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REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO JUDGE-ALONE TRIALS UNDER SECTION 132 OF THE CRIMINAL PROCEDURE ACT 1986

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At Sydney on Friday 13 August 2010

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The Committee met at 11.30 a.m.

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PRESENT

The Hon. C. M. Robertson (Chair)

The Hon. D. J. Clarke
The Hon. G. J. Donnelly
Ms S. P. Hale

CHAIR: Welcome to the third public hearing of the Law and Justice Committee's inquiry into judge alone trials under section 132 of the New South Wales Criminal Procedure Act 1986. Today we are hearing from Mr Malcolm McCusker, QC, based in Perth, Western Australia. Mr McCusker, if the connection drops out we will redial to reconnect you. We have some processes in relation to our inquiries. In the videoconference I draw the Committee's attention to the highly sensitive microphones being used today. Whispered conversations and comments may be clearly audible to the witness and the audience. Could everyone please turn off their mobile phones for the duration of the hearing, including on silent, as they interfere with the videoconference equipment and Hansard' recording? I also ask Committee members to introduce themselves when asking Mr McCusker a question so it is clear who asked the question. There are broadcasting guidelines but we do not have media here at present, and the media who work in this place understand the guidelines very well.

MALCOLM JAMES McCUSKER, **AO, QC**, Barrister, Perth, Western Australia, before the Committee via teleconference, sworn and examined:

CHAIR: Can you identify your job title and employer if you are appearing in a representative capacity?

Mr McCUSKER: I am not appearing in a representative capacity although I will mention in the course of the hearing that I am Chairman of the Legal Aid Commission of Western Australia, which I think probably has an interest in this, but I am not representing the Legal Aid Commission. Otherwise, I am a practising barrister in Perth, Western Australia.

CHAIR: Would you like to start by making an opening statement?

Mr McCUSKER: Yes. This subject, I think I should make it clear, and probably the paper that I sent with my submission does make it clear, is one that I have given a great deal of thought to and in answering the questions posed by the Committee, which I have sent answers to, I come from a background of thought where I have concluded that the jury system ought to be seriously reviewed and, indeed, revoked in favour of trial by judge alone; not necessarily by one judge, and there are various schools of thought about that. But, based on my experience—I have practised in Perth now for nearly 50 years, and I have practised as both prosecutor and counsel on briefs as well as defence counsel—I have come to the conclusion, as many others have, that the jury system is outdated and is not appropriate to this day and age.

I will give you, very briefly, some reasons for that. One reason, which people seem to disregard because of the kind of motherhood aspect of jury trials being a basic tenet of our justice system, but one important aspect, which, to me at least and many others, seems unjust, is that juries never give reasons for their decisions. That is not so, of course, with judges or magistrates when they are sitting alone. Magistrates always sit alone, they do not have juries, but many trials are conducted by judges alone, that is, civil trials are conducted by judges alone. In all those situations, save in jury trials, reasons must be given so that in the case of a criminal charge if a person is convicted or, for that matter, acquitted, the parties and the public know what the reasons were for the decision, I think that it is a major defect in the jury system, that no reasons are given.

The second, and this is not necessarily in order of importance, but a second, I think, important reason nevertheless is that jury trials take much longer to run than a trial by judge alone. They take much longer because, for a start, the jury panel has to be empanelled, and sometimes that can take up to a day, which is a waste of the court's resources and the fees that are paid to the barristers on both sides incurred in that process. Also, juries may not be able to reach a verdict—what is called a hung jury may occur. When there is a hung jury that means the trial has to be started again, perhaps months later. Furthermore, with jury trials there are sometimes occasions, fortunately not too frequent but they do occur from year to year, where the jury is discharged by the judge because of some prejudicial material that may appear in the media or otherwise.

I could go on, and I think I have mentioned in the paper that I sent with my submissions that a number of people, including, as examples, Christopher Maxwell, QC, who is an eminent prosecution barrister, and I think still is, in New South Wales; the Hon. Val French, formerly both a magistrate and a judge in the District Court in Western Australia; and last, but by no means least, the well-known Richard Dawkins, are some of the people who have analysed the jury system, taken it apart and said, to quote Richard Dawkins, "If I were guilty I would take a jury any time"—in fact, he called it the loose cannon of a jury—"but if I were innocent give me a judge alone". He does not speak simply from a theoretical base but also from the fact, as he said, that he had the great misfortune to serve on three different jury trials, so he is speaking from experience as well.

So that is the background to my thinking on these subjects and I appreciate, as Sir Humphrey said to the Prime Minister once, "It would be a bold decision, Prime Minister, "to suggest the jury trial would be abolished altogether". The States could abolish the jury system if they chose to, and I suspect that there would be very little, if any, outcry against it, save for those who have some kind of, without denigrating them, some rather romantic and unproven attachment to the jury system as a bastion of our justice system. When you think about it, jury trials are a very small proportion of the total number of trials that take place in criminal matters. Magistrates, as I said earlier, do not have juries and they customarily deal with quite serious offences ranging over all kinds of matters, which it is sometimes said are best suited to juries. For example, obscenity matters may be dealt with, matters involving negligence—all kinds of standards which those who strongly support the jury system say are best left to a jury. But without blanching we give magistrates the jurisdiction to deal with these matters alone and there is no public outcry; no-one says it should have been done before a jury.

