

FEATURES

Walsham trio's lawyer puts juries in the dock

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The decision by three WA judges to free the young men jailed for the killing of Phillip Walsham has split the community.

The appeal court verdict infuriated most of the 12 West Australians who formed the jury that unanimously sent the three accused to jail. And now it has provoked an extraordinary attack on the jury system by one of WAs leading barristers.

"Why do juries even exist?" seven of the 12 Walsham jurors wrote in a statement to this newspaper. "Remember, the system chose us, we did not choose them."

The jurors, who sat through a 10-week trial, were frustrated that their conduct had been cast as unprofessional and based on emotion.

"We all took the role of juror very seriously," they said. "We are all intelligent and professional people who were prepared to listen to both sides of the case and were more than capable of analysing the evidence presented to us."

That angry response in turn has provoked an incisive review of the role of juries sent to me by the Walsham trios silk, Malcolm McCusker.

"I would not say that the jury system is a farce, as some of the Walsham jurors have reportedly said," Mr McCusker wrote. "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."

That appears to be a gauntlet thrown down to Attorney-General Jim McGinty, who obviously values the opinions of Mr McCusker, having been responsible for his appointment as Parliamentary Inspector of the Corruption and Crime Commission.

Mr McCusker discloses extremely mixed feelings about juries for a man who has built a considerable reputation on his ability to convince them in his clients interests:

"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."

I disagree with Mr McCusker on the issue of media prejudice. In my travels, I find that most of the people with strong views about the case were galvanised by the highly partisan three-part (now four-part) series run on the ABC's Australian Story program.

The raw perception of bias - and the clever focus on a pretty young heroine - hardened peoples views far more than any negative reporting about the convicted men.

Mr McCusker maintains that had the trial gone to a judge sitting alone, a conviction would have been unlikely. Even if there had been a conviction, he says the judge would have to provide full reasons, making an appeal easier.

"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?" Mr McCusker says.

"And, as well, calling on the Walshams to express displeasure at the appeal courts 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).

"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."

Such attacks on juries by legal luminaries are unusual. Ill be interested to see what the public makes of it.

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