for all observable characteristics fell below a 10% threshold in all the matched samples. This indicates that the entropy balancing method has achieved sound balance across the analysis samples (Austin, 2009).

In some cases, entropy balancing struggles to identify suitable comparison groups. This would result in atypically large matching weights that would, for example, put undue emphasis on jury trials that meet specific characteristics of a small number of judge-alone trials. In this study, matching weights have been examined for each analysis subgroup to ascertain whether large weights are driving estimates (Appendix Figures D3 and D4). These figures show that all entropy balancing weights are below 3.6, which is well below the 20-30 range that has been suggested as being a reasonable limit for matching weights (McMullin & Schonberger, 2022; Parish et al. 2017).

Statistical model

Estimates of the association between judge-alone trials and the outcomes of interest were produced using the following statistical model:

$$Y_{it} = \alpha_0 + \alpha_1 JA_{it} + \alpha_2 X_i + \tau_t + \varepsilon_{it} \qquad (1)$$

where Y_{it} is the outcome of interest (described above) for defendant i at finalisation year t, JA_i is a variable equal to one if a defendant's matter was heard by a judge-alone and zero otherwise, and X_i is a vector containing defendant characteristics, offence characteristics and a judge leniency index. τ_t is a vector of indicators equal to one for each finalisation year spanning 2011-2019 and zero otherwise. ε_{it} is the error term.

Model (1) is estimated using OLS regressions, where judge-alone trials are the treatment group and jury trials are the counterfactual group matched through entropy balancing. The results tables report the size of α_1 , which represents the average change in outcome Y_{it} associated with judge-alone trials.

54 Entropy balancing is a matching method that uses a reweighting algorithm to produce robust matching weights that closely align treatment groups with comparable control groups (Hainmueller, 2012). This produces observable characteristics that are better balanced than propensity score matching approaches and lowers the chance of modelling bias that can result from manual iterations of other matching approaches.

55 Ideally, matching would also include the characteristics more likely to give rise to a judge-alone trial, such as the nature of evidence, extent of logistical challenges in jury trials, presence of extraordinary pre-trial publicity or the nature of evidence. However, these characteristics are not reliably measured by analytics platforms like Google Trends. Another preferable alternative would be including unsuccessful judge-alone applications, but this data is also unavailable.

Subgroup analyses

We repeat the above steps for two sub-samples: (1) defendants whose principal offence was a violent offence; (2) defendants charged with at least one offence with a higher likelihood of involving prejudicial elements or complex evidence. The size of these samples is shown in Table 1.

The violent offences sub-sample was chosen to confirm whether any differences in outcomes were also present in a more serious group of offences (e.g., sexual assault, serious assault, and homicide)[56] and not being driven by relatively less serious offences (which comprise about 40% of judge-alone trials). An offence-level analysis for the most serious offences was not feasible due to several offence categories of interest having too few judge-alone trials. For example, from 2011-2019, there were only 27 murder trials and 33 manslaughter trials that proceeded to a judge-alone trial.

Table 1. Sample sizes for higher court matters that proceeded to trial in 2011-2019, by jury or judge-alone trials and subsamples

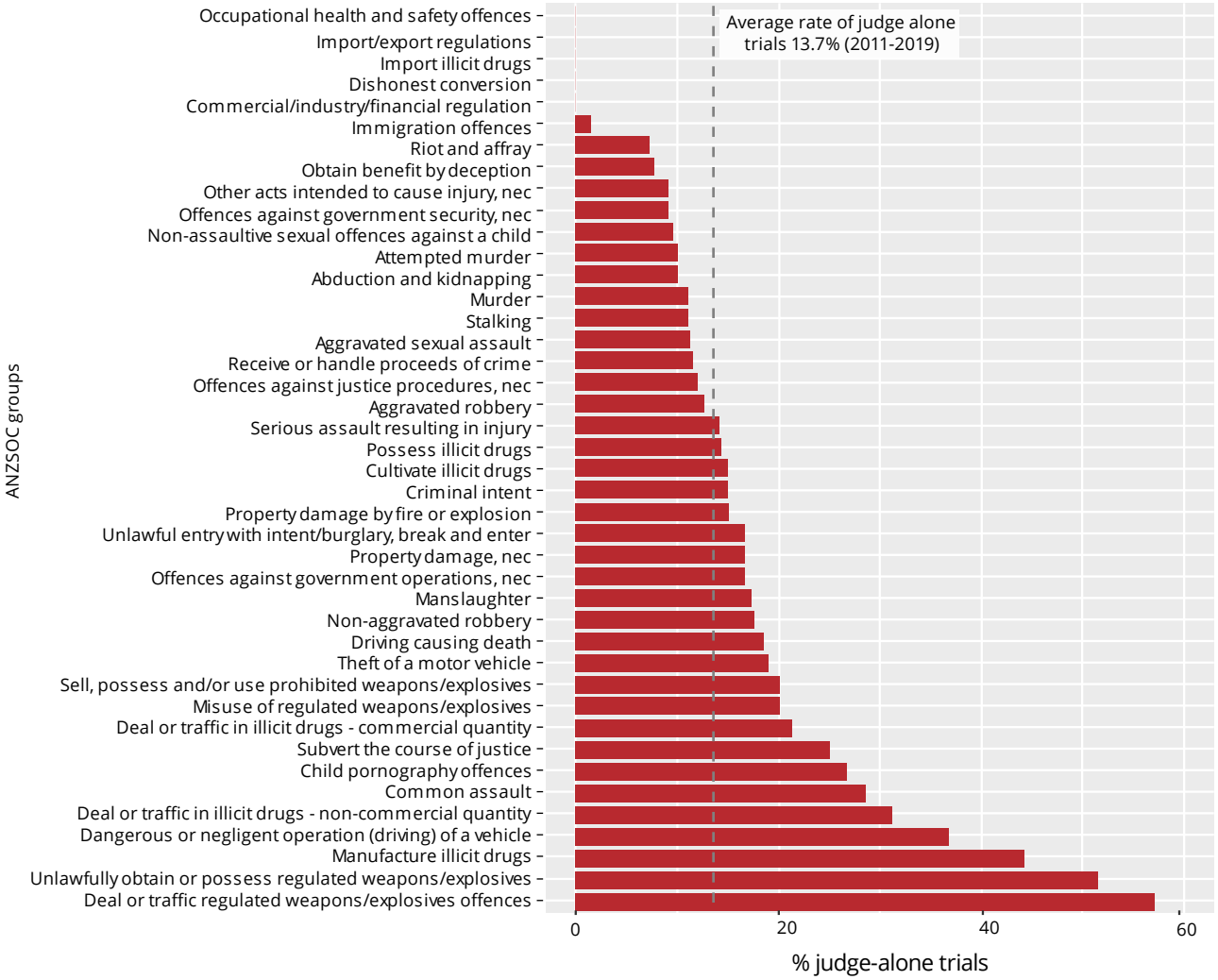
	Jury	Judge-alone	Total
A. All offences	n = 5,064	n = 805	N = 5,869
B. Violent offences	n = 3,406	n = 480	N = 3,886
C. Offences with a higher likelihood of involving prejudicial elements or complex evidence	n = 470	n = 200	N = 670

The second sub-sample contains offences that have been interpreted as having a greater likelihood of involving prejudicial elements or complex evidence. This consists of 10 of the top 11 ANZSOC offence groups with the highest percent of judge-alone trials, ranging from 20% to 57% judge alone (all exceed the 13.7% average rate of judge-alone trials between 2011-2019; see Figure 3).[57] They include offences relating to regulated or prohibited weapons, illicit drug offences (supply/trafficking, manufacturing but not possession or cultivation), child pornography, subvert the course of justice and dangerous or negligent driving. When these offences were shown to legal practitioners, they associated them mostly with prejudicial factors or complex evidence (Appendix Table E1; see Qualitative findings section).

This second sub-sample is considered because it is possible that judge-alone and jury trials hearing these types of matters are more similar in terms of unobserved case characteristics that affect our outcomes. This helps to isolate any causal effects of judge-alone trials. For example, from interviews with legal practitioners, offences relating to regulated or prohibited weapons in the higher courts may involve an accused with affiliations to organised crime or gangs. This could affect how the jury views the defendant's culpability given strong social disapproval of gang-related crime. Similarly, complex expert evidence is known to differentially affect the verdicts of jurors and judges (Briody, 2004, 2002; Goodman-Delahunty & Hewson, 2010; Martire & Montgomery-Farrer, 2020) and may also impact trial length as juries would require more introductory explanation about the use of scientific evidence in trials.

56 Violent offences include ANZSOC divisions 01, 02, 03 and 06.
57 This excludes ANZSOC offence groups with fewer than 6 total trials between 2011-2019. The one ANZSOC group not included in this category for the purposes of the analysis is "Common assault", which is not easily associated with either prejudicial elements or complex evidence.

Figure 3. Percentage of judge-alone trials, 2011-2019, by ANZSOC 2011 group, excluding offences with fewer than six trials



Qualitative approach

To supplement the quantitative analysis, we interviewed 12 legal practitioners with experience across both judge-alone and jury trials in NSW. There were three main reasons for undertaking these interviews. Firstly, aside from some case law on the interests of justice test, there is very little information on the factors determining selection into judge-alone trials. For example, of the 1,869 judge-alone trial proceedings in the 2011-2019 analysis sample, fewer than half had publicly available decisions on judge-alone trial applications in CaseLaw NSW.[58] Secondly, legal practitioners are well placed to discuss any differences in how judge-alone and jury trials operate in practice, such as how evidence is presented, how arguments are delivered and how witnesses are cross-examined. All of these may impact court efficiency. Thirdly, the interviews were beneficial in exploring potential explanations for observed effects and where necessary, inform further analysis.

The 12 interviewees comprised three District Court and Supreme Court judges, three prosecutors and six defence lawyers from Legal Aid NSW, the Aboriginal Legal Service and the Public Defenders. Ten of the legal practitioners were based in metropolitan Sydney and two were based in regional NSW. However, at least three of the Sydney-based practitioners also had some experience with criminal trials in regional NSW. Participants shared personal views that did not necessarily represent the views held by their

58 Based on searches in the free text of "judge" AND "alone" AND "application", legislation cited "Criminal Procedure Act", for cases between Jan 2011 and Nov 2022. The lack of case law on judge alone applications could reflect a large proportion of cases proceeding with consent from both the accused and the prosecution (where no interlocutory decision would be required), or judge-alone trials being granted from unpublished decisions.

respective agencies. The legal practitioners were nominated by the heads of their respective agencies to participate in this study based on their experiences with judge-alone trials (and willingness to participate) and were not randomly selected.

The semi-structured interviews were held in person or over video call and were 40-60 minutes long (a copy of the interview guide is provided in Appendix F). Legal practitioners were asked a range of open-ended questions about systemic differences between judge-alone and jury trials, with topics covering:

- the characteristics of cases where judge-alone trials are sought;
- how judge-alone trial proceedings differ from jury trials, including the presentation of evidence and trial length;
- perceptions of the impact of judge-alone trials on verdicts and sentences;
- how judges may differ from juries in their understanding of the burden of proof in criminal cases; and
- whether judge-alone trials are currently used too often, too little or about the right amount in NSW.

As this qualitative analysis aimed to supplement the quantitative analysis, the legal practitioners interviewed were not intended to comprise a fully representative sample of those involved in judge-alone trials in NSW, which would also encompass complainant/victims and their families, witnesses, and others.

RESULTS

Descriptive statistics

Table 2 shows the differences in characteristics of defendants appearing in jury and judge-alone trials in the NSW District and Supreme Courts. In the *all offences* sample, judge-alone defendants were on average 7.6 percentage points (p.p.) more likely to be Aboriginal, 4.9 p.p. more likely to be aged 35-64 years old and 6.9 p.p. less likely to be aged 65 or over. Judge-alone defendants were also more likely to be living in regional (7.9 p.p.) or remote areas (2 p.p.) and more likely to be tried in the West/South West[59] (11 p.p.) or Hunter/North[60] (4.6 p.p.) court regions. This is consistent with some of the challenges country courts experience, such as local pre-trial publicity and jury assembly, factors which could be persuasive in judge-alone applications (see discussion above). Defendants appearing before a judge-alone trial were also more likely to reside in disadvantaged areas (i.e. postcodes falling within the bottom two SEIFA quartiles). Similar differences between defendants appearing in judge-alone and jury trials were observed in the *violent offences and prejudicial and complex offences* sub-samples, though the latter was not large enough to test for statistically significant differences.

Judge-alone defendants were also more likely to have had prior contact with the criminal justice system both as a victim (6.8 p.p.) and an offender (10.7 p.p.), and were more likely to have had a prior court appearance with a mental health outcome (3.1 p.p.). Judge-alone trials were less likely to involve any child sex offences (2.5 p.p.) or any domestic violence offences (2.3 p.p.), and less likely (4 p.p.) to have been subjected to a suppression or non-publication order.[61]

59 The West/South West region includes the District Court in Albury, Bathurst, Bourke, Broken Hill, Coonamble, Dubbo, Griffith, Orange, Parkes and Wagga Wagga.
60 The Hunter/North region includes the District Court in Armidale, Coffs Harbour, East Maitland, Gosford, Grafton, Lismore, Moree, Port Macquarie, Tamworth, Taree, Tweed Heads and Newcastle.
61 These orders are used for a range of reasons including preventing "prejudice to the proper administration of justice" and protecting the safety of any person. See *Court Suppression and Non-Publication Orders Act 2010* (NSW), s. 8(1)(a), s. 8(1)(c). Although they can be used to prevent prejudicial pre-trial publicity (Bosland, 2018) there is ongoing debate as to their effectiveness amid the rise of social media (McEwen, Eldridge & Caruso, 2018; Tubridy, 2020).