In our courts, and I think it is the same in New South Wales, although I have not researched it, in the Children's Court there is a presiding judge, a President of the Children's Court, who is judicially qualified and he or she sits alone—there is no jury—and deals with every possible offence, the range of offences that may have been committed or allegedly committed by children, even if at the time that the matter comes to trial before the Children's Court the person who was a child at the time of the alleged offence is now an adult. A recent example in Western Australia, and I am sure it is not isolated, was where a woman in her forties, I think she was, came before the President of the Children's Court, who sat alone without a jury, on a charge of murder of which the President acquitted her.

It might be asked for what reason, because there was some fairly cogent evidence, including an alleged confession. With a jury, the jury would probably have acquitted her because of the emotional aspect to it—she allegedly committed the offence of killing her newly born child; she was under severe psychiatric disorder herself. When the President of the Children's Court gave the decision in that case there was no outcry, "It should have been before a jury". He gave reasons, which is very important, because the public then knew what the reasons were for the decision.

So they are some of the considerations that I think are important, because I have seen in a couple of the submissions, contentions, which are by no means new, that the jury system is a pillar of our system of justice and nothing should be done to erode that system and so on. With all respect to those who hold that view, I do not share it. I hope that is a sufficient opening statement.

CHAIR: That was excellent. We have had discussion on the hearing days about the associated demographic situation of the majority of judges in comparison to the persons. Also there has been discussion about jury systems not necessarily being of peers and systems that have sometimes been put in place in our own environment where juries have been brought in from a neighbouring, we call it shire, a neighbouring area to balance what was perhaps perceived to be a distortion in one particular region—it was actually in metropolitan Sydney. How do you address those sorts of situations about the perception that people have a right to be judged by their "peers"?

Mr McCUSKER: It sounds great but there are a number of problems with it. First, juries are selected at random, as we know. In Western Australia, and I believe in New South Wales too, there is a right to a number of peremptory challenges—that is challenges of jurors without cause. I know from experience that some lawyers, be they prosecution or defence, try to pick jurors who they think—I do not know how they get to this conclusion—might be favourable to their cause. So, if the juror's address seems to be from a working-class suburb and the person on trial is a working-class person there is an attempt made to have that kind of jury. Sometimes, where it is an offence against a female, some lawyers take the view that they try to keep as many females off the jury as possible.

But the fact is that although we talk about judgement by one's peers, it is theoretically possible and by no means far-fetched that you could have a jury consisting mainly of 18-year-old unemployed people, and that is supposed to be the collective wisdom and experience of representatives of the community. So it sounds good in theory to have judgement by one's peers—the theory actually stems from the fourteenth century. You are probably aware of the history of the jury system: we inherited it from England. It sounded like a good idea at the time and we simply went along with it. But to get back to the sociological question that you raised, Chair, I do not think that bringing in people from some other area is ever going to be the solution. It might be, to some extent, an apparent solution and it might give greater credence to the jury, I do not know.

As I said in the paper that I sent with my submissions, Lord Denning, who was a very strong adherent of the jury system in his early years of practice and indeed as a judge, swung right round and said before his death that the jury system is no longer appropriate to our modern-day system; it was a system that was founded in small local communities where, indeed, the jury were selected because they knew the accused and the other persons involved and therefore were considered better capable of making an assessment of their guilt or innocence. We have swung away from that.

CHAIR: A bit like our circle sentencing processes we have for Aboriginal persons in New South Wales.

Mr McCUSKER: Yes, it is very similar. We have got something similar to that system in the north-west of Western Australia too. Talking of the north-west, because of the communities which are, in some cases, sparse and scattered, we have got a problem of getting a jury panel where the persons involved do not know anyone in the trial, because, as you know, if anyone who is proposed to be a juror volunteers that he or she knows the accused or some other people involved in the trial then they must be excused from the jury.

CHAIR: Yes, we have the same problem in western New South Wales.

Mr McCUSKER: Yes. I am not surprised at that. I think that a lot of the views expressed in support of the jury, with all respect to those who present them, do not bear critical analysis because, in practical terms, they do not stand up. In practice, I know one doyen, as I call him, of the legal profession who is a criminal barrister in Perth, who took the view that there is no point in trying to judge which juror is for you or which is against you, so he never challenged. But there are others who have taken the other extreme—and who knows who is right—and who exercise all the peremptory challenges in the hope of getting a jury that is likely to favour their cause. That seems to me to be totally inappropriate to a justice system.

On a question that is often raised, of judges coming from a distinct sociological group whereas you want judgement by your peers, they say that someone from a working-class suburb with little education should not be judged by someone who comes from an entirely different environment, having gone to a private school, for example, and having gone on to university and having come from a wealthy background. I cannot see the logic or sense in that. For a start, no analysis has been made of the backgrounds of judges. I know in Western Australia, and I imagine it is so in other States, that many of the judges do not come from that kind of background that is attributed to them. Indeed, in any event, we appoint judges because of their education and their ability, it is hoped, to bring to bear an objective mind in considering guilt or innocence. We appoint jurors because they happen to be drawn from the electoral list and are unlucky enough not to be able to get out of jury service.

That is another point. Many people who are selected or called up for jury service do their level best to get out of it. That says something about the attitude of the community to the jury system. I also should mention that a lot of people take the jury system for granted as an important part of our system and they just brush it off. But when they have experience with it, that is when things begin to be more closely analysed. Since my views became a little public, I have had a number of ex-jurors write to me and tell me of their horrible experiences as jurors. Earlier this year a journalist from the *West Australian* was called up for jury service. She wrote a full-page article afterwards, expressing her horror at the way that the jury system in fact operated—with people paying no attention, not understanding a lot of the matters that were being put before them, being bored, being prepared to go along with those who were more outspoken than others, and so on. She actually said, "When I left the jury room and went to the train station, I physically vomited because I was so repelled by the way the system was working in practice."

