STANDING COMMITTEE ON LEGISLATION

CRIMINAL PROCEDURE AMENDMENT (TRIAL BY JUDGE ALONE) BILL 2017

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
FRIDAY, 14 FEBRUARY 2020

SESSION FOUR

Members

Hon Dr Sally Talbot (Chair)
Hon Nick Goiran (Deputy Chair)
Hon Colin de Grussa
Hon Aaron Stonehouse
Hon Pierre Yang

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Hearing commenced at 4.20 pm

Mr MALCOLM McCUSKER
Queen's Counsel, sworn and examined:

The CHAIR: On behalf of the committee, I would like to welcome you to the hearing. Today's hearing will be broadcast. Before we go live, I would like to remind you that if you have any private documents with you, keep them flat on the desk to avoid the cameras. We will begin the broadcast now. Before we begin, I require you to take either the oath or the affirmation.

[Witness took the oath.]

The CHAIR: you will have signed a document titled "Information of Witnesses." Have you read and understood that document?

Mr McCUSKER: I have.

The CHAIR: These proceedings are being recorded by Hansard and broadcast on the internet. Please note that this broadcast will also be available for viewing online after this hearing. Please advised the committee if you object to the broadcast being made available in this way.

Mr McCUSKER: No objection.

The CHAIR: A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphone and try and talk into it, and ensure that you do not cover it with papers or make noise near it. I remind you that your transcript will be made public. If you wish to provide the committee with details of personal experiences during today's proceedings, you should request that the evidence be taken in private session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

With the formalities over, I would just ask you whether you would like to make an opening statement to the committee?

Mr McCUSKER: Very brief, thanks, because I have already supplied to the committee in advance of this hearing a fairly lengthy submission in writing, with an attachment.

The CHAIR: Indeed.

Mr McCUSKER: As the committee members who have read it will appreciate, I have been long an advocate of the right to opt for trial by judge alone. There are several reasons for that, set out in my paper, but perhaps one of the principal reasons—in fact, certainly one of the principal reasons—is that juries do not have to give reasons. In fact, they are prohibited from giving reasons for their decision. In this day and age, it is an extraordinary thing that people who are going to decide your fate, if you are an accused person, do not have to give any reasons for it. It works both ways, because not only would an accused person who is an innocent person desperately want to have reasons for a conviction, but similarly the state, as prosecutor, would want to know just why the jury has acquitted against all the evidence. I think that without reasons being given in this day and age, something is completely wrong. We advocate transparency behind all decisions. Magistrates, the President of the Children's Court, and members of tribunals, of course, all of whom are obliged to give reasons and often adjudicate on very important matters. Why should a criminal trial on indictment be exempt from that requirement?

The CHAIR: Let me start by asking you—I understand that you do have a list of the questions that we want to ask you?

Mr McCUSKER: I have received them, yes, thanks.

The CHAIR: My colleagues will interrupt if there are avenues they want to follow up as we go along. If these measures are introduced. in your view would the change be likely to result in an increase in the number of trials by judge alone?

Mr McCUSKER: Probably, but not very significantly.

The CHAIR: If the bill were to result in an increase in the number of trials by judge alone, would you expect the additional trials to represent a similar distribution of offences to that currently dealt with by the courts or would applicants charged with certain offences be more likely to apply for a trial by judge alone?

Mr McCUSKER: This is to some extent speculation, of course, but I would expect that persons who are charged with, for example, sexual offences against children—paedophilia charges—would want to have a trial by judge alone because that kind of offence—together with a number of others, of course—is apt to create a lot of hostility in advance of the trial. Although there is provision under our legislation to make an application for trial by judge alone, there has to be a very clear reason for doing so, and sometimes to simply say, "The nature of the charge is enough to entitle me to a trial by judge alone" just will not wash.

The CHAIR: Is it your view that moving to the measures proposed by this bill—that is, an increase in judge-alone trials—would save the court's time? Do you agree with that statement?