Table 2. Summary statistics for each offence grouping

	A. All offences			B. Violent offences			C. Complex and prejudicial offences		
	Jury trial	Judge-alone	Diff.	Jury trial	Judge-alone	Diff	Jury trial	Judge-alone	Diff.
Defendant characteristics									
Aboriginal	19%	27%	7.6 p.p.	21%	31%	9.9 p.p.	10%	11%	0.8 p.p.
Male	93%	91%	-1.5 p.p.	95%	92%	-3.0 p.p.	87%	88%	0.8 p.p.
18 and under	1%	2%	0.8 p.p.	2%	3%	1.8 p.p.	0%	1%	0.1 p.p.
19-34	30%	29%	-0.7 p.p.	45%	38%	-7.1 p.p.	44%	41%	-2.8 p.p.
35-64	30%	35%	4.9 p.p.	47%	49%	2.0 p.p.	54%	54%	0.2 p.p.
65 and over	36%	29%	-6.9 p.p.	7%	10%	3.2 p.p.	2%	5%	2.6 p.p.
Major cities	64%	59%	-4.9 p.p.	66%	55%	-11.4 p.p.	76%	70%	-6.2 p.p.
Regional	26%	34%	7.9 p.p.	28%	38%	10.4 p.p.	14%	23%	9.7 p.p.
Remote	1%	3%	2.0 p.p.	1%	3%	2.0 p.p.	1%	2%	1.6 p.p.
Remoteness missing	13%	7%	-6.0 p.p.	7%	7%	-0.2 p.p.	11%	6%	-5.3 p.p.
SEIFA1	29%	30%	1.3 p.p.	30%	30%	-0.5 p.p.	28%	29%	1.1 p.p.
SEIFA2	21%	27%	5.4 p.p.	24%	28%	3.9 p.p.	20%	22%	1.6 p.p.
SEIFA3	23%	26%	2.4 p.p.	24%	27%	2.6 p.p.	25%	27%	2.5 p.p.
SEIFA4	14%	11%	-3.0 p.p.	15%	10%	-5.7 p.p.	16%	16%	0.0 p.p.
SEIFA missing	13%	7%	-6.1 p.p.	7%	7%	0.2 p.p.	11%	6%	-5.3 p.p.
Prior criminal justice contacts									
Victim of a prior crime	71%	78%	6.8 p.p.	73%	77%	4.6 p.p.	75%	79%	4.1 p.p.
Prior mental health outcome	2%	5%	3.1 p.p.	2%	7%	4.1 p.p.	2%	4%	1.7 p.p.
Prior finalised offence (ever)	66%	77%	10.7 p.p.	66%	76%	9.5 p.p.	76%	81%	4.3 p.p.
Number of prior finalised offences (5 years)	1.49	1.95	0.46	1.45	1.79	0.34	1.63	1.89	0.26
Number of prior finalised offences (ever)	4.66	6.16	1.50	4.73	4.43	-0.30	4.99	5.40	0.42
Offence characteristics									
On bail	66%	64%	-2.1 p.p.	67%	63%	-3.4 p.p.	71%	70%	-0.9 p.p.
Child sexual offence	20%	18%	-2.5 p.p.	30%	29%	-0.4 p.p.	2%	2%	-0.3 p.p.
Domestic violence offence	10%	8%	-2.3 p.p.	14%	13%	-1.5 p.p.	0%	0%	0 p.p.
Suppression order or non-publication order	12%	8%	-4 p.p.	16%	12%	-4.3 p.p.	4%	4%	-0.3 p.p.
Early appropriate guilty plea	2%	2%	-0.1 p.p.	2%	2%	-0.3 p.p.	0%	1%	0.8 p.p.
Residualised measure of judge leniency	-0.111	-0.139	-0.01	-0.121	-0.152	-0.03	-0.088	-0.09	0.00
Number of charges at trial	4.289	4.111	-0.18	4.726	4.427	-0.30	3.491	3.325	-0.17
Number of proven charges at trial	1.780	1.335	-0.45	1.879	1.521	-0.36	1.547	1.055	-0.49
Court characteristics									
Metro region	39%	30%	-8.2 p.p.	31%	26%	-5 p.p.	53%	37%	-16.3 p.p.
Greater Metro region	19%	19%	0.1 p.p.	20%	19%	-0.7 p.p.	22%	23%	1.1 p.p.
Illawarra/South region	12%	8%	-4.5 p.p.	13%	8%	-5.4 p.p.	11%	11%	-0.1 p.p.
Hunter/North region	17%	21%	4.6 p.p.	20%	19%	-0.5 p.p.	10%	22%	11.5 p.p.
West/South West region	6%	17%	11 p.p.	7%	21%	13.7 p.p.	4%	9%	4.2 p.p.
Country court[62]	42%	50%	8.2 p.p.	49%	55%	5.8 p.p.	25%	41%	15.2 p.p.
Supreme Court	7%	5%	-2.9 p.p.	9%	7%	-2 p.p.	0%	0%	-0.4 p.p.
Observations	5,064	805	5,869	3,406	480	3,886	470	200	670

Note: Diff. = difference.

62 Country court is defined as courts outside the Metro and Greater Metro court regions.

Difference in means

Table 3 compares unadjusted outcomes for the judge-alone and jury trials. As seen here, judge-alone trials had a higher average probability of acquittal across all samples — though the probability of acquittal by jury in the *prejudicial and complex offences* subgroup is almost half that of *violent offences* or *all offences*. Judge-alone trials were also, on average, shorter than jury trials. With respect to sentencing, defendants appearing in a judge-alone trial were less likely to be sentenced to prison than those appearing in a jury trial and, where a custodial penalty was imposed, received shorter prison sentences on average. This comparison does not, however, account for any systematic differences between judge-alone and jury trials, in terms of defendant and case characteristics.

Table 3. Difference in average outcomes, jury and judge-alone trials, across analysis samples

	A. All offences			B. Violent offences			C. Prejudicial and complex offences		
	Jury	Judge-alone	Diff.	Jury	Judge-alone	Diff.	Jury	Judge-alone	Diff.
Probability of acquittal	0.42	0.52	0.10	0.45	0.56	0.11	0.23	0.40	0.16
Trial length (days)	9.97	8.42	-1.56	8.57	8.46	-0.11	10.36	7.34	-3.03
Probability of custodial sentence	0.48	0.39	-0.10	0.48	0.40	-0.09	0.54	0.37	-0.17
Total sentence length (aggregate)	98.10	82.75	-15.35	109.93	100.26	-9.67	64.60	53.98	-10.62

Notes: Diff. = difference.

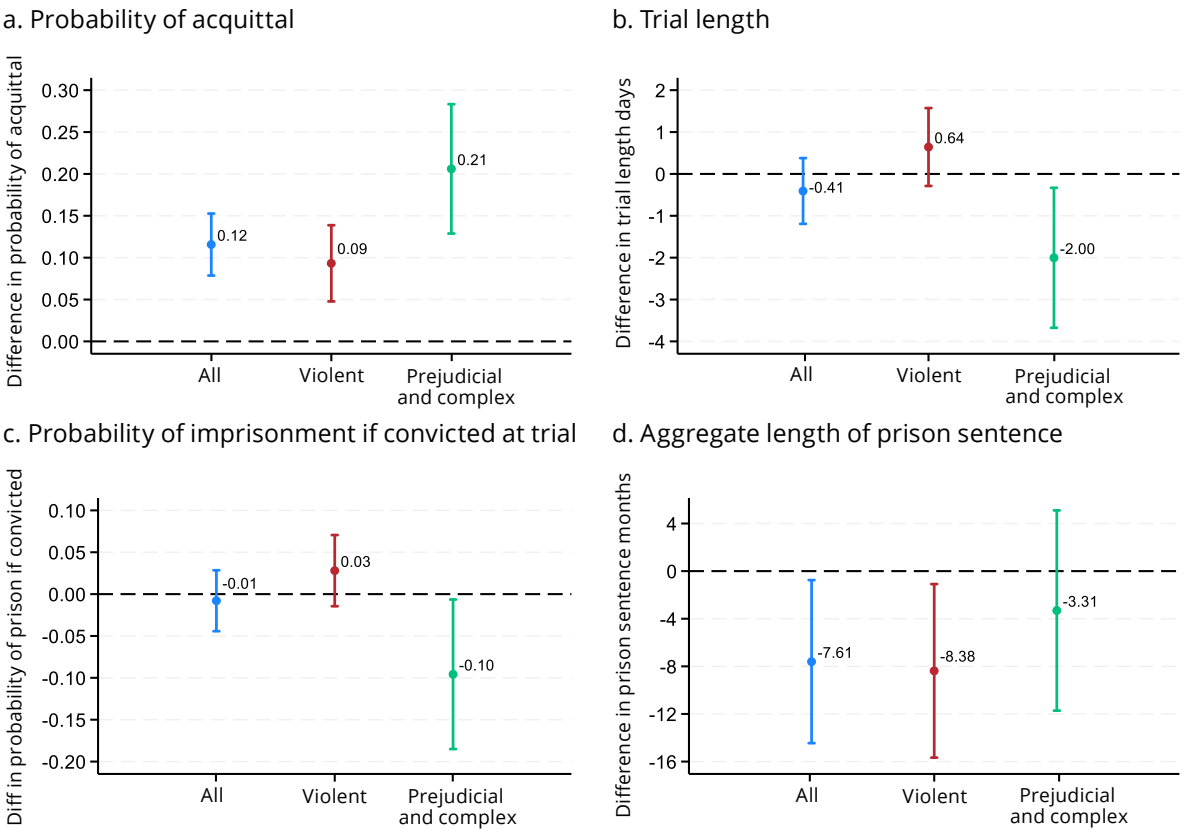
Quantitative results

This section presents the main quantitative estimates for associations between judge-alone trials and the probability of acquittal, trial length, aggregate sentence length and probability of imprisonment for those found guilty at trial. Figure 4 presents the regression coefficient estimates and 95% confidence intervals for the difference between the matched judge-alone and jury trials on each of the four outcomes of interest, after adjusting for defendant and case characteristics. Estimates are shown for the all offences sample, and the violent offences and prejudicial and complex offences subsamples. The full regression results and robustness checks can be found in Appendices G and B.

Turning to Figure 4a, we see that judge-alone trials were associated with statistically significant increases in the probability of acquittal across all samples. The estimated increase in acquittal probability was about 12 p.p. (29% increase) in the *all offences* sample, 9 p.p. (20% increase) in the *violent offences* sample and 21 p.p. (91% increase) for the *prejudicial and complex offences* sample. However, the size of these increases should be interpreted with caution due to the likely presence of selection bias (discussed below).

Judge-alone trials involving offences that were more likely to have prejudicial and complex elements were also, on average, associated with a statistically significant decrease of two days in trial length (19% decrease) (see Figure 4b). We estimated a decrease in trial days for *all offences* and an increase for *violent offences*, but these estimates were not statistically significant. These magnitudes may be influenced by measurement error (discussed below). Additional estimates for an association between judge-alone trials and the number of days between committal hearing and trial outcome can be found in Appendix Table G1. This analysis showed that judge-alone trials were associated with an increase in the average time to outcome for *all offences* and *violent offences* and a decrease for *prejudicial and complex offences*, but none of these differences were statistically significant.

Figure 4. Coefficient plots for the estimated association between judge-alone trials and outcomes (matched samples)



For defendants who were found guilty at trial, judge-alone trials were associated with a statistically significant 10 p.p. (18.5%) decrease in the probability of a custodial sentence, though only for the *prejudicial and complex offences* sample. However, this estimate should be interpreted cautiously as it was not robust to a change in model (Appendix Table B2). The other estimates were not statistically significant and ranged from 1 p.p. in the *all offences* sample to an increase of 3 p.p. in the *violent offences* sample (see Figure 4c).

Among cases where the defendant was convicted and received a custodial sentence, judge-alone trials were on average associated with shorter aggregate prison sentences (see Figure 4d), at least for the *all offences and violent offences* samples. For the *all offences* sample, this was an 7.6 month (7.7%) reduction. The association was similar for the *violent offences* sample, where judge-alone trials were associated with an 8.4 month (7.6%) reduction in sentence length. Meanwhile the direction of the estimates was negative for the *prejudicial and complex offence* sample and not statistically significant.

Conviction appeals

While appeals are not the primary focus of this study, they are worth considering here given the significant association between judge-alone trials and the probability of an acquittal. This is because a higher rate of appeals against judge-alone convictions may indicate heightened concerns regarding erroneous decisions or errors of law.

Data provided by the Judicial Commission of NSW suggests that slightly more judge-alone convictions are appealed than jury convictions (Figure 5).[63] As a percentage of all guilty verdict trials finalised between 20 November 2018 and 6 November 2021 (the effective date range of the first instance of outcomes

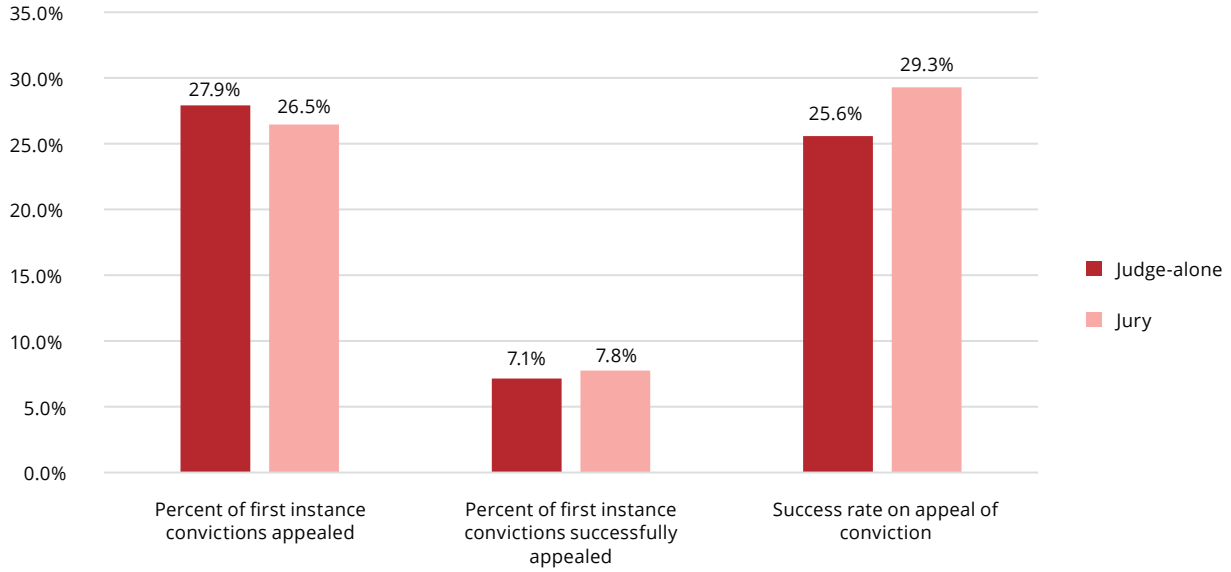
63 The data provided excludes cases where the principal offence was not subject to appeal (n = 6), where the appellant pled guilty at first instance so no trial took place (n = 13), special hearing cases (n = 2) and backup or related offences on a s 166 *Criminal Procedure Act 1986* (NSW) certificate (n = 2). Inquiries into convictions under Pt 7 of the *Crimes (Appeal and Review) Act 2001* (NSW) were also excluded (n = 3). The appeals data does not include unpublished judgments, but may include restricted judgements provided to the Judicial Commission of NSW.

that were appealed),[64] 27.9% of judge-alone matters were appealed compared to 26.5% of jury matters. Further, if we consider only successful appeals as a percentage of all guilty verdict trials, we see that 7.1% of judge-alone convictions were successfully appealed compared to 7.8% of jury convictions.