A distinguished associate professor, who is also a well-known journalist, wrote me a letter. He described his experience on a jury that was just outrageous in respect of the approach that the jurors made. I am not criticising the people for what they did: they did not know any better and they were not trained to bring to bear an objective analysis. The general population—and I am not saying this in a condescending way—find it very difficult to get to grips with such concepts as proof beyond reasonable doubt. In fact, one woman juror told me her experience in a jury trial in Western Australia. When they retired and started to talk, some were immediately expressing their view of the guilt of the accused. She said to them, "No, wait a minute, we've got to be satisfied beyond reasonable doubt." They were throwing up all kinds of postulates that were really hypothetical. A number of them turned to her and said, "Where did you get that idea?" The judge had told them probably about a dozen times that they had to be satisfied beyond reasonable doubt.

Have you read the paper I wrote and sent with the submission? I am not sure that you have had the opportunity to go through it. It is often said in support of juries that they bring to bear a collective wisdom and community view on such matters as, for example, criminal conduct. Yet quite recently in the United Kingdom quite an extensive survey was carried out of people to find out what their attitude would be as regards criminality on certain matters. The diversity of views expressed, as to whether or not a particular matter was criminal and wrong, was so wide that the authors of the survey concluded that, if you go before a jury, it would be very dangerous to assume, and really is just a matter of luck, that the panel you have got is representative of any particular community view on these matters.

CHAIR: That is very interesting, thank you.

The Hon. DAVID CLARKE: Good morning, Mr McCusker.

Mr McCUSKER: Good morning.

The Hon. DAVID CLARKE: Your position is that you believe that trial by jury is outdated, I think.

Mr McCUSKER: Yes. It is.

The Hon. DAVID CLARKE: You believe we should get rid of it altogether.

Mr McCUSKER: I do.

The Hon. DAVID CLARKE: Thank you.

Mr McCUSKER: But, as I said in response to the questions, being at least pragmatic about this—and I know that the Committee is not asked to consider that question—I just put that forward and say, "From that background and for those reasons, I have given the following answers." That is where I am coming from. I am not suggesting that the Committee, unless they are bold, take this step and say, "Let's get rid of juries altogether."

The Hon. DAVID CLARKE: I understand. Would you agree with me that your view is not the view of the majority in the community?

Mr McCUSKER: No, I do not.

The Hon. DAVID CLARKE: You do not?

Mr McCUSKER: I do not agree with that.

The Hon. DAVID CLARKE: You do not agree with that?

Mr McCUSKER: No.

The Hon. DAVID CLARKE: Do you believe that a majority would agree with your view?

Mr McCUSKER: First, I think the majority do not think about it. They only think about it when they have come into contact with the jury system in some way, either as a juror, or as an accused, or as a victim. Victims have a right to complain too when a charge against an accused is dismissed by a jury and they do not know why, and often for no apparently good reason. Not all, but a large number of judges like the jury system. They have a fond belief that somehow or other justice is always done by a jury. With that, though, is an implication that they would not do justice just as well if the matter was tried by a judge. I do not think so.

The Hon. DAVID CLARKE: The truth is that you have no anecdotal evidence that the majority of the community would agree with you. Are you aware of any opinion polls and surveys on this issue?

Mr McCUSKER: No, and I was careful to answer your question, "I do not agree that the majority are against it". I do not know, but the majority of the population do not give any thought to it. That is my opinion. But when they are asked to give some thought to it—I have addressed audiences on this and debated with, for example, the former Director of Public Prosecutions in Perth on the jury system and most of the people present

were not members of the legal profession—almost unanimously at the end of debate people in the room say they are against the jury system for logical reasons.

The Hon. DAVID CLARKE: Do you believe that the majority of the legal profession agree with your view that trial by jury should be got rid of altogether?

Mr McCUSKER: The majority of the legal profession does not practice criminal law—rather sadly, actually—but a large majority do not. Among those who do practise, some are wedded—I suspect the majority—to the concept of the jury system because they have been brought up in that system. But, again, I debated this question with a senior counsel who was a criminal barrister, and he was in favour of the jury system. After the debate, he wrote to me and said, "Look, you've made me start thinking about this." He is starting to veer away from what was no more really than an emotional attachment to it.

There is a strong emotional view which is kindled very much by shibboleths such as, "Well, it is a bastion of our society. It is what makes our society free", and so forth. I do not know what they think about the justice system in European countries apart from the United Kingdom where, generally speaking, they do not have juries and the system seems to work, as Christopher Maxwell said.

The Hon. DAVID CLARKE: Would a summary of your position be that in regard to the legal profession you suspect that the majority is for the jury system but that you have found, when you have spoken to individuals and the legal profession and have put your point of view, more acceptance of your view? Would that be a summary?

Mr McCUSKER: Yes, I have. That is the case.

The Hon. DAVID CLARKE: But that could be counterbalanced with someone presenting the other point of view who might follow you in speaking to them. Then they might be back to square one, which is where they were before you spoke to them. That is a question very often of hearing both sides. After you have spoken to them, they have given a sort of off-the-cuff favourable response to what you have been saying. Would you agree that that could also be the situation?

