

# Letter from Malcolm McCusker QC

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If you were charged with a crime and were innocent, would you like your fate to be decided by 12 people, chosen at random by lot, not qualified or experienced in assessing evidence, and no legal training? And who give no reasons for their decision, so that if they found you guilty, it would be extremely difficult to appeal?

Or would you prefer the decision-maker to be a qualified judge, trained and experienced in assessing evidence and the law, and obliged to give detailed reasons for his or her decision? That is possible, but only if a judge so orders.

The three young men charged with the murder of Phillip Walsham, conscious of prejudice whipped up by the media, did apply to be tried by a judge alone, and not a jury, but their application was refused.

Had it succeeded, it is most unlikely that they would have been convicted; but in that event the judge (unlike a jury) would have to give full reasons, so that an appeal would be far less difficult. And when the appeal was upheld, can you imagine the judge whose decision was overturned going to the media and complaining that he or she was "intelligent and professional", had given the decision careful thought, and that the reversal of that decision made a "farce" of the criminal justice system? And, as well, calling on the Walshams to express displeasure at the appeal court's decision? Of course not! Yet that is what, according to media reports, some of the jurors in the Walsham case have done.

Most people who serve on juries will probably be convinced their verdict was correct. So would the judge, in a trial by judge alone. But experience has shown that to err is human. That is why we have a court of appeal. Most of us accept that (but some jurors who sat on the Walsham case apparently do not).

I wonder if any of them, or the other vocal critics of the decision of the court of appeal (on talk back radio, the internet, and TV) have actually read the carefully reasoned 130 page judgment of the three eminent and very experienced judges (the Chief Justice, the President of the Court of Appeal, plus one of the most experienced and able criminal trial lawyers in this State) who unanimously concluded that the jury's decision was unsupported by the evidence, was unsafe, and must be set aside?

In this age of "transparency", in which decision-makers must give reasons, surely anyone charged with a criminal offence has a right to expect that reasons will be given for a conviction. Equally, the prosecution has a right to get reasons for an acquittal. The "inscrutability" of a jury decision (as it is sometimes described) is a euphemism for "no reasons given". It is out of step with modern, enlightened thinking.

An egregious example of what can happen is in a recent case in the UK, when it was revealed that some of the jurors on a murder trial had summoned, on a Ouija board, the spirit of the deceased, to assist them in reaching a verdict (the "spirit" told them to convict). Because the law in this State prohibits jurors from telling anyone the reasons for their decision, one can never be confident that verdicts are always reached by a logic which would survive close scrutiny. Before the prohibition, most criminal lawyers heard "horror stories" of jurors sometimes deciding cases on the basis of supposition, speculation or just plain prejudice.

I would not say that "the jury system is a farce", as some of the Walsham jurors have reportedly said. It is not, in the true sense of the word, really a "system" at all, but a procedure which Australia inherited from the English common law, and which has not changed very much since it was introduced, in the 13th Century, as an alternative to trial by combat. It is high time it was critically assessed as a way of achieving justice, instead of just taking it for granted. After all, many countries have a justice system which gets by without a jury. If it is proposed to introduce a Bill of Rights in WA, surely a fundamental right is to be told the reasons for being found guilty.

**Malcolm McCusker QC**

**(Mr McCusker defended Mr Fazzari and led the successful appeal for the Walsham Three)**