In addition, judge-alone trials have lower rate of (successful) conviction appeals than jury trials. Between 1 January 2021 and 19 December 2023, success rates for appeals of convictions were slightly lower for judge-alone convictions (25.6%) compared to a 29.3% success rate for jury convictions (Figure 5).

None of the differences between percentages listed in Figure 5 are statistically significant (see Appendix H). Additionally, because these comparisons do not control for systematic differences between judge-alone and jury cases, some caution is warranted when interpreting the significance of these findings. More detailed data on conviction appeals can be found in Appendix Table H1.

Figure 5. Rates of appeal of conviction and success on appeal for appeals finalised between 1 Jan 2021 and 19 Dec 2023



Qualitative results

Factors affecting outcomes in judge-alone trials

The quantitative results presented in the previous section suggest that judge-alone trials are associated with higher acquittal rates, decreased aggregate prison sentences and reduced trial lengths (at least for complex and prejudicial matters). This section discusses the potential causal mechanisms and sources of selection bias influencing these outcomes.

Potential mechanisms for increased acquittal rates

Interviews with legal practitioners identified several plausible reasons for increased acquittal rates in judge-alone trials. One key reason for this difference is the requirement for judges to write judgments explaining the reasons underpinning their verdict.[65] This contrasts with jury decisions which are finalised without any written explanation. Judge-alone convictions therefore face greater scrutiny because they can be appealed based on "whether you got the law right, as well as whether you got your... analysis of the facts correct". As noted by one judge:

64 The effective date range of first instance outcomes is a constructed measure. Using the true date range of first instance outcomes was unfeasible because it ranged from 17 February 2009 to 1 December 2022, which would severely exaggerate the comparison denominator. We have instead created an effective date range using the median lag time between first instance outcome to appeal outcome, which is about 772.5 days. The median lag time was subtracted from the date range for appeals finalised in the data extract, which is 1 January 2021 to 19 December 2023.
65 *Criminal Procedure Act 1986* (NSW), s. 133. A bare statement of legal principles and findings of fact are not sufficient in judge-alone trials — the presiding judge must expose their reasoning process and justify the verdict reached (*Fleming v The Queen* (1998) 197 CLR 250).

> *From my experience, I would think the verdicts I came up with would likely to be the same verdicts that a jury would return.* ***I anecdotally suspect there might be more acquittals from judges only because of the fear of being unable to justify their outcome****, without it looking like it was just some sort of intuitive response to it rather than an informed position. It is very much concerned about the review under the appeal process. […]*
>
> *What I consider hard and from speaking to colleagues is having to justify everything you do. Because it's not just making sure you give yourself the appropriate legal directions, which would be what you would give to a jury…* ***when you actually have to explain why you found a witness to be compelling, or what there was about somebody's evidence that you feel you can comfortably put aside and not act upon, it is sometimes based upon your observations, and it is really hard to convey that. Because it's usually not just one or two questions that are problematic. It'll be the observations over the whole time of their evidence.*** *[…]*
>
> *… but really if you're frightened of the Court of Criminal Appeal,* ***that should just mean that you're more meticulous and more careful in your judgment, rather than that you perversely gave a not guilty verdict where in fact the evidence suggests guilt****. (Author's emphasis)*

Another potential causal explanation for an increased probability of acquittal in judge-alone trials is that judges may be applying a stricter threshold for beyond reasonable doubt compared to jurors. Interviewed legal practitioners frequently described experiences with juries who struggled to understand the concept of beyond reasonable doubt and would ask judges to provide a definition despite previously being directed to its ordinary English meaning. When asked about their perceptions of how judges applied beyond reasonable doubt compared with the average jury, four legal practitioners thought that judges applied a stricter threshold (i.e. judges required *more* evidence to convict than juries) and two thought they were about the same as juries. However, half of the legal practitioners interviewed were not sure how judges and juries differed in their application of beyond reasonable doubt. Their uncertainty was due to a range of factors, including case-by-case variations in facts, differing prosecutorial or defence backgrounds of judges, individual judicial inclinations, and the subjective nature of the beyond reasonable doubt test.

Among legal practitioners who believed that judges applied a higher threshold of beyond reasonable doubt, some attributed this to how judges need to provide reasons for their verdicts. One legal practitioner contrasted the detailed reasons provided in judge-alone trials with the lack of transparency in the jury system, where the reasoning for jury verdicts remains unknown, and stated that "if the judge is producing an unreasonable verdict, you'll get a better sense of exactly where they've gone wrong". Another practitioner stated their view that defendants are "better off with a judge" because judges are "going to properly apply 'beyond reasonable doubt'" and are "far less likely to be influenced by extraneous matters than a jury".

However, interviewees also suggested that some of the positive association with probability of acquittal may be explained by factors also associated with the decision to opt for a judge-alone trial. For instance, weaker prosecution cases may be more likely to be heard judge-alone. Weaker prosecution cases can include those where there is a lack of adequate corroborative evidence or unreliable key witnesses. For example, alleged offences committed in custody were often described as being likely candidates for judge-alone trials because of potential prejudice towards the accused, but one practitioner observed that these were also the cases where witnesses may be very unwilling to provide key evidence due to fears of reprisal. Another practitioner also described a judge-alone case with prejudicial elements where they believed investigators "[latched] onto a particular feature that arises in the brief of evidence" at the expense of "obtaining more corroborative evidence", enabling the defence to secure an acquittal. Two defence lawyers based in different areas of NSW described how, in two instances, prosecutors consented to judge-alone trials when they were overseeing cases that the defence lawyers perceived to be particularly weak.

Three defence lawyers also preferred judge-alone trials where the prosecution's case was relatively weak and a judge-alone option was available. Their preference tended to be based on their opinion that judges generally have a better understanding of beyond reasonable doubt, thereby producing a lower chance of a perverse verdict that may erroneously be based on jurors' belief that "suspicion will be close enough" to convict.

Potential mechanisms for shorter aggregate prison sentences

One possible reason proposed for shorter aggregate prison sentences in judge-alone trials is the application of s. 22A(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which provides that a sentence may be lessened "having regard to the degree to which the administration of justice has been facilitated by the defence (whether by disclosures made pre-trial or during the trial or otherwise)."[66] This provision was applied in *R v Maguire (No 3)*,[67] where Bennett DCJ stated that:

> *I accept that the decision to elect a trial by judge alone facilitated the conduct of the proceedings: s. 22A Crimes Sentencing Act 1999. Had this trial proceeded before a jury I have no doubt that it would have extended well into 2022. The transcript of evidence and submissions extended to 1,375 pages supplemented by submissions in writing and documents assembled as aide memoire [...]*
>
> *Although there was no more than a modest saving in the array of material tendered and the resources required in the conduct of the trial, a* ***greater benefit derived from the decision by the offender to facilitate justice by electing a more efficient course of having the trial before a judge alone*** *saving at least the time that would have been necessarily consumed in ensuring that the jury were properly assisted by the advocates representing the parties and properly informed and instructed by the trial judge. (Author's emphasis)*

However, this reasoning was not well supported by the stakeholders interviewed. Two out of three judges interviewed opposed the use of s. 22A(1) to decrease sentence lengths for judge-alone convictions, suggesting that this is a relatively unsettled area of law. Defence lawyers and prosecutors also observed that this may not necessarily be a reliable means of securing a sentencing discount compared to other available options such as the Early Appropriate Guilty Plea scheme.[68]

Instead, stakeholders noted two potential sources of selection bias that could overstate the decrease in sentence severity observed in judge-alone trials. First, one defence lawyer suggested that judge-alone trials can be advantageous in situations where the defence believes there are no reasonable prospects of success but is nevertheless obliged to run a trial on the instructions of the accused. They described this type of trial as an "extended plea" where "a judge can tell if, obviously, this case has to be run on the instructions of the accused" and counsel runs the case to "maximise its efficiency... and perhaps minimise the impact of running the trial", such that it triggers s. 22A(1) considerations:

> *... it can be useful to run a trial as an extended plea... [In one case] we weren't going to win it... a judge can tell if, obviously, this case has to be run on the instructions of the accused. But you can run a case in such a way that you can maximise its efficiency... and perhaps minimise the impact of running the trial.*

Second, shorter prison sentences could arise from judges being more likely to convict on offences that contain a less severe subjective element. In this scenario, judges and juries may agree on the objective element of the offence (i.e. that the accused committed a physical act or omission that amounted to an offence) but diverge in their opinions on the subjective element (i.e. the state of mind of the accused during the offence, such as whether the accused has demonstrated an *intention* to commit harm rather than *recklessness* about the effects of their conduct). One legal practitioner thought that juries may be more likely to convict for an offence "with intent" because of emotive reasons. In their view, a jury confronted with a case where grievous bodily harm was inflicted against a baby was at greater risk (compared to judges) of convicting the accused for committing the offence with intent, even if the evidence indicated that recklessness was a more likely state of mind. Another legal practitioner spoke about the multiple pathways to establishing state of mind in sexual assault matters. This affects sentencing because the severity of the sentence varies with the pathway established. For example, sexual assault cases where the defendant had *actual knowledge* that the complainant did not consent would attract a more severe penalty than if the defendant was deemed *reckless*.

66 One legal practitioner linked the application of s. 22A(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to gains in trial efficiency from the increased use of tendered evidence and agreed statements of fact as conferring "a benefit to the justice system, in the trial being conducted more succinctly with less inconvenience to witnesses". Trial efficiency is discussed further in Table 4.

67 [2022] NSWDC 359, [41]-[42].

68 Under the Early Appropriate Guilty Plea scheme, defendants who plea guilty are entitled to sentencing discounts depending on the stage of pre-trial proceedings. This includes a 25% discount for guilty pleas before the end of committal proceedings in the Local Court, a 10% discount after the matter has been committed for trial, and a 5% discount in any other circumstance (Klauzner and Yeong, 2021; Trimboli, 2021).

Differences in judge-alone trial procedures which produce court efficiencies

All legal practitioners interviewed agreed that judge-alone trials resulted in shorter trials that were more efficient than jury trials. They identified several different aspects of judge-alone trials that were conducted more efficiently (see Table 4). Efficiency was often linked to increased flexibility in how evidence is presented and hearings are scheduled. Individually, these factors likely reduce the number of hours in each trial day, but together can cut whole days from trial proceedings.

Table 4. Features of judge-alone trials that can shorten trial length

Characteristics	Interview mentions (n = 12)	Explanation
Tendering of witness statements or expert advice, summaries of fact, evidence by agreement	58%	In judge-alone trials, witness statements are more likely to be tendered (i.e. submitted in writing) in the place of in-person witness testimony. Prosecution and defence may be more willing to agree to summaries of fact and tendered expert evidence, accepting that judges require less framing due to their legal training and ability to read lengthy documents out of court compared to juries. Since juries tend to be unfamiliar with expert evidence, it needs to be simplified and thoroughly explained (e.g. through visual aids, posters and photographs), which lengthens time in court. Tendering expert evidence in a report during a jury trial is so uncommon that it was regarded by one interviewed judge as creating a "risk of miscarrying".
Mid-trial evidentiary issues and legal issues can be dealt with substantially less disruption, without risk of discharge	58%	Juries may need to be moved out of the courtroom when the judge deliberates on objections on the admissibility of evidence (i.e. voir dire). This can be time-consuming when accumulated across all objections. One legal practitioner estimated that these physical movements can add 1-2 hours per day of a criminal trial. Juries exposed to inadmissible evidence may need to be discharged, which can be costly to all parties (growing in cost the further the trial has progressed), including jurors, witnesses, the accused, the complainant, and their family. In judge-alone settings, the judge immediately rules on admissibility and if they are exposed to inadmissible evidence, counsel accepts that they submit a written objection without changing the presiding judge.
Deliberation process is streamlined for prosecutors and defence (at the cost of generating more work for judges)	42%	During jury deliberation, counsel for the prosecution and defence, as well as the judge, wait in court for the jury to deliberate. In judge-alone trials, there is no need to wait for deliberation, freeing counsel (and the judge) to tend to other matters until the verdict is issued and arguably lowering costs for legal representation. The judge may be "snatching two hours… to write [the judgment] each morning" while tending to other matters.
No risk of disruption from juror absences	33%	Jury trials were described as having "12 moving parts" that can be subject to many types of disruption, including sickness, lateness, and unavailability due to childcare responsibilities. This is compared to judges, who were described as having to "be just about dead before they delay a trial and don't come to work".
Ability to spread trial across non-consecutive days or be flexible with sitting hours	33%	Jury trials typically run continuously, as adjourning/resuming trials across weeks would be disruptive to jurors' lives. In contrast, judge-alone trials have increased flexibility to adjourn/resume across non-consecutive days to meet the needs of the accused, complainant, and other witnesses. If a witness is unavailable, judges can "intersperse matters in between" and "come back to the trial when the witness is available, which you can't really do with a jury". Judges acting alone may also make sitting hours start earlier or lengthen them. However, one practitioner observed that while overall time in court remains lower, the process can sometimes get drawn out by adjournments.