Mr McCUSKER: No, I do not, actually, for this reason: when you debate this topic, those in favour of the jury system cannot put forward a pragmatic, sociological, survey-based reason. For example, they say, "Well, the jury system is supported by the majority of the community." Now, there is absolutely no evidence one way or the other that that is so. It is just something that is said and often taken for granted. It is also said in support of the jury system, "Well, the juries represent a range of opinions, views and life experience", and so forth. But by and large, you are going to get a lot of jurors who have very little life experience of the kind we are talking about.

For example, I have spoken to one of my eminent colleagues from Western Australia, who was a Rhodes Scholar but is now a professor of law in Oxford, and he has had experience with juries, as I have. He is totally against the jury system. He says it just does not bear critical scrutiny. To come back to your question, yes, it is possible that some of the responses to me by criminal barristers may be, "Yes, I agree with your views", and they may be off the cuff, as you put it. I do not think so, because off the cuff they would generally say, "Well, I am in support of the jury system." But when they hear reasoned argument against it, they think, "Well, there's something in that." Jury trials take much longer. As Christopher Maxwell said, as reported in the *Age*—and he is a very eminent criminal prosecuting barrister in New South Wales—"I was originally wedded to the jury system, but having had experience," as he did, "in the War Crimes Tribunal, I don't see why we should have juries. Why can't judges do the job? It is far less costly."

The Hon. DAVID CLARKE: Do you believe that judges agree with your view?

Mr McCUSKER: I have not done an analysis. I want to stress: I do not want to say I have done any survey. Of course, I have not. But I did have a response, from one former judge, to my views. I know a couple of judges agree with me, but I have not asked every one of them. One former judge wrote to me and said that he was in support of the jury system because, if you do not have trials by jury—I am serious about what he said—that would mean that the judges would have to write reasons for their decision, to which I said, "But, look, isn't this really an important matter?" He said, "Well, this would be time consuming for judges." But judges have to follow a trial. They have to prepare their addresses to the jury, so the time consumed would not be much greater.

The Hon. DAVID CLARKE: Do you suspect that the majority of judges are opposed to your view?

Mr McCUSKER: I have no grounds for suspicion one way or the other. I do know that a former judge—and again I think I mentioned that in the paper—from Tasmania who is now living in Queensland wrote to me, having read my paper, and sent me a copy of an address that he made when he was retiring, which strongly criticised the jury system and said that it should be abolished. It said that in his view about 25 per cent of jury verdicts were wrong. I suspect, but he did not say it, he meant that juries acquit against the evidence sometimes. Indeed they do. Some people say that that is a good thing about the jury system. I do not. I think that if a person is wrongly convicted, that is a terrible indictment. But if a person is wrongfully acquitted against the evidence, that is bad too. And in either case, there is no reason given.

The Hon. DAVID CLARKE: If we retain the jury system, you believe it should be open to either party to seek a judge only trial?

Mr McCUSKER: Yes, that is right.

The Hon. DAVID CLARKE: You believe that the decision should be left to the judge. You do not believe that the accused should have a veto.

Mr McCUSKER: Yes, that is right. In the case of an accused, though, in my view if an accused asks for a judge alone trial, then he or she should be entitled to it because it is a right to trial by jury, as it is often said. If it is a right, why should the accused not be entitled to waive the right and say, "I don't want a trial by jury."?

The Hon. DAVID CLARKE: Let me put this situation to you: The DPP here in New South Wales favours that, under the proposed model for New South Wales, the DPP should be able to apply for a judge only trial with no power for the defendant to veto that. What would your view be on that situation?

Mr McCUSKER: I agree. It should be open to the prosecution to apply for a judge only trial. If the accused opposes it, then the accused should be given the right to be heard. So there should not be an automatic right on the part of the prosecution if the accused opposes it. But it still should be open to the judge, despite the accused's opposition, to say that for the following reasons there should be a judge alone trial. The first judge alone trial, in of all places the UK, happened earlier this year. It took place because there had been two previously aborted jury trials, there being in each case a strong suspicion there had been an attempt to tamper with the jury. The trial was a high-profile trial involving some extremely violent actions on the part of the accused, as it was ultimately found. There was an outcry by some in the UK, but only by a few, who said, "This should never happen – trials should always be before juries".

The UK has the legislation. The accused wanted a trial by jury. You can understand why, in some cases. They want a trial by jury because they have got a better chance, as Richard Dawkins says, of being acquitted even though they are guilty. That trial, as was later reported by one of the counsel involved, went very smoothly. It went much more quickly than it could have by a trial by judge and jury. The judge cut out a lot of, you might say, the oratorical flourishes to which some counsel are addicted. The trial was condensed to the relevant facts. It was impossible to have something occur which would abort the trial, because the judge is taken not to be influenced by prejudicial material. He or she can dismiss that. Under that legislation the judge may decide to have a trial by judge alone, notwithstanding the protests of the accused, where there are good reasons for that to occur.

The Hon. DAVID CLARKE: I have one final question because of time. You believe that to be judged by one's peers has its defects. You have pointed to instances of juror picking by barristers and that jurors do not always represent the community, they can represent a very small section of the community. What would you say to the statement that you do not throw out the baby with the bathwater and that you try to remedy the situation rather than dismiss it and get rid of the jury system altogether?

Mr McCUSKER: I take it your Committee has its terms of reference and you are not there to consider whether to get rid of the jury system altogether. But, I must say, the attitude towards the retention of the jury system must colour your ultimate views on the answers to these questions. To come back to this question on judgement by one's peers, it is not that I disagree with it as such. I disagree with the jury system and I say that judgement by one's peers is a myth. I will give you just one instance of it—a trial I did about 18 months, two years ago where the three accused men were subjected to enormous pre-trial adverse publicity. I will not go into

detail but it was terrible. We had a folder of material showing adverse and highly prejudicial pre-trial publicity. They were trials for murder, by the way.

We took it to the judge, who said, "No, I think this is a matter that should go before a jury because the jury is a better capable of understanding"—I forget the exact words but it was something to do with the community's views about these matters. A later judge, the Chief Justice, said that was wrong. He could not accept that. But it went before a jury. The three accused men were of Italian, Greek and Macedonian backgrounds. They looked it and their names showed it. I had a friend come into the court, not a lawyer, who said to me after the first day, "They're gone". I said, "Why do you think that?" She said, "The three accused are wogs and you have got an Anglo jury". So was that by one's peers? They were three young men and the people on the jury were not necessarily their peers at all. The idea of peers, it is a fanciful notion that does not bear practical analysis.

The Hon. DAVID CLARKE: Were they gone?

Mr McCUSKER: Yes. I knew. We could tell. The atmosphere in that court was so hostile towards these three men that even though we established by clear evidence that they could not have done it—it was not, I should mention, just because of their race, but I do not think that helped, but also because two of the three men admitted they had kicked the man who had died some time before he actually had died. But the kicks were not savage blows to knock him off his seat or anything like that. They kicked him because he did not talk to them. That was bad and they paid for that by admitting to it and doing community service. That came out and it was hammered and hammered and hammered before the jury. The prosecuting counsel did not help the atmosphere by saying, "The dead man is not here to speak for himself, I am speaking for him" and stuff like that. They were convicted. We took it on appeal and the Court of Appeal unanimously reversed the decision on the ground that no reasonable jury could have reached that decision.

The Hon. GREG DONNELLY: With your submission and responses to the Hon. David Clarke's questions much has been covered. I will pick out some particular points and ask them of you. Reflecting on some of the evidence we have received in the past two full days of hearing in Sydney, one line of argument that has been put to us by at least one witness is that if we move towards a system of judge alone trials whereby the judge will be required to detail in his judgement his grounds and reasons for the decision, then that has the capacity to lead to a great deal of additional appeals of matters. What is your comment on that?

Mr McCUSKER: It may. It would increase the opportunity to appeal. To appeal against a jury verdict, for example, as in the case I have just mentioned, is extremely difficult because the jury does not give reasons. With a jury verdict appeal there are basically two things for possible grounds of appeal. One is that the judge has not properly directed the jury. That is the usual ground of appeal. The other, which is less common, is as it was in that case I mentioned, that is, that the jury's verdict was so unreasonable that no reasonable jury could have delivered it. If a judge gives his or her reasons for a decision, it is true it is then open to scrutiny, unlike a jury verdict, and there may be good grounds for an appeal. If there are, that is good because the system of justice is then being served. In all other areas of the law judges have to give reasons for the decision, laying the decision open to appeal if the reasons are untenable. Why should it not be the same with criminal trials? I do not understand why the distinction is drawn.

The Hon. GREG DONNELLY: It has been articulated by some witnesses that the jury system we have connects the broader community or the broad society to the system of criminal justice and that connectivity extends to the broader community or society an appreciation of our judicial system. It has been argued that it is a good thing that people are involved. It is part of the legal process and that engagement, in and of itself, has a value for society or the community. Do you have a view about that?

Mr McCUSKER: Yes, I do. There is simply no sociological evidence to support that view. I am not saying it is wrong but there is no evidence to actually support that view and there is some evidence suggesting to the contrary. That is from, first of all, jurors, those who have been brave enough to speak out—and I think it is the tip of the iceberg—who have expressed their disgust with the way the jury system operates and have said that this is an awful way to achieve justice. I have a son who went on a jury. When I asked him what his experience was he said, "Dad, half the people in the jury could not care less. They wanted to get home. Some of them were disgruntled because they had been taken away from their jobs." I have had many people, friends, over my years of practice come to me and say, "I have been called up to jury service. I don't want to do it."

There are all those negative views about the jury system. I have not seen any counterbalancing views from people within the community saying, "Because it gives us connectivity, therefore we should continue it." What about all the magistrate's decisions which are on serious matters that can send people to jail? No-one raises an eyebrow about that. I think the jury system is somehow a sacred cow or, as Val French, the wife of the Chief Justice of the High Court of Australia, wrote in an article, it is like attacking motherhood. When you actually analyse all these claims that there is connectivity and the community somehow feels involved, it does not stand analysis. There is no evidence that that is correct and there is plenty of evidence that people do not want to serve on juries and do not like the experience when it happens.

The Hon. GREG DONNELLY: There are many people who do not like to vote either but they will be turning up Saturday week to participate in an election. As a society we have formed a view, at least in the past, that there is a value in doing something in a particular way.

Mr McCUSKER: Compulsory voting is a bit different. When you are compelled to vote, and there are arguments for and against, you may vote informally. We do not know. But in a jury you have to have the decision of 12 people, a unanimous decision. People who are compelled to vote may vote informally, they may be part of the donkey vote. Who knows? I think that compulsory voting on the whole is a good idea but there are plenty of reasons against it. In my respectful view, there is absolutely no parallel. If it is said that the community members think there is connectivity and it is a good idea to have judgement by one's peers, et cetera, where is the evidence that they do think that? Look at the contrary evidence, the number of people who do not want to serve on juries and thereby express their dislike of the system.