Table 4. Features of judge-alone trials that can shorten trial length (continued)

Characteristics	Interview mentions (n = 12)	Explanation
Streamlined cross-examination	25%	Three legal practitioners stated that cross-examination tends to be more streamlined in judge-alone trials. From the defence's perspective, cross-examination involves fewer "theatrics". In jury trials, defence lawyers sometimes "impliedly [criticise] issues in the trial" hoping "the jury will... sort of dislike the prosecution case as an entity, rather than focusing on the material from the prosecution case". This is fruitless in judge-alone trials. Another practitioner stated that theatrics, such as "[thumping] the lectern a bit with a complainant" would lead the judge to "look at you like you're a pork chop". For the prosecution, they may want the jury to connect with witnesses on a human level which can add time — they cannot hand the jury "a piece of paper and say, 'Alright, read this for yourselves'" before the cross-examination. With a judge-alone trial, by contrast, they are more willing to proceed to the issues.
No jury directions	25%	In a judge-alone trial, there are no jury directions because the judge directs themselves. Practitioners assumed that judges obey their own directions, whereas some practitioners were sceptical that juries obeyed directions.
Streamlined opening or closing statements	17%	Opening addresses in jury trials are lengthened by basic facts that must be provided to the jury (e.g. on the role of trial advocates, the nature of charges, simplified overview of the evidence). Most can be omitted in a judge-alone trial. One legal practitioner noted judge-alone opening statements are shorter (10-15 mins in judge-alone vs 1.5-2 hrs in a jury trial), allowing them to address the most relevant issues (e.g. witness testimonies and admissibility).
Calling witnesses out of order	17%	In a jury trial, witnesses are generally called in chronological order to guide jurors through what occurred. However, in a judge-alone trial, counsel is much more likely to call witnesses based on their availability, likely in a non-chronological order (and possibly in part-day court sittings), as judges do not need the same guidance.
Unusual conduct can be more easily managed	8%	One legal practitioner described a situation in a judge-alone trial where they were being shouted at by a witness during a cross-examination, and how a judge was better placed to preside over the court.

It is also worth noting that the estimated decrease in trial length associated with judge-alone trials that we report may be an underestimate of the court efficiencies that judge-alone trials generate. This is because the trial length data in our study is measured in whole days not hours or part days. For example, a judge-alone trial that consisted of 5 half-day sittings was recorded in the data as consisting of 5 *whole* days and would therefore be equivalent to a jury trial that required 5 full-day sittings. This measurement error would underestimate the advantage of part-day judge-alone hearings in enabling judges to tend to other matters assigned to them and potentially progress multiple matters in the same day.

Despite agreement that judge-alone trials are more efficient than jury trials, all three judges interviewed described judge-alone trials as a placing significant burden on individual judges, particularly through the requirement to write verdicts and the pressures of a potential appeal. As stated by one judge, "when you talk about saving time, the saving time is in the 'in-court time', but you have exponentially greater time then having to justify your verdicts."

Judges described the scrutiny of decisions by the Court of Criminal Appeal (CCA) as a major burden. One judge shared that from "speaking to judges of the District Court... they feel totally devalued by the Court of Criminal Appeal" and that the CCA's decisions made "judges less willing to have to take on the burden of doing a judge-alone trial". Another described the impact of an appeal as being "very confronting, when it's both your legal reasoning as well as your factual reasoning, and an argument that you've been unreasonable in coming to your conclusion" and "very unnerving... it basically means you haven't performed your job". One source of this pressure is that judges on appeal rely exclusively on backup

transcripts, compared with a trial judge who may have had access to in-person testimony (despite the increased probability of tendered statements in judge-alone trials). To illustrate, one judge referred to an appeal decision that they strongly disagreed with:

> *... [The case] went before a judge alone who produced what I think was an impeccable judgment. And where, just in terms of application of principle for an appeal court, considering the correctness of the verdict, you would have to make a very significant allowance for the advantage the trial judge had in seeing the witnesses give their evidence rather than just reading a transcript. The CCA thought they knew better on the backup transcript alone and they quashed the verdict and entered a verdict of acquittal, not even a retrial... in my view, that decision was a disgrace... I think the CCA is more likely than certainly it used to be when I was a trial lawyer to quash the verdicts of judges. And really, if the judge is doing the right thing, how does that happen?*

The judge also spoke to the personal nature of the burden from judge-alone trials, which disrupted their lives outside chambers. They stated that:

> *... [judge-alone trials] are difficult, you know, instead of having 12 heads to consider a complicated issue, you've got one. And I don't like doing judge-alone trials because I really feel the burden of it. I feel the burden of having to say this person's guilty or not guilty [of a serious offence]... and it's a personal burden, you know, you do wake up in the night thinking about it... worrying about it. And I'm sure jurors do too. But if you're doing trial after trial that's judge-alone, that's a big burden to take on.*

Factors that motivate judge-alone applications

To better understand any sources of selection bias that may affect the estimates generated from the quantitative analysis, legal practitioners were asked about the characteristics of cases that typically applied for judge-alone trials based on their own experiences. They were also presented with a specific set of offences and asked why these cases had a higher proportion of judge-alone trials (over 20%). Table 5 includes the six characteristics and rationales mentioned by practitioners for why judge-alone trials were pursued by the defence (and at times, suggested by the prosecution). These reasons are not mutually exclusive, as some cases have characteristics that fall into multiple categories.

Table 5. Characteristics of cases that apply for a judge-alone trial

Characteristics	Interview mentions (n = 12)	Explanation
Prejudicial factors	75%	Where a case has a factual component or admissible evidence that is likely to trigger an emotional response or other type of bias in the jury, such that it would threaten the impartiality of the jury required for a fair trial.
Complexity of evidence	50%	Where a case involves complex expert evidence of a highly technical nature compared to the average case. This includes cases where the Crown heavily relies on extensive written documentary evidence.
Practical considerations	33%	Where a trial faces additional logistical challenges concerning witness availability or juror availability, including problems specific to the COVID-19 pandemic and public health measures such as self-isolation and social distancing.
Mental health reasons	33%	Where an accused is raising issues relating to mental illness or substantial impairment by abnormality of mind, the revolves around questions of law and psychiatric evidence.
Publicity	25%	Where there is pre-trial publicity that includes prejudicial content that could bias juries.
Complex legal questions	17%	Where convictions depend on complex questions of law rather than questions of fact. This may overlap significantly with cases involving complex evidence.

Prejudicial factors

The factor most frequently identified by legal practitioners (75%) as motivating judge-alone applications was the presence of an element of the case that could give rise to prejudice in the jury and which was unlikely to be cured by judicial direction. This was raised by multiple judges, prosecutors, and defence lawyers, who described a range of factual circumstances where this could potentially arise, particularly cases where a serious crime such as murder, child sexual assault or child pornography had been committed. That lawyers, judges and prosecutors interviewed raised this rationale suggests prejudicial factors can be pivotal in both obtaining consent from the prosecution for judge-alone trial applications, and for successful defence applications when the prosecution opposes a judge-alone trial.

These offences can contain extremely confronting materials, where the defence and/or prosecution "think the jury won't be able to deal with the standard direction [and] are likely to not keep the appropriate distance",[69] possibly due to the "injuries or the age of the complainant or the relationship between the complainant and the accused". Other factual scenarios raised by practitioners included:

- where the admissible evidence includes proven prior offending that cannot be readily separated from the offence(s) at trial; and
- offences alleged to have been committed in custody.

When legal practitioners were prompted with a group of offences that were more likely to be subject to a judge-alone trial, they also noted two additional factual circumstances.[70]

- The accused has links with organised crime, gangs, extremist organisations or other groups which are likely to be viewed extremely negatively by most members of the public.
- The defence relies on an argument that the alleged offending was conduct amounting to a less serious offence (e.g. drugs were possessed for personal use, not drug trafficking) or abhorrent behaviour that is not a crime.

However, when prejudicial concerns are present, judge-alone applications may also be raised tactically by the defence. For example, during disputes about the admissibility of evidence perceived by the defence to be of a prejudicial nature, the defence may raise a judge-alone application to mitigate against prejudice if that evidence is ultimately ruled admissible. One legal practitioner recounted a case where:

> *... [The Crown] wanted to use the earlier offending as demonstrating a tendency. And so defence's first line of defence was to argue against the tendency reasoning. [Defence] wanted to say 'look, this tendency evidence is too prejudicial. It should not be put before a jury.' And when [defence] lost that argument, their backup position was, in that case, 'we want a judge-alone trial'... [The Crown] consented... on the basis that [the Crown] could see that it was going to be highly prejudicial.*

Complexity of evidence

The second most motivating factor for judge-alone applications was the presence of complex or expert evidence, which was mentioned by half of the practitioners interviewed. This rationale at times overlapped with mental health considerations[71] and complex questions of law. The offences most frequently linked to this reason for a judge-alone application were fraud cases which involve substantial amounts of financial evidence and murder cases where there are substantial amounts of circumstantial scientific evidence. After prompting, practitioners also associated dangerous driving, illicit drug supply and illicit drug manufacturing offences with complex or expert evidence (see Appendix Table E1).

69 One practitioner described these reasons as distinct from other prejudicial factors, but we have subsumed it in this category to improve readability based on the similarities with other prejudicial characteristics.
70 See Appendix Table E1 for more detail on these offences and how they related to prejudicial factors.
71 Where the defence is aiming for an outcome of "act proven but not criminally responsible because of mental health impairment or cognitive impairment, the facts are often either largely agreed or else not in dispute. The matter then rests on questions of law which are typically dealt with by a judge. From 2011-2019, 99.3% of cases ending with mental health outcomes were subject to judge-alone trials.

Complex questions of law

Three legal practitioners noted that offences involving joint criminal enterprise or accessorial liability could include particularly complex legal directions, which may give rise to a judge-alone trial. One practitioner stated that given criminal law students they taught at university struggled with understanding joint criminal enterprise, and that legal practitioners also often struggled in applying these concepts, there was little chance that a jury of laypeople would be able to properly comprehend these legal principles.

Prejudicial publicity

Prejudicial pre-trial publicity was part of the original rationale for the introduction of judge-alone trials in NSW in 1990,[72] but generally is not a determinative reason for going judge-alone. As one legal practitioner noted:

> *… in determining a judge-alone trial… pre-trial publicity isn't a good basis upon which to get an order. It's actually really hard, because if you think of some of the cases that have gone through historically, where there's been just 24-hour publicity, like say the [Ivan Milat] trial. I mean everyone was reading about that every day coming up to the trial and reading some quite disturbing evidence allegations concerning the evidence. And Milat tried for a stay of his trial on the basis that he was impossibly prejudiced by the pre-trial publicity. And the court held 'no, he wasn't impossibly prejudiced, a jury could be given directions to set aside anything they'd read in the paper and what have you'. And those principles of law that have developed in relation to stay applications have kind of crept into the determination of judge-alone applications.*

However, two legal practitioners spoke about cases in country courts where substantial publicity was determinative in their judge-alone applications. In one case, counsel secured a judge-alone trial — despite the prosecution withholding consent — by drawing the judge's attention to extensive publicity from both national and local media that disclosed prejudicial personal details of the accused, potentially impacting the impartiality of any jury drawn from the small community where the accused lived. In another case, the accused was so well-known that it caused substantial challenges in empanelling a jury from the town:

> *… we couldn't [get a jury of 12] because the accused was well-known in the community… And so our options then became really two options: move to another regional centre [that was] an eight-hour drive from the [original regional area]… or alternatively to proceed judge alone [in the original regional area]… [Judge-alone] made sense, both from the defence point of view because all of [the] support networks were in the [original regional area], and also from the prosecution's point of view because all of [the] witnesses were coming from [the original regional area].*

Aboriginal defendants from families with intergenerational incarceration may face additional challenges in securing an impartial jury. As one legal practitioner explained:

> *… there are clients who are from 'well-known' families… not for positive reasons. They're from families that have been through generations of trauma and disadvantage and have been through the system. So you often have, you know, clients' grandparents, parents and then by the time it gets to them all in the same town, that their name is tarnished in the area. So it's certainly something that clients raise with me, once we get instructions to take the matter to trial, they do want to talk about, can I do judge-alone? … [one client was concerned] that if you Google his last name, even if it's not him, but he will be associated with the negative impacts of his family and the crimes that his family members have committed.*

Experiences in seeking consent from prosecutors for judge-alone trials

The prosecutor's consent can be pivotal in securing a judge-alone trial. According to one judge, fewer than half of judge-alone applications succeed where the prosecution opposes the application. This was attributed to the prosecution's position generally being closer to the "interests of justice" consideration than defence, whose application is more aligned with the interests of the accused.

72 NSW Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report No 48 (1986), see [7.3]-[7.5]. This report recommended introducing judge-alone trials, which was accepted by the NSW Government.

The Prosecution Guidelines of the Office of the Director of Public Prosecutions lists a range of considerations that the prosecution must consider when deciding whether to consent to a judge-alone application.[73] These include the role of juries in administering justice and whether the trial involves a factual issue "that requires the application of objective community standards",[74] the latter of which parallels s. 132(5) of the *Criminal Procedure Act 1986* (NSW). Other factors include "whether any potential prejudice may be adequately addressed through the process of jury selection or by instructions to the jury by the trial judge" and the presence of technical or complex expert evidence,[75] which relate to the two most frequently cited factors for judge-alone applications in Table 5. When asked about prosecutors' willingness to consent to judge-alone applications, interviewed prosecutors all referred to these guidelines and generally held the view that they were tightly adhered to, while also stating that they were amenable to judge-alone trials when there were appropriate reasons for doing so.

Defence lawyers reported a wide range of experiences in relation to the willingness of prosecutors to consent to judge-alone applications. Some of these views are reproduced below.

> *... I think it probably depends on what area you're in... **my personal experience with the DPP is they're not willing to consent**. Their fallback position is 'no, we are not consenting.' And the application will have to be heard in front of the judge. (Author's emphasis)*

> *... **I personally have found the Crown, overwhelmingly, to consent, if there is a good reason** for making the application... I think good, strong applications are generally either consented to or granted. I think the Crown could do more to agree and consent where it could go either way. (Author's emphasis)*

> ***Not frequently**... I think that the state of the law is that it's supposed to be a jury trial unless... something sort of forces the DPP's hand. (Author's emphasis)*

Other benefits and risks associated with judge-alone trials

After legal practitioners were informed that judge-alone trials comprised about 13.7% of trials in 2011-2019, they shared a wide range of opinions about the frequency with which judge-alone trials should be used. Five thought that judge-alone trials "should be used more", three thought that they were being used "about the right amount" and four believed they were being "used too often". Views within practitioner groups were also mixed. The views of both the three prosecutors and three judges were evenly spread across the response categories of "should be used more", "about right" and "used too often", while half of the six defence lawyers thought they "should be used more". The two quotes below represent the strongest opposing views held by practitioners interviewed.

> *[Judge-alone trials are used] **too much**. I think there's a tendency, particularly in the District Court, perhaps attracted by efficiency... But in my view, **trial by jury is a critical plank in a civilised democracy**. (Author's emphasis)*

> ***I think juries are an anachronism**. Effectively, I think they belong to a different era of justice that I think really society has moved on from. (Author's emphasis)*

Among legal practitioners who thought that judge-alone trials were being "used too often" or "about right", themes included a trade-off between efficiency and the interests of justice, concerns about the lack of diversity among judicial officers and the need for community standards to determine acceptable standards of behaviour.

> *If you were trying to achieve greater efficiency and cost-effectiveness... we should encourage more [judge-alone trials]. But if you're interested in the proper administration of justice, and the interests of justice being achieved, then they're probably being used about the right amount.*

73 ODPP Prosecution Guidelines (March 2021) [9.3]. <https://www.odpp.nsw.gov.au/prosecution-guidance/prosecution-guidelines/chapter-9#guidelineanchor347>
74 Ibid.
75 Ibid.

> *I think juries are really important… with a judge if they're from privileged backgrounds, I just don't think you are judged by your peers, and especially with the lack of diversity on the bench… Some judges, no matter how much they try, will just never get the client's background… Jury may not either, but I think you've got a better chance of having a good cross-section when you get to jury.*

> *Judge-alone trials were most likely used more in 2020-2022 because of the impacts of COVID and the difficulty in keeping a jury. But, as an advocate, my preference is for a jury trial because criminal matters should be determined by a jury of the accused person's peers, who represent the community and what it views as being standards of behaviour and questions of intent…*

On the other hand, practitioners who supported increasing the number of judge-alone trials suggested a variety of reasons for doing so, including lowering the risk of perverse verdicts and influence from extraneous factors, the benefits from transparent verdicts, problems with juror attentiveness or comprehension, and the increasing complexity of trials.

> *… you get to all of the other problems with juries in terms of: Well, are they listening? Are they paying attention? Are they following the evidence? Because it can be hard, but especially with a long trial, it can be super hard to sit down and concentrate. We've all seen jurors sleeping in court. You know, or obviously disinterested [sic]. I wouldn't want my fate placed in the hands of someone who was nodding off in the courtroom and not following the evidence… But then there are a host of directions that can come up in any case, whether it's consciousness of guilt, or tendency… context evidence where evidence is not being used as tendency but it's still in the trial, and what's the difference between the two? These are hard things for lawyers, let alone for laypeople.*

> *I think that trials are generally becoming more complex, more technical, there's more pretrial… they're longer in general. So I feel like unless they do something to address that, judge-alone trials should be more frequent. Because otherwise it can just take forever wading through the evidence and in having these technical arguments, whereas before a judge, some of them fall away because it's just not going to be an issue… But I think the jury system is a good system, and I think we need to protect it and support juries, and that the default should always be a jury trial.*

In speaking to the benefits of transparent verdicts from judge-alone trials, a legal practitioner stated that they can help with post-trial communications, even when an undesired verdict was reached. The practitioner referred to a case where they believed the judge reached the wrong verdict, but stated that the judge's reasons "do stand up to scrutiny" and were "unimpeachable", which assisted with communicating with the complainant after a trial, compared to jury verdicts which are left unexplained. As this practitioner observed:

> *In the reasons that they've given… you can go back to a witness or you can go back to a complainant and say, for instance, 'oh look, the judge believed you. But the standard is a very high standard, you know, it's got to be proved beyond a reasonable doubt. What the judge found was, there was just enough gap between what you told him or her and proof beyond reasonable doubt'… with a jury… we can't say for certain 'Oh look, the judge or jury believed you'*

However, transparent verdicts can place greater burdens on complainants if a trial judge finds that they are not a credible witness.

> *… where the judge has said that they didn't find the complainant credible… we can go to the complainant… in a delicate way, but we can just say 'look, the judge just did not accept your version of events'…. I think that shifts some of the anger or the disappointment of the complainant away from the accused, away from the prosecution team, away from the police, and forces that person to either take personal responsibility for the outcome, or to question why the judge came to the view that the judge came to.*

One legal practitioner perceived the current system of judge-alone trials as placing the accused in a "substantially disempowered position" by requiring them to obtain consent from the prosecution, even after receiving advice from their lawyers, or otherwise pass an interests of justice test from the judge. In their view, after receiving competent legal advice from their lawyers, the accused should be empowered to abandon their right to a jury trial, given the few barriers against how the accused can abandon other rights *without* legal advice (e.g. the right to silence when held by police).

This legal practitioner also took issue with how the interests of justice test involves a consideration about whether there is a factual issue at trial that requires "the application of objective community standards",[76] given that judicial officers are already expected to apply community standards in some capacity. This interviewee also noted that District Court judges apply community standards when considering appeals from the Local Court without a jury and suggested that magistrates also apply community standards when dealing with matters summarily in the Local Court.

DISCUSSION

This study is the first of its kind to compare outcomes for a large sample of judge-alone and jury trials, including differences in the probability of acquittal, trial length and sentence severity. We found that, on average, judge-alone trials were associated with a statistically significant 12 p.p. increase in the probability of acquittal and a significant decrease in average aggregate prison sentences of 7.6 months. Judge-alone trials were also associated with a statistically significant decrease in trial length, but only for matters involving complex and potentially prejudicial offence elements. None of these results suggest that presiding judge-alone increases the chance of erroneous decisions or errors of law. Indeed, preliminary data indicate that a smaller proportion of judge-alone convictions are successfully appealed compared to jury convictions.[77]

This study also interviewed 12 legal practitioners with experience in judge-alone matters, who suggested that the higher acquittal rates associated with judge-alone trials may be caused by judges applying a stricter threshold for beyond reasonable doubt compared to juries (i.e., judges require *more* convincing evidence to convict). This is an inversion of findings from U.S. studies that found a greater willingness among American juries to acquit and that this was driven primarily by *juries* applying a stricter threshold of beyond reasonable doubt compared to judges (Eisenberg et al., 2005, p. 189; Kalven & Zeisel, 1966). However, since these U.S. studies relied on questionnaire data which asked judges how they would have adjudicated in a sample of criminal matters that had been heard by a jury, it is not certain that these judges would have decided to acquit (or convict) had they actually been the adjudicator in the matter. Further, judges in NSW are required to provide transparent verdicts with detailed written reasons that can be appealed, while the judges participating in the U.S. studies were not asked to provide any legal reasons for their decisions. Several practitioners believed that this requirement to justify their decision in writing was a likely explanation as to why judges would apply a more stringent threshold to convict in NSW criminal trials.

The interviews also identified several features of judge-alone trials that may be driving the observed difference in court efficiency. These include shorter presentations of evidence and greater use of written submissions, such as tendered statements to replace parts of cross-examination, which can reduce the time spent in court, particularly where matters involve complex scientific or financial evidence. This explanation is reassuringly consistent with findings from other Australian research (Hanlon, 2014). It is worth noting here that the estimated decrease in trial length associated with judge-alone trials that we report may be an underestimate of the court efficiencies that judge-alone trials generate. This is due to trial length data in our study being measured in whole days not hours or part days, leading to half-day or part-day sittings being recorded as whole day sittings. This measurement error would underestimate the advantage of part-day judge-alone hearings in enabling judges to tend to other matters assigned to them and potentially progress multiple matters in the same day. Future studies could mitigate these issues by using hourly or half-day measurements of trial length.

76 *Criminal Procedure Act 1986* (NSW), s. 132(5).
77 This is similar to findings about judge-only Diplock courts in Northern Ireland (Quirk, 2021, p. 145), which despite having an automatic right of appeal saw a halving in the appeals success rate (16% judge-alone vs 32% jury trials, 1987-1993). This was attributed to reasoned judgments being harder to challenge.

The defence's use of tendered statements and expert evidence, among any other efforts to shorten trial length, may also be considered by some judges as efforts by defence counsel to facilitate the administration of justice, and therefore be considered in sentencing decisions in accordance with s. 22A(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). While s. 22A(1) is a possible explanation for the shorter aggregate prison sentences handed down in judge-alone trials, this was not well supported by the practitioners interviewed, who considered it a unsettled area of law and an unreliable way of securing a shorter sentence. An alternative explanation put forward by two legal practitioners was that shorter prison sentences are associated with judge-alone convictions because judges may be more likely to select into offences that contain a less severe subjective element. For example, a judge may not believe that *intent* was proven in relation to a grievous bodily harm offence but only that the defendant was *reckless* as to causing actual bodily harm. The former offence carries a 25-year maximum imprisonment penalty but the latter only has a 10-year maximum. Jurors, on the other hand, may be more swayed by emotive evidence and therefore more likely to convict for an offence with *intent*.

The legal practitioners interviewed identified confounding factors that may be biasing our estimates of the effect of judge-alone trials on the probability of acquittal, trial length and sentencing severity. Practitioners observed how factors motivating judge-alone trials might be associated with weaker prosecution cases, which could explain some of the positive association with probability of acquittal. For example, a case where an accused allegedly committed an offence in custody may be eligible to be heard judge-alone because of potential prejudice towards the accused, but also may be weaker from the prosecution's side due to a lack of witness cooperation. In addition, three defence lawyers described their preference for proceeding with a judge-alone trial when opposing what they perceived to be weaker prosecution cases. Two defence lawyers also noted two instances where prosecutors consented to judge-alone trials in cases that the defence perceived to be particularly weak. For these reasons, we are unable to conclusively state whether the estimates reported here are causal. Further research should be undertaken to better isolate the causal impact of judge-alone trials on acquittal rates and sentencing severity by exploiting a source of exogenous variation, such as the timing of COVID-19 emergency measures, rather than matching groups on observables. In addition to addressing selection bias issues, this approach would better control for other confounding factors, such as judicial characteristics (including schooling, prosecutorial and/or defence counsel experiences), which were raised in interviews as potentially impacting verdicts, as well as judicial attitudes towards the defence and prosecution.

From interviews with legal practitioners, the factors identified as most often motivating judge-alone applications were the presence of prejudicial elements in the case (75% of respondents), complexity of evidence (50%) and practical considerations (33%). Examples of prejudicial elements included offences committed in custody, extremely traumatic evidence, accused with affiliations with organised crime (for firearms offences), and defences where the accused claims possession of drugs for personal use (for drug supply and trafficking offences). While practitioners associated murder and sex offences with prejudicial factors, only a small proportion of those offences in our sample were finalised by way of a judge-alone trial. From 2011-2019, 11% of murder trials and 11.3% of sexual assault trials were held judge-alone, which is less than the 13.7% average rate of judge-alone trials (Figure 3). But in absolute terms, there were 241 judge-alone sexual assault trials and 27 judge-alone murder trials. Complex evidence was most frequently linked to financial and accounting evidence in fraud cases consistent with case law, although only 7.1% of fraud, deception and related offences in our sample were subject to judge-alone trials. Legal practitioners additionally raised pharmacological (for drug supply and manufacture offences), intercepted telecommunications (for firearms offences) and circumstantial forensic evidence as potentially problematic for juries. Practical considerations were more determinative in regional areas (consistent with observations by Ierace (2011)) and during the COVID-19 pandemic, where jury trials were challenging amid public health measures. Legal practitioners generally noted that pre-trial publicity was often not a determinative reason for going judge-alone, contrary to court decisions in Western Australia and Queensland (O'Leary, 2011), but consistent with legal commentary on NSW courts' management of adverse publicity (Smith & Wheeler, 2018).

Further analysis by offence type suggests that the increase in probability of acquittal among judge-alone trials is consistent across offences of varying seriousness, with statistically significant increases of 9 p.p. and 21 p.p. also observed for *violent offences* and less serious *prejudicial and complex offences*, respectively. The estimates from the *prejudicial and complex offences* subgroup analysis might be considered a "truer" estimate of the causal effect of judge-alone on acquittal rates because selection biases arising from case characteristics, such as prejudicial offence elements (for firearms offences), complex evidence (for drug manufacture offences) and weaker prosecution cases, are minimised. Having said this, these offences have unique characteristics that set them apart from other criminal cases finalised in the District and Supreme Courts, and have much lower acquittal rates in general compared with other types of offences, making it difficult to generalise these results.

In contrast, the subgroup analysis produced mixed estimates for trial length, with a statistically significant decrease of 2 trial days on average for *prejudicial and complex offences* and a small, non-statistically significant increase in the *violent offences* subgroup. These different results could be partially explained by stronger biases in the *violent offences* subgroup caused by judge-alone cases that were substantially more complex or logistically difficult compared to those proceeding with jury trials. For example, for offences with more than 2 judge-alone trials within the *violent offences* subgroup, only the ANZSOC offence group for manslaughter had judge-alone trials that were longer than jury trials on average (24.3 days for judge-alone vs 13 days for jury). That judge-alone manslaughter cases were on average 87% longer than jury trials for manslaughter suggests that they may have been substantially more complex than their jury trial counterparts, irrespective of whether they occurred judge-alone.[78] By comparison, judge-alone and jury trials of offences in the *prejudicial and complex offences* subgroup may be more likely to be similar in their level of complexity or logistical difficulty, illustrated by the smaller gap in trial length for the one ANZSOC offence group ("subvert the course of justice") where judge-alone trials were longer on average (16.2 days for judge-alone vs 13.3 for jury).