The Hon. GREG DONNELLY: Another line of discussion we have been exposed to is in respect to matters that come before courts today. Taking the very confronting nature of some matters, particularly gruesome criminal matters, and ally that with perhaps complex forensics-type evidence or matters that may involve an extensive understanding of complex accounting issues, this leads to a situation in our jury system of 12 peers that the jurors have to deal with a whole lot of very difficult issues. As a result, a judge alone system may have merit because the nature of these matters lends itself to being dealt with by a person who has had legal training and experience so that the issues can be dealt with in an efficient way. Against that has been presented the argument that it is innately good that there is a jury system because there is a requirement that in dealing with these complex matters those prosecuting and defending are challenged to bring the matters down to their essence so that they can be clearly understood and ventilated by the ordinary person. Therefore, that assists in the process of getting to the bottom of things and, hopefully, a just outcome. Do you have a view about that?

Mr McCUSKER: Yes, it is wishful thinking. As good as defence and prosecuting counsel may be, there are some matters that are so complex it is impossible for the average person—and I beg to differ about peers because they might not be peers at all—on a jury to have little prospect of understanding it. I have many anecdotal stories, including the one from the professor I mentioned, that the jurors just did not get it, they did not understand it. That was only in a one week trial. Some of these trials go on for months and it is a huge burden on the individual juror, although some of them seem to handle it all right. I should mention some of them call for counselling after some of these cases which are particularly gruesome. As far as I know judges never seem to need counselling.

The Hon. GREG DONNELLY: Need or want?

Mr McCUSKER: At least they do not express it. I think there is a very strong case for saying at least in instances where it is obviously complex there should not be a jury trial. If it is going to take a lot longer to explain it to a jury that still might not get it, and I suspect do not, why not have a trial before a judge who will get it quicker? And if he or she does not understand they will press defence counsel and prosecuting counsel to explain points, which again a jury cannot do. They can sometimes, through their foreman, raise a question or two but a judge may delve, and often does, into what is being put as argument. The answer is: I do not think that there is any validity at all in this suggestion that it is a good idea to have juries, even in complex cases and cases involving nasty wounds and so forth, because the likelihood is that the jurors will not understand it, or will react emotionally.

(Transmission interrupted)

The Hon. GREG DONNELLY: In response to a question from the Hon. David Clarke who was reflecting on the evidence from the DPP in New South Wales you said that you supported in principle the notion that there would be a right for either party to be able to put their position that they would seek a judge alone

trial. You said that you could envisage a circumstance that you could support the case when the judge could decide notwithstanding the position being put forward that the judge alone trial could or should proceed. Do you envisage that the decision about the judge deciding would be subject to appeal?

Mr McCUSKER: No, I would not. I think that the decision should be final. It would lead to too many interruptions in the criminal process.

CHAIR: Would you have to legislate that it be final?

Mr McCUSKER: That is right, yes, you would. That is a simple matter. Western Australia's legislation provides that the judge's decision is final. If the accused wants a trial by judge alone then that should be granted, and that is the end of it. If the prosecution wants a trial by judge alone and the accused does not, that should be subject to scrutiny and decision by a judge. I notice a submission—I think from the DPP—that the DPP, in effect, should decide whether or not there is to be a trial by judge alone. I do not see why the DPP should have any such decision-making power because one would question, why would the DPP ever want a trial by jury? The reasons I think are probably that the DPP has come to the conclusion—I may be too cynical—that this is more likely to result in a conviction, whereas a trial by judge alone may result in an acquittal because the evidence is not there. To recap, if the accused wants a trial by judge alone then that should be granted. Even if the prosecution opposes it and wants a trial by jury, as has been suggested by the DPP, that should not prevail against the wishes of the accused. If, against the wishes of the accused, the DPP wants a trial by a judge alone then it should go before a court to be determined by reference to a number of relevant considerations.

Ms SYLVIA HALE: One of the intriguing aspects of this inquiry is that people have responded in ways—at least the evidence from people has been—completely the opposite to what I anticipated. That has been that the Crown and prosecutors generally have been strongly in favour of trial by jury; the defence has clearly strongly wanted, in many instances, while reserving the right to trial by jury, judge alone trials. But the victims of crime have also been the ones who want trial by jury. The argument that was advanced on their behalf was that the notion of trial by jury is so embedded in the popular consciousness that to be given any other form of trial could suggest that they were being short changed in some way. None of those responses had I anticipated.

However, I have been interested that you have produced a lot of anecdotal evidence about the unsatisfactory nature of the jury process but the really disturbing thing is that it is all anecdotal and it is the absence of research in this country that, it seems to me, goes to the heart of the matter. Rather than asking a question I seem to be making statements. But I must say my two experiences of serving on a jury were that they produced in one case a guilty verdict and in the other a non-guilty verdict, and I was impressed by how seriously the jury undertook its task. I certainly had no experience of any people being bored, indifferent or inattention. But you do suggest that the judiciary has the ability to take an objective view of evidence. Would you agree that the judiciary, rather than being consistently objective and the champions of individual liberty, there is a lot of history in the English judicial system whereby the judiciary is seen as the bulwarks of the status quo, the upholders of the conservative view of society, and that often juries have been the antidote to that?