Subgroup analysis produced uncertain results for sentencing severity outcomes. Judge-alone trials were associated with a statistically significant decrease in sentence lengths for *violent offences* (-8.4 months on average). The estimated decrease for *prejudicial and complex offences* was not statistically significant. Conversely, a statistically significant relationship between judge-alone trials and a decrease in the probability of a custodial sentence (10 p.p.) was only found for *prejudicial and complex offences*, although this result is not robust to a change in model. It is not immediately clear why there a difference in the probability of a custodial sentence was found for this subgroup.

Lastly, legal practitioners shared a wide range of views about judge-alone trials. Five of the 12 practitioners were supportive of expanding their use. Practitioners considered that judge-alone trials provide numerous benefits, including greater efficiencies that reduce their time in court, less time on remand for remanded defendants willing to proceed with judge-alone trials (during the COVID-19 pandemic), more transparent verdicts, a lowered risk of perverse verdicts,[79] and fewer problems arising from juror inattentiveness, comprehension or influence from extraneous matters.[80] As case complexity increases in the NSW District Court by way of more sexual assault prosecutions and a greater reliance on scientific evidence, the advantages of judge-alone trials may become more pronounced. However, the three judges interviewed spoke to the personal burden that judge-alone trials place on judicial officers,

78 Two of the longest manslaughter cases that proceeded with a judge-alone trial centred on arguments that the accused committed manslaughter by criminal negligence, which is a relatively legally complex form of manslaughter. This is because the prosecution must prove six elements of the offence beyond reasonable doubt, including elements associated with negligence such as the accused owing and breaching a legal duty of care to the deceased.
79 Interviewees described risks of jurors misapplying beyond reasonable doubt, which was arguably borne out through the acquittal of Cardinal George Pell, whose conviction by a jury in the County Court of Victoria (which has no option for judge-alone trials) was overturned by the High Court of Australia. In *Pell v The Queen* [2020] HCA 12, the High Court unanimously ruled that there were compounding improbabilities that "required the jury, acting rationally, to have entertained a doubt as to the applicant's guilty". This decision implied that the jury misapplied beyond reasonable doubt, but has been subject to substantial academic controversy (Byrne 2020; Goodman-Delahunty et al., 2020; Hamer 2023; Hemming 2022; Hum & Hemming 2022; Patrick 2023). For example, Goodman-Delahunty et al. (2020) argued that the High Court may have undervalued the complainant's episodic while possibly overvaluing schematic recall of repeated events by elderly opportunity witnesses. This was contested in a rejoinder by Hum and Hemming (2022, p. 151), which argued that the evidence presented at the trial "did not establish guilt beyond a reasonable doubt".
80 This influence of extraneous matters on jury decision making was recently seen in the trial of Bruce Lehrmann in the Supreme Court of the ACT, which was aborted after a juror was found to have engaged in out-of-court research against the instructions of the trial judge (Sarre, 2022). The trial of Lehrmann could not proceed judge-alone as sexual assault offences are excluded from judge-alone trials in the ACT (*Supreme Court Act 1933* (ACT), s. 68B(4), Sch 2, Pt 2.2).

particularly the added layers of pressure from scrutiny of legal reasoning and factual interpretation on appeal. Practitioners who believed judge-alone trials should be used less also raised concerns about the lack of diversity[81] in the judicial bench. Any proposals to increase access to judge-alone trials should therefore consider raising the number of judges to reduce the burden on individuals, while also pursuing a more diverse judiciary that reflects a broader cross-section of society. Increasing judge-alone trials also carries the *chance* of unintentionally raising the probability of acquittal, though we cannot be certain that an increase would eventuate due to biases in our estimates. This uncertainty is especially relevant to specialised applications of judge-alone trials which can involve other changes to court procedures that influence selection into judge-alone trials and their outcomes (George et al., 2023), as may have occurred in the New Zealand pilot for sexual assault offences where higher conviction rates were found for judge-alone trials (McDonald, 2022).

ACKNOWLEDGEMENTS

The author would like thank interview participants from the District Court, the Supreme Court, the Office of the Director of Public Prosecutions, Public Defenders NSW, the Aboriginal Legal Service and Legal Aid NSW for their generosity in sharing insights and experiences with judge-alone trials. The author would also like to extend thanks to Tracy Painting and the Data team at BOCSAR for assembling the datasets used in this study, and to anonymous reviewers, Min-Taec Kim and Suzanne Poynton for their helpful comments on earlier drafts.

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81 Legal practitioners also observed the lack of representative juries for Aboriginal and Torres Strait Islander defendants. This issue gained renewed attention following the May 2022 acquittal of Zachary Rolfe during a murder trial in the Supreme Court of the Northern Territory by an entirely non-Indigenous jury (McGlade, 2022). The most recent data in NSW (sourced from a 1986 survey) found that only 0.4% of jurors were Aboriginal or Torres Strait Islander people (Anthony & Longman, 2016; Hunter & Crittenden, 2023). In contrast, Aboriginal people comprised 20% of defendants in criminal proceedings in NSW higher courts from 2011-2019 (author's calculations using COURTS data from 2011-2019). Judge-alone trials cannot be a panacea to most of the problems associated with Aboriginal underrepresentation on juries (see Hunter & Crittenden 2023), especially given that there are currently no Aboriginal judicial officers in NSW higher courts. However, there is a chance that in some cases, judge-alone trials could partially mitigate against specific forms of prejudice that are disproportionately experienced by Aboriginal defendants in regional areas, such as prejudicial attitudes held by community members towards defendants from families with intergenerational incarceration.

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APPENDIX

Appendix A – Trial outcomes in non-common law jurisdictions

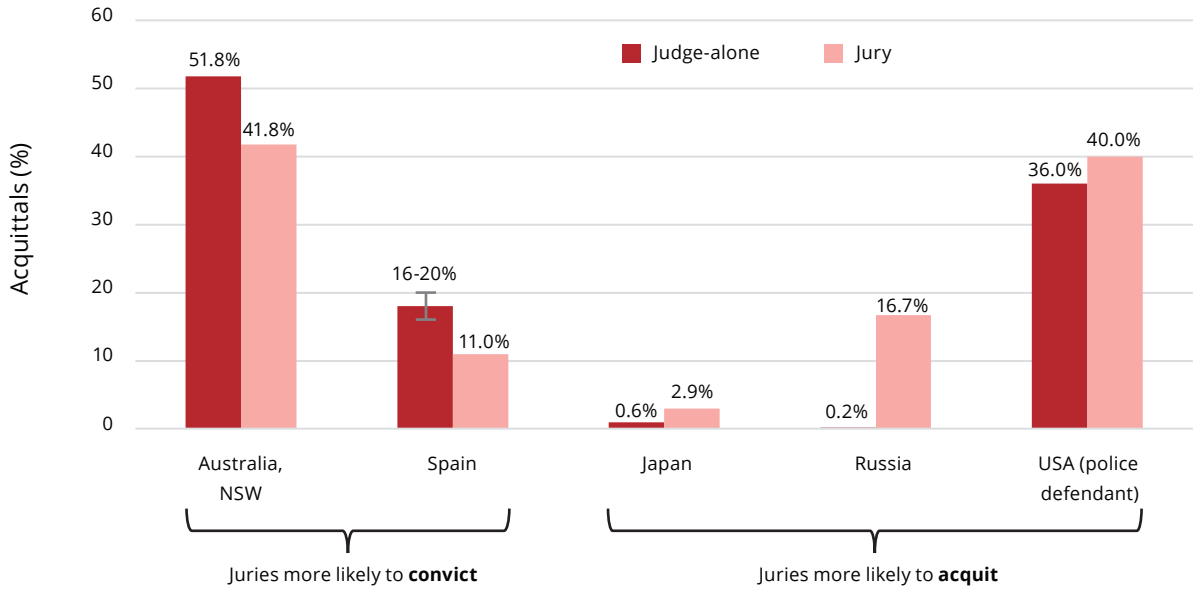
Japan's mixed *Saiban'in* tribunals have overseen decisions on over 12,100 defendants for a subset of serious criminal offences from 2009 to 2019. These trials feature a panel of six randomly selected citizens and three professional judges, who jointly deliberate on the facts of a case (Vanoverbeke & Fukurai, 2021, p. 70). *Saiban'in* tribunals have produced slightly lower conviction rates at 97% compared to the 99% conviction rate of judge-only cases. This was particularly strong with drug trafficking cases, where lay judges acquitted 2.9% of defendants compared to only 0.6% by judge-only courts (Reichel & Suzuki, 2015, p. 252).

South Korea has held over 2200 jury trials on eligible serious criminal cases from 2008 to 2018, under a system where jurors issue non-binding advisory verdicts to judges on the guilt of defendants and advise on sentencing (Park, 2021, p. 89). As of 2018, judges and juries agreed in about 93.1% of cases. Within the 155 cases where judges and juries disagreed, 92.9% of juries chose to acquit when judges convicted (Park 2021, p. 96).

In Russia, jury reforms were first introduced in 1990 and following additional reforms in 2018, jury trials have been held in district courts across the country. According to a 2023 study, about 16.7% of jury trials in Russia result in acquittals compared to just 0.2% of judge-only decisions, possibly due to substantial accusatorial bias within courts. However, over 70% of jury acquittals were overturned on appeal, which may reflect widespread scepticism and distrust in jurors across Russia's juidiciary and legal profession (Khodzhaeva, 2023, pp. 229-230).

Unlike most other jurisdictions, jury trials in Spain have tended to have a higher conviction rate compared to judge-only trials (Jimeno-Bulnes, 2021, pp. 117-118). From 1995 to 2014, juries in Spain presided over 6000 cases and had a conviction rate of 89%, compared to the conviction rate in judge-only trials of 84% for more serious offences (punishable up to nine years of imprisonment) and 80% for less serious offences.

Figure A1. Differences in average acquittal rates between judge-alone and jury trials



Appendix B – Robustness checks

To test the robustness of the estimates, two additional sets of estimates were produced.

1. Estimates using an expanded sample that included trial proceedings from January 2020 to November 2022.
2. Estimates for the probability of acquittal and probability of custodial sentences using a probit functional form.

Estimates from sample containing trial proceedings from 2011 to 2022

Despite increasing the sample size,[82] estimates remained largely the same. Judge-alone trials had statistically significant associations with an increase in the probability of acquittal across all analysis samples. Compared with the 2011-2019 sample estimates, the expanded sample produced slightly higher estimates for *all offences* (12 p.p., 29% increase) and *violent offences* (12 p.p., 27% increase), but lower estimates for the *prejudicial and complex offences* (17 p.p., 67% increase). The slight increases in *all offences* and *violent offences* may be due to relatively stronger selection bias from cases with weaker prosecution cases. This is because COVID-19 emergency measures further facilitated judge-alone trials[83] and saw District Court cases reprioritised when the accused was willing to give up their right to a post-pandemic jury trial and have a judge-alone trial sooner, according to interviewed legal practitioners. During the COVID-19 pandemic, the accused may have been more willing to relinquish their right to a jury trial to an earlier trial if they were advised by their counsel that the prosecution's case was weak or if they were refused bail and on remand. The decrease in probability of acquittal in the *prejudicial and complex offences* sample may be connected to the expanded sample size of cases from 2011-2022, which would have increased the precision of the estimate.

For trial length estimates, statistically significant associations between judge-alone trials and shorter trial lengths were found only for *prejudicial and complex offences* (1.8 decrease in average trial days, 18% decrease), consistent with the 2011-2019 sample although with slightly smaller magnitudes in the coefficients. *All offences* and *violent offences* produced higher coefficient estimates, with the estimate for *violent offences* (1.0 increase in average trial days, 12% increase) now statistically significant at the 5% level. For days between committal and outcome, no statistically significant results were found.

For the probability of a custodial sentence on conviction, the expanded sample produces similar results compared to the 2011-19 sample, with a statistically significant decrease of 9.1 p.p. observed only for *prejudicial and complex offences*. With aggregate sentence lengths, results were largely consistent with the 2011-2019 estimates in direction, magnitude of effect sizes, and in varied statistical significance. Judge-alone trials were associated with statistically significant decreases for *all offences* (6.1 month decrease on average, 6% decrease) and *violent offences* (9.1 month decrease on average, 8% decrease), but not *prejudicial and complex offences*.

82 In the expanded sample, the number of judge-alone trials grew in all samples, increasing by 22.3% for all offences, 26% for violent offences and 12% for prejudicial and complex offences.
83 Above n 6.

Table B1. Results table for associations between judge-alone trials and outcome variables (2011-2022)

	Probability of acquittal		Trial length		Days between committal & outcome		Aggregate sentence (custodial)		Probability of custodial sentence	
	Unmatched	Matched	Unmatched	Matched	Unmatched	Matched	Unmatched	Matched	Unmatched	Matched
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Panel A: All offences										
judge-alone	0.125***	0.120***	0.0736	0.362	-5.613	-2.550	-6.361**	-6.076*	-0.0282	-0.0288
	(0.0152)	(0.0159)	(0.365)	(0.360)	(10.03)	(9.857)	(2.451)	(2.433)	(0.0155)	(0.0163)
Mean	0.417	0.417	9.974	9.974	434.7	434.7	98.49	98.49	0.488	0.488
N	7182	6376	6409	5725	7177	6371	3467	3090	4080	3616
R-sq	0.203	0.233	0.218	0.166	0.191	0.224	0.655	0.677	0.298	0.337
Panel B: Violent offences										
judge-alone	0.121***	0.122***	0.816	1.138**	5.860	7.341	-8.168*	-9.118**	0.00176	0.00663
	(0.0184)	(0.0191)	(0.424)	(0.430)	(12.12)	(12.37)	(3.287)	(3.420)	(0.0162)	(0.0168)
Mean	0.447	0.447	8.743	8.743	430.4	430.4	109.3	109.3	0.489	0.489
N	4936	4578	4376	4051	4932	4574	2370	2201	2646	2463
R-sq	0.206	0.227	0.229	0.163	0.178	0.213	0.681	0.683	0.190	0.252
Panel C: Offences more likely to contain prejudicial elements or complex evidence										
judge-alone	0.149***	0.165***	-1.683*	-1.841*	-57.93*	-36.31	-5.239	-4.852	-0.0796	-0.0905*
	(0.0371)	(0.0386)	(0.847)	(0.805)	(27.90)	(23.86)	(4.689)	(4.168)	(0.0426)	(0.0413)
Mean	0.246	0.246	10.365	10.365	480.9	480.9	63.19	63.19	0.533	0.533
N	751	686	705	643	750	685	385	360	536	499
R-sq	0.183	0.195	0.257	0.296	0.185	0.276	0.526	0.552	0.373	0.392

Note: * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$. "Mean" refers to the mean value of the outcome for jury trials, which is the baseline from which relative differences are calculated.