Mr McCUSKER: In past history, and I am talking of several hundred years ago, there have been some instances where jurors, against a judge's directions, have returned a verdict of acquittal, but they were political trials, in effect, and I grant you that. You come back to the question, how many trials are tried by jury and how many trials are tried by magistrates which often involve serious offences which could result in imprisonment. And no-one blinks an eye about that. I do not know whether victims say all criminal trials, including those presently done by magistrates, should go before a judge and jury. If they did it, would be such an intolerable burden on the State that I doubt very much whether it would happen.

I take your point too about your experience as a juror. I have had a couple of people say, "Oh, it wasn't too bad because we think we got the right verdict". A very unusual survey of juries in Western Australia was done by Dr Judith Fordham. The results of her survey were somewhat disquieting. She was allowed to survey jurors on a random basis. The results do not give you a lot of confidence in the jury system. Although obviously there will be juries, particularly those that you are sitting on, where the jurors will come to attention and earnestly apply their minds to the task, there have been a number, and I suspect it is the tip of the iceberg, where the contrary applies so what do we do? We say, well, now and again, although we do not know the reasons in either case, maybe 50:50, sometimes jurors do apply themselves conscientiously and sometimes they do not. Who knows? The real propensity of an unjust verdict is enough in my view, even if it is one in 100, to say, "Well, let's get rid of the jury system or at least modify it."

When you have people such as Dawkins and Christopher Maxwell saying, "The jury system is not such a great idea" then I think that you have got to look at it seriously and say, "Well, within our terms of reference" with respect "let's at least give the accused the right to a trial by a judge alone." Why should the accused be denied that right? I noticed that one of the submissions, it might have been from Legal Aid in New South Wales, made the point that because the DPP can oppose an application for trial by judge alone meant that very often those who would like a trial by judge alone do not bother because they know there is no chance of getting it. I think that is unfortunate because the people I have mentioned and many others say, "Look, if we were guilty we would go before a trial by jury because what have we got to lose?" If they are innocent they have a greater risk of an unjust verdict which is inscrutable, that is, it is not subject to appeal in most cases, than if they go before a judge alone whose reasons certainly are open and subject to appeal. I am sure Committee members accept that when you are forced to write reasons, it is a mental discipline, which is very important.

Ms SYLVIA HALE: I found it interesting that when the Dawkins position was put to our own Director of Public Prosecutions he said that it was a view to which he ascribed but, nevertheless, thought it was important from the point of view of his office to emphasise the role of the jury and to argue very strongly for its retention. But I agree that once you have discernment there should be an option of a judge alone trial it seems to me that the accused should have the ultimate right to determine which forum he or she wishes to appear before.

Mr McCUSKER: With respect, I totally agree with that because, as I said earlier, it is a right to trial by jury. It is the right of the accused. It is not the right of the State. I mentioned earlier, has it not been thought in the past that juries somehow are the bastions of freedom and so forth, standing for, obviously, the accused. If the accused does not want that bastion of freedom and justice why force it on him or her?

Ms SYLVIA HALE: You say, and it is also in the paper attached to your submission, that jurors often do not agree or had widely different understanding of what constituted dishonesty. Is one of the virtues of the jury system that because there is a divergence of opinion within the jury then there has to be a working out of those differing perceptions, but at least they are perceptions that take account of changing community values or differing life experiences and, therefore, that is a more valid way to assess dishonesty than say, the view of a judge whose life experience could be quite constrained?

Mr McCUSKER: But if there are differing views in the community, as there apparently are, on such basic matters as what constitutes dishonesty in particular cases, is it not then a case of taking a chance with the jury? You might get a jury that has a particular view that this is not dishonest and another jury later on says it is dishonest, and neither gives any actual reason, whereas if the judge concludes dishonesty the judge has to explain why and it is open then to scrutiny and possibly appeal. I do not think that having judges write the reason for the decision is going to create an avalanche of appeals, it is just that it gives the accused and, for that matter, the prosecution—because I would say the prosecution should have a right of appeal—a right of appeal if a verdict is clearly perverse. If a decision is of acquittal is perverse there should be a right of appeal.

Ms SYLVIA HALE: But where you have something such as the assessment of honesty or dishonesty, which does involve a discretionary element, surely you are taking an equal chance with a judge as you are with a jury? Where you have judges who have the opportunity to exercise their discretion as they do at the sentencing level, you can have widely diverging views, so diverging that in fact there need to be processes put in place to make sure that there is some central agreement?

Mr McCUSKER: Absolutely.

Ms SYLVIA HALE: One of the things that is supposed to be wrong is when you go judge shopping, and that very act is an admission that judges have widely different interpretations of potential outcomes. I think there is every argument to have this with the jury as well.

Mr McCUSKER: This business of judge shopping, I do not know whether it happens much if at all in New South Wales but I have never come across an instance where it happened or was allowed to happen. But I think sometimes people say, "I prefer Judge X to Judge Y", not for reasons to do with that judge's perception of honesty or dishonesty but for reasons to do with the way the judge conducts himself or herself in court. Some judges are particularly testy—perhaps as we get older that is what happens—and some judges are a lot more easy to deal with. But I do not think there is any good reason to think that a judge is not more capable because of his or her training than a jury to understand the concept of dishonesty, as one illustration.

Just to illustrate that: the survey in the UK I mentioned earlier, they put up such questions to people who were surveyed as, "Suppose you take a video from a shop. Do you think that is dishonest?" Some people said, "No, we don't think that is dishonest". If a judge said that in reasons, a court of appeal would say, "You got it wrong". It would expose the views to scrutiny. This is a day and age where everything is supposed to be transparent, but the jury's verdict is absolutely inscrutable, and I think that is a major defect. If I were an accused person and I went before a jury and I was innocent and got convicted I would want to know why.