Probit regressions for probability of acquittal and probability of imprisonment

Probit regressions are non-linear models that restrict the probability of outcome variables between zero and one. They are primarily interpreted through the estimated marginal effect of being on a treatment (such as being subject to a judge-alone trial), which is calculated for all observations and averaged across the sample. To test the veracity of the coefficient estimates for probability outcomes relating to acquittal and imprisonment for defendants found guilty at trial, the probit regression model below was applied to matched and unmatched samples.

$$Y_{it} = \Phi(\beta_0 + \beta_1 JA_{it} + \beta_2 X + \tau_t + \varepsilon_{it}) \qquad (2)$$

where Y_{it} are outcome variables of interest (acquittal and imprisonment), JA_i is a variable equal to one if a defendant undertook a judge-alone trial and zero otherwise, and X_i is a vector containing the same defendant characteristics as used in the OLS model (1). τ_t is a vector of indicators equal to one for each finalisation year spanning 2011-2019 and zero otherwise.

In Table B2, estimates on the association between judge-alone trials and both the probability of acquittal and probability of imprisonment are similar to the main OLS estimates (Table G1). For the probability of acquittal, the probit estimates are almost identical, with only slightly smaller estimates for unmatched and matched estimates in the violent offences and prejudicial and complex offences samples. For the probability of imprisonment, the probit model returned results that were not statistically significant across matched iterations, which further suggests that any associations are weak.

Table B2. Results table for probits on probability of acquittal and probability of custodial sentence (2011-2019)

	Probability of acquittal		Probability of custodial sentence	
	Unmatched	Matched	Unmatched	Matched
	(1)	(2)	(3)	(4)
Panel A: All offences				
judge-alone	0.104***	0.119***	-0.0357*	-0.00632
	(0.0170)	(0.0176)	(0.0164)	(0.0179)
N	5,813	5,133	3,303	2,895
Panel B: Violent offences				
judge-alone	0.0930***	0.0890***	0.00742	0.0207
	(0.0218)	(0.0224)	(0.0201)	(0.0228)
N	3,854	3,595	2,063	1,928
Panel C: Offences more likely to contain prejudicial elements or complex evidence				
judge-alone	0.149***	0.191***	-0.0828*	-0.0733
	(0.0317)	(0.0334)	(0.0415)	(0.0420)
N	659	599	473	437

Note: * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$.

Appendix C – Judge leniency measure

The calculation of the leniency measure is shown below, for defendants found guilty and not guilty.

$$L_{itj}(n, Prison \mid Not\ guilty) = \frac{1}{n_{tj}}\left(\sum_{k=0}^{n_{tj}} Prison^{*}_{itk}\right)$$

$$L_{itj}(n, Prison \mid Guilty) = \frac{1}{n_{tj} - n_{itj}}\left(\sum_{k=0}^{n_{tj}} Prison^{*}_{itk} - \sum_{b=0}^{n_{itj}} Prison^{*}_{itb}\right)$$

Here, L_{itj} refers to the leniency measure calculated for defendant i, in finalisation year t, from a sentence issued by judge j. $Prison^{*}$ refers to the residuals from the regression of the indicator variable imprisonment on fixed effects (see methods section). In short, the leniency measure involves the sum of residuals for all sentencing decisions that a judge j makes in a finalisation year t, which is then divided by the total number of sentencing decisions made by the judge in that year. This produces an average leniency measure for each judge, which acts as the leniency measure for defendants found not guilty of their principal offence.

For defendants found guilty of their principal offence, there are further adjustments to the average leniency measure. This is because defendants are generally randomly assigned to judges, each with a different level of leniency. If the guilty defendant i was included in this measure, they would be influencing the judge's leniency. As a result, the sum of residuals relating to the guilty defendant i and the number of decisions relating to that defendant are subtracted from the leniency measure.

Appendix D – Matching diagnostics

Figures D1 and D2 show how matching neutralises the standardised difference in means between judge-alone and jury trials for key covariates. The dashed lines in the diagrams represent a 10% threshold in the standardised difference in means. Differences between judge-alone and jury trial groups below this threshold are considered negligible (Austin, 2009). Before matching, several covariates exceed this threshold, as seen by the higher likelihood of regional and remote defendants in having judge-alone trials. After matching, these differences are substantially reduced, improving the balance in the characteristics of judge-alone and jury trials.

Figure D1. Standardised difference in mean for entropy balancing (acquittals and convictions)

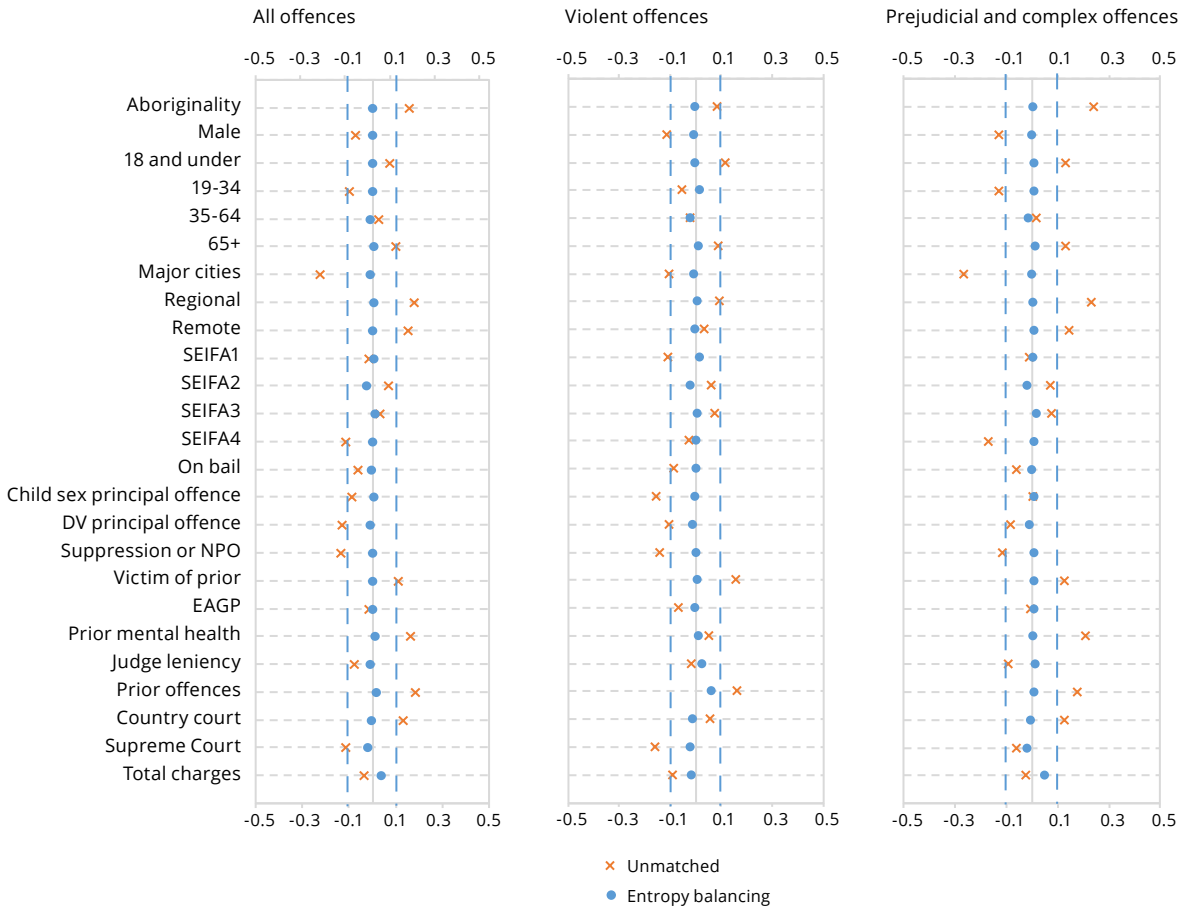
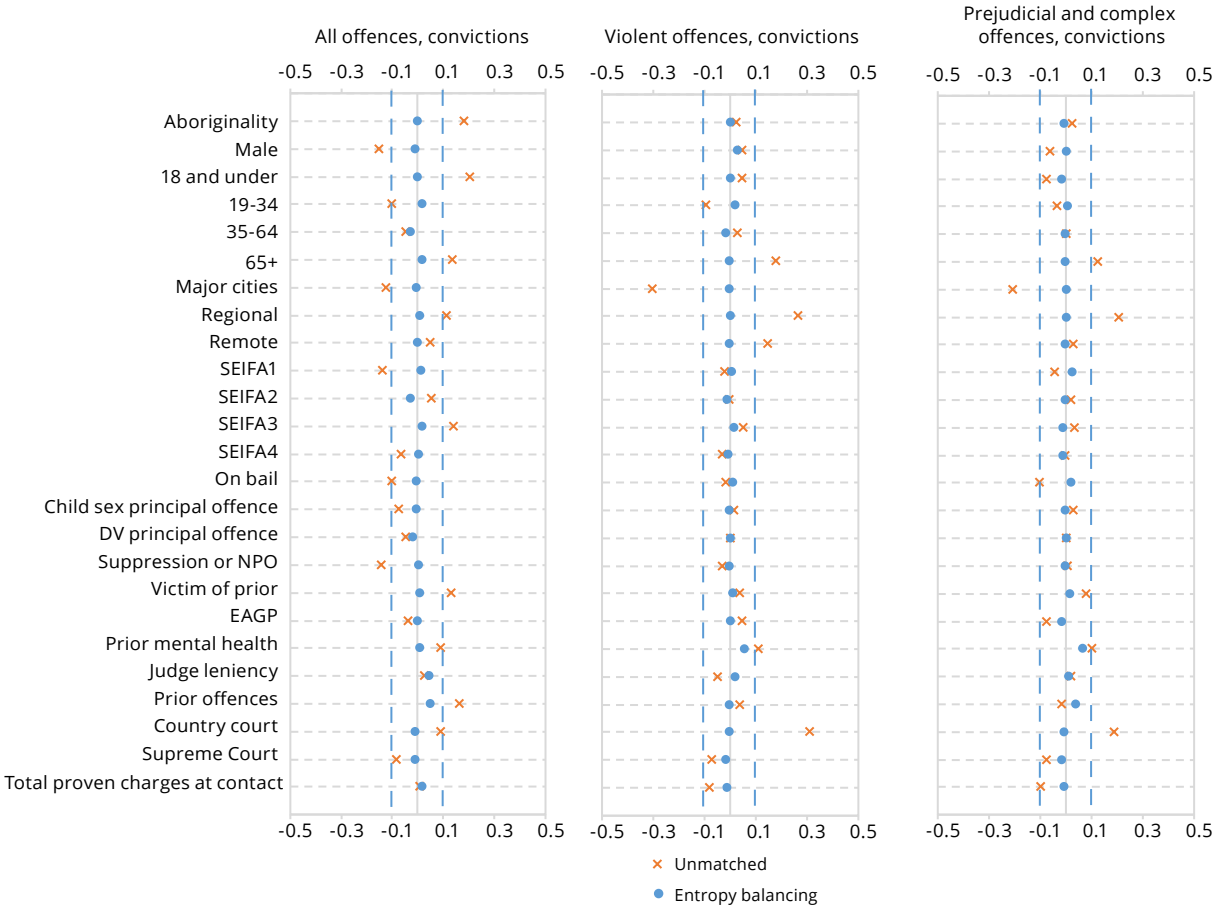


Figure D2. Standardised difference in mean for entropy balancing (convictions only, for sentencing outcomes)



Figures D3 and D4 show the distribution of balancing weights for cases applying entropy balancing onto all analysis samples in the main analysis. For judge-alone trials, weights were equal to one by the design of entropy balancing, which calculates weights to construct a counterfactual group. For jury trials, most weights were below 1, with a maximum of 3.6 in the *prejudicial and complex offences* (acquittals and convictions) subgroup. This indicates that the counterfactual groups formed by entropy balancing were not unduly influenced by a small group of jury trials with large matching weights.

Figure D3. Entropy balancing weights for analysis samples (acquittals and convictions)

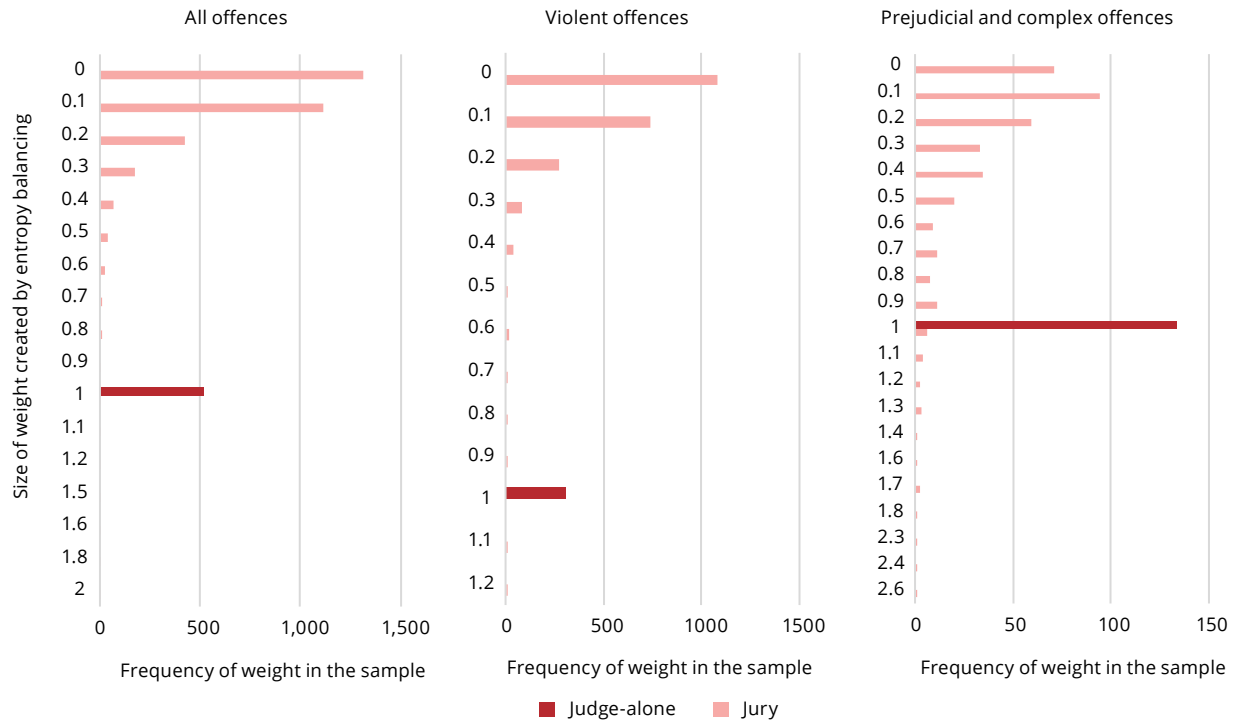
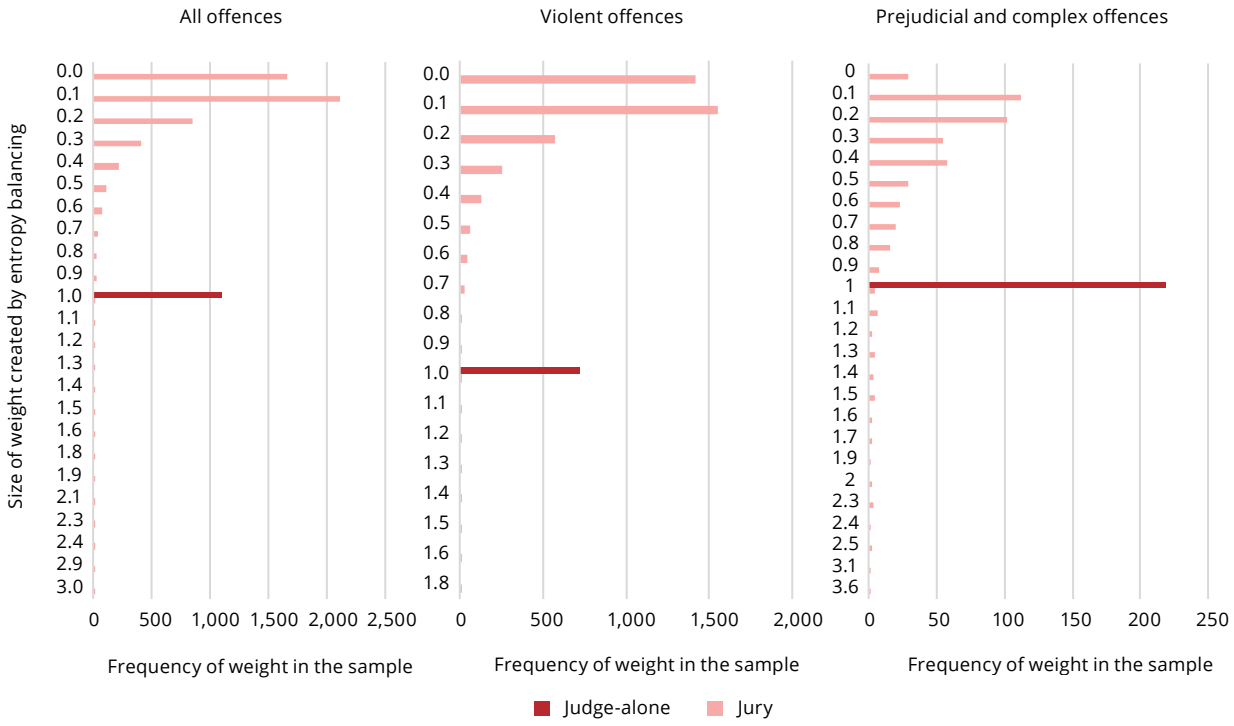


Figure D4. Entropy balancing weights for analysis samples (convictions only, for sentencing outcomes)



Appendix E – Offences with a higher likelihood of being seen judge alone

Interviewed legal practitioners were shown a list of offences with a higher likelihood of being seen judge-alone, and were asked about the potential reasons why they were proceeding judge-alone. Table E1 outlines their responses, which were then used to rationalise analysis for the subgroup of *prejudicial and complex offences*.

Table E1. Prejudicial factors and complex evidence that interviewed legal practitioners associated with offences with a higher likelihood of being seen judge-alone

	Prejudicial factors	Complex or expert evidence
Offences relating to regulated or prohibited weapons	Accused who is affiliated with organised crime groups or gangs	Ballistics evidence
Illicit drug offences (supply, trafficking, manufacturing)	Accused who is a drug user using a defence relating to personal drug use, and/or affiliated with organised crime groups or gangs	Pharmacological evidence relating to the narcotic content of substances, and/or Evidence relating to police-intercepted communications and codes used to communicate
Child pornography	Evidence of a distressing or graphic nature that would disturb members of a jury	
Subvert the course of justice	Likely connected with another serious offence, such as murder and/or associated with organised crime or gangs	
Dangerous or negligent driving	Likely to involve evidence of a distressing or graphic nature that would disturb members of a jury	Scientific evidence about driving mechanics, mathematical calculations by experts or medical evidence

Appendix F – Interview guide

Thank you for agreeing to participate in this study about judge-alone trials. Your experiences are crucial in helping us to better understand judge-alone trials and any impacts they might have on cases in NSW District Courts and the Supreme Court. This interview will take about 40-50 minutes and will be recorded so your comments will be captured accurately. The interviews will be deidentified to ensure you remain completely anonymous if any of your information is used in our report.

This research aims to understand the effects of judge-alone trials on criminal justice outcomes. To begin, I'll start by asking about applications for judge-alone trials, then about trials and differences between judges and juries. We also have a few questions about offences that are more likely to be held judge-alone (including for reasons relating to complexity of evidence), and your views on improving judge-alone trials.

Judge-alone trial application process

1. Based on your experiences, what are the characteristics of cases that apply for judge-alone trials?

   Prompts: Can include

   a. Case characteristics (offences, facts, evidence, number of charges)

   b. Court characteristics (metropolitan or country courts)

   c. Defendant characteristics

   d. Legal representation characteristics (do most defence lawyers know about this option?)

2. What determines whether an application for a judge-alone trial is granted or denied?

   - [**Optional follow-up**] Have there been any changes to how applications are granted before and after COVID?
   - [**Optional follow-up**] How often and under what circumstances would both the defendant and prosecution agree to a judge-alone trial?

Trial characteristics

3. When the case goes to trial, how does the "judge-alone" aspect affect what happens in the courtroom?

   Prompts: In terms of...

   a. Presentation of evidence, oral arguments and cross examination
   b. Trial length
   c. Issues with juries that don't exist with judges and vice versa

Trial outcomes

4. In what ways could holding trials "judge-alone" affect the outcomes of cases?

   a. Verdict
   b. Sentencing severity
   c. [**Optional**] Withdrawals by prosecution

   [**For prosecutors**] What about for particular kinds of offences, such as sexual assault?

Differences between judges and juries

5. How do you think judges differ from juries in their understanding of 'beyond reasonable doubt'?

   [**For judges**] What are the consequences for judges who are found to overconvict (in terms of legally correct decisions)? What about for judges who overacquit?

   - [**Optional follow-up**] How do judge-alone trials affect the likelihood of appeal and likelihood of overturned verdicts?

On complex and technical offences subcategory

6. We've noticed that the following offences have an above average likelihood of being held judge alone. Could you please share what you think could be causing this?

   - About 13.7% of court contacts are subject to judge-alone trials. For most of these offences, over 20% of cases are subject to judge-alone trials

   a. Prohibited and regulated weapons and explosives offences
   b. Illicit drug offences (dealing, supplying, trafficking, manufacture of illicit drugs in non-commercial and commercial quantities)
   c. Criminal intent (accessory before/after the fact, participate in criminal group/activity, publicly threaten)
   d. Dangerous or negligent driving of a vehicle
   e. Subvert the course of justice
   f. Offences against government security

g. Other offences against justice procedures

h. Offences against public order sexual standards

i. Receive or handle proceeds of crime

7. Are any of these offences prone to having judge-alone trials based on the complex nature of evidence?

8. What offences do you think are more likely to be judge-alone due to complexity?

General views about judge-alone trials

9. What are your views on whether judge-alone trials are currently used too often, not often enough or about the right amount?

Prompts: How could judge-alone trials be improved?

Appendix G – Full regression results

Table G1. Results table for associations between judge-alone trials and outcome variables (2011-2019)

	Probability of acquittal		Trial length		Days between committal & outcome		Aggregate sentence (custodial)		Probability of custodial sentence	
	Unmatched	Matched	Unmatched	Matched	Unmatched	Matched	Unmatched	Matched	Unmatched	Matched
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Panel A: All offences										
judge-alone	0.123***	0.116***	-0.501	-0.408	-0.630	8.316	-6.056*	-7.605*	-0.0143	-0.00790
	(0.0181)	(0.0189)	(0.419)	(0.400)	(12.45)	(12.44)	(2.744)	(3.492)	(0.0186)	(0.0186)
Mean	0.418	0.418	9.974	9.974	419.4	419.4	98.10	98.10	0.484	0.484
N	5,633	4,979	4,986	4,439	5,629	4,975	2,685	2,381	3,206	2,828
R-sq	0.202	0.234	0.236	0.188	0.140	0.141	0.684	0.789	0.304	0.350
Panel B: Violent offences										
judge-alone	0.106***	0.0932***	0.250	0.643	15.67	18.55	-8.326*	-8.379*	0.0247	0.0280
	(0.0227)	(0.0232)	(0.488)	(0.474)	(15.60)	(15.60)	(3.730)	(3.716)	(0.0197)	(0.0217)
Mean	0.451	0.451	8.571	8.571	413.0	413.0	109.9	109.9	0.483	0.483
N	3,716	3,467	3,263	3,041	3,713	3,464	1,765	1,646	1,989	1,860
R-sq	0.203	0.232	0.264	0.186	0.125	0.123	0.719	0.749	0.199	0.262
Panel C: Offences more likely to contain prejudicial elements or complex evidence										
judge-alone	0.187***	0.206***	-1.851*	-2.004*	-50.50	-20.22	-4.856	-3.310	-0.0817	-0.0957*
	(0.0390)	(0.0393)	(0.889)	(0.851)	(31.54)	(25.65)	(4.922)	(4.272)	(0.0470)	(0.0454)
Mean	0.233	0.233	10.36	10.36	473.1	473.1	64.60	64.60	0.540	0.370
N	649	591	605	550	648	590	330	308	468	434
R-sq	0.205	0.227	0.260	0.278	0.164	0.245	0.547	0.537	0.370	0.383

Note: * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$. ""Mean" refers to the mean value of the outcome for jury trials, which is the baseline from which relative differences are calculated. R-sq = R-squared.

Appendix H – Note on appeals

There were 282 conviction appeals finalised in the NSW Court of Criminal Appeal between 1 January 2021 and 19 December 2023,[84] relating to an effective first-instance conviction date range of 20 November 2018 to 6 November 2021. Of the 282 conviction appeals finalised, 239 (84.8%) arose from a jury trial and 43 (15.2%) stemmed from a judge alone trial. Most conviction appeals were unsuccessful (71.3%), with 201 dismissed. A smaller share of appeals were allowed (29.7%). Of the 81 successful conviction appeals (i.e., the appeal was allowed), 70 (86.4%) were from jury trials and 11 (13.6%) from judge-alone trials.

The overall success rate of conviction appeals was 28.7%, and was slightly lower for judge-alone trials (25.6% for judge-alone vs 29.3% for jury, the difference of which is not statistically significant).[85] Similarly, the difference in the percentage of first instance convictions appealed[86] and first instance convictions successfully appealed[87] are both not statistically significant.

Table H1. Conviction appeals finalised in the NSW Court of Criminal Appeal between 1 January 2021 – 19 December 2023, based on first instance convictions finalised between 20 November 2018 – 6 November 2021

	Judge-alone	Jury	Total
Number of appeals dismissed	32	169	201
Number of appeals allowed	11	70	81
Total number of appeals	43	239	282
Total number of first instance trials	358	1,520	1,878
Total number of first instance convictions	154	903	1,057
Percent of first instance convictions appealed	27.90%	26.50%	
Percent of first instance convictions successfully appealed	7.10%	7.80%	
Success rate on appeal of conviction	25.60%	29.30%	

Source: Data request from the Judicial Commission of NSW (2023), first instance trial data from BOCSAR's COURTS dataset (2023).

84 The data provided excludes cases where the principal offence was not subject to appeal (n = 6), where the appellant pled guilty at first instance so no trial took place (n = 13), special hearing cases (n = 2) and backup or related offences on a s 166 *Criminal Procedure Act 1986* (NSW) certificate (n = 2). Inquiries into convictions under Pt 7 of the *Crimes (Appeal and Review) Act 2001* (NSW) were also excluded (n = 3). The appeals data does not include unpublished judgments, but may include restricted judgements provided to the Judicial Commission of NSW.
85 Z-stat = -0.495 for a two-sample proportion test.
86 Z-stat = 0.560 for a two-sample proportion test.
87 Z-stat = -0.263 for a two-sample proportion test.

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ISSN 2204-5538 (Online) • ISBN 978-1-922576-44-6