Ms SYLVIA HALE: If you knew the number of pens and pencils that were pilfered from this place you can understand why people may not say that is an act of dishonesty.

Mr McCUSKER: Exactly.

Ms SYLVIA HALE: And you would also, presumably, be aware of cases, say, within the Northern Territory, where children have been incarcerated or detained because they stole a virtually worthless item from a shop.

Mr McCUSKER: Oh yes.

Ms SYLVIA HALE: By any strict application of the notion of dishonesty you would say that child deserved to go to jail, but a common sense view, a community view, would say no, that is outrageous.

Mr McCUSKER: That was an isolated incident which was reversed. It was exposed to be quite wrong. You referred to judges sentencing. Juries do not sentence. You could well say why do they not sentence as well, because you have got different views then expressed as to what the appropriate sentence is? But no-one raises an eyebrow about the fact that it is always the judge who does the sentencing. In the United States, juries do the sentencing, and they get some extraordinary results, which then are reversed on appeal. If the view is taken that it is all right for judges to sentence and they bring to bear their views of current community standards, in the case of the child who takes some small item, it is absolutely certain—unless the judge has taken leave of his or her senses—that that child will simply be, at the worst, placed on a good behaviour bond and not incarcerated.

So there is a wide range of sentencing options and the judge gives reasons even then for sentencing, which are open to scrutiny by the Court of Appeal. If the Court of Appeal thinks that the judge has made it too low or too high outside an appropriate range then the Court of Appeal will reverse it. They are all the good attributes of decisions by judge alone even on the sentencing side.

CHAIR: I appreciate the time you have given us and the incredibly value evidence you have delivered to our inquiry. It has been really important to us. Do you have anything that you want to tell us that we have not asked?

Mr McCUSKER: No, I do not think so. My paper probably says it all. There was one other matter—it is in the paper. I noted that in New South Wales a very rare survey of jurors was carried out and the results of that survey were, again, very disquieting because a number of the jurors did not know what verdict they had given; a number of jurors gave the wrong answer; and a number of jurors thought, wrongly, that they had been directed by the judge to acquit when they had not.

CHAIR: Was this the Fordham work that you spoke of?

Mr McCUSKER: No, this was a survey done in New South Wales.

CHAIR: Was the Fordham work peer reviewed?

Mr McCUSKER: I am not sure of that.

CHAIR: So you do not know if it is published?

Mr McCUSKER: It has been published, yes.

CHAIR: So it is peer reviewed.

Mr McCUSKER: I know it has been published, although some parts of it were withheld at the direction of the Attorney General. She was very upset about that.

Ms SYLVIA HALE: Do you think we would have a stronger community involvement in the jury system if the conditions under which one served on a jury—mainly the remuneration or such other things—were improved? Is jury service made particularly unattractive for people as it currently stands and, if so, could that be overcome in some way?

Mr McCUSKER: I think it would be a slight improvement. It would not overcome the basic problem of the jury system, as far as the perception of people. People whose lives are disrupted by a two-, three-week or even month trial are particularly upset and often incapable of concentrating on the matter at hand. That is the judge's job—to focus on the trial. But the people in the jury, that is not really their occupation for the most part; their occupation is often occupying their minds. I have had anecdotal stories where people have just gone into the jury room angry that their business activities or their employment activities have been disrupted.

We particularly get problems, of course, with the large number now of fly-in, fly-out workers in the north of Western Australia who come to Perth and have got very lucrative jobs in the mining towns and so forth and if they are called away for a month or even two weeks to sit on a jury they are very, very resentful. That is a major problem: you do not want people sitting in judgement who are resentful of the fact that they are there.

CHAIR: Losing several thousand dollars a week.

Mr McCUSKER: Yes.

Ms SYLVIA HALE: Have your views on juries been developed as a result of your experience as both prosecution or defence or whatever—

CHAIR: A barrister.

Ms SYLVIA HALE: A barrister, or have they been as a result of your involvement in appeals against jury decisions or is it a combination of all?

Mr McCUSKER: It is a combination of all. But I will give you one instance that stuck in my mind and made me start to think about the jury system. I prosecuted a number of detectives for a drug conspiracy and the police internal investigation had done a fantastic job and got what I thought was overwhelming evidence. The jury, almost from day one, looked frightened and upset and every time they left the court, I found, there were a number of large men standing outside the court looking at them. I went to the judge with the defence counsel—there were four defence counsel—and said, "Look, I want something done about this". The judge said, "What can I do?" and nothing was done. The jury retired after a trial that went for nearly 10 weeks and they came back in half an hour with a not-guilty verdict. They all had their heads hung down and as they passed me one woman juror turned to me and said, "I'm sorry, Mr McCusker. It's not your fault, of course". I had real concerns about the pressure, direct or indirect, that had been placed on that jury. It is true that theoretically judges can be put under some kind of pressure but I think that they are strong and it is much easier for the State to protect one judge than 12 jurors.

CHAIR: We will have to wind up. If the Committee perceives some more information would be useful to us would you be happy to take a question on notice from the secretariat?

Mr McCUSKER: Certainly. As you can probably gather, I feel fairly strongly about this, because the more I have discussed it and the more I have thought about it the more I think it is about time that we all realised that the king is not wearing any clothes.

CHAIR: Personally I believe that what you have offered us today and in your submissions is incredibly important to our deliberations. Thank you very much for your time.

(The witness withdrew)

(The Committee adjourned at 12.40 p.m.)