Mr McCUSKER: I do, overall because trials by jury are beset with possible problems. For a start, juries have to be empanelled. That takes time. Judges have to give them admonitions and warnings, which of course a judge alone does not have to give to himself or herself. Juries have to have breaks, of course. Sometimes a juror may fall ill, in which case there may be an adjournment until the sick juror has recovered. Sometimes, of course, there is a hung jury. That is one of the worst. There have been cases, for example, one that was notable, where a poor woman who was charged with murder went on trial three times because there were three hung juries, which meant that the jury could not agree. That would never have happened in a trial by judge alone. The judge has to give reasons there and then. When I say "there and then", not straightaway, but usually within a few days. If the judge's reasons are susceptible of attack on the ground of misunderstanding of the law/misstatement of the law, or a failure to properly comprehend the facts, which can sometimes happen, there is a right of appeal. Only rarely can you get an appeal mounted against a decision of a jury, for two reasons. First, the jury's verdict is inscrutable, as they say. Some say proudly that it is inscrutable, but I do not think that is good at all. Juries' decisions are, because of that, not open to attack as for the reasons. So, essentially, you have to establish in the Court of Appeal hearing that either the judge gave misdirections, which is the most common attack on a jury's verdict, or that the jury's verdict was so unreasonable that no reasonable properly directed jury could have given such a reason. That is in fairly rare cases. I have had a few, but not many, in my over 50 years' of practice.

Hon NICK GOIRAN: This line of questioning is in regards to determining whether judge-alone trials would save the court's time. We have just been told by the two heads of jurisdiction that it would not save time but in fact would increase time. I was interested to hear some of the things that you mentioned would save time—for example, the empanelment of the jury and the warnings that are given at the start of a trial. The Chief Justice indicated to us that in his experience, that normally takes about one hour. Is that consistent with your experience in this area, that it would normally be an hour, or have you found it to be a longer process?

Mr McCUSKER: I think an hour is an average time. In some very complex cases, it may take longer, or in cases where there are particular concerns about the possible contamination of a jury, but an hour is about the time.

Hon NICK GOIRAN: Okay. You also mentioned that sometimes there is a need for jurors to take breaks. Can you explain in what circumstances that happens?

Mr McCUSKER: There is, at least in my experience, always a mid-morning break for juries, taking about 20 minutes on average. There is usually an afternoon break as well. That is just a question of the time per day that can be saved by having a judge alone. But, in addition to that, there is this question of the hung jury. That is a real problem.

Hon NICK GOIRAN: I will come to that. Is the afternoon break typically about the same as the morning break?

Mr McCUSKER: It is a bit shorter, usually, I think.

Hon NICK GOIRAN: You also mentioned that sometimes a juror falls ill and that can create delays. It was explained to us by one of the witnesses this morning—I have forgotten who it was; I think it might have been the Director of Public Prosecution—that it is okay to continue with the trial if there were originally 12 jurors and it can actually go down to 11 or 10. Does that alleviate the concern about a juror falling ill?

Mr McCUSKER: To some extent, it would, but sometimes, because a juror has fallen ill, there is a delay in the hope that the juror may recover. So there is that aspect.

Hon NICK GOIRAN: Just dealing with this issue of the hung jury, what is the prevalence of hung juries?

[4.30 pm]

Mr McCUSKER: I could not put on any particular percentage but it does happen, and this has happened in my experience on a number of occasions. Sometimes jury trials have to be aborted because of something that has happened in the course of the trial. For example, I think of once instance and it is certainly not unique. In one trial in which I was conducting the defence, one of the women jurors, to her credit, sent a note to the judge saying that one of the members of the jury had, against the judge's clear directions, got on the internet and turned up all the information possible which was adverse against the accused. So the judge said, "Look, I've got no alternative but to dismiss the jury and start all over again."

Hon NICK GOIRAN: Yes. I have one further question on this with regard to hung juries. You mentioned the case where it is most unfortunate that it ended up being three trials.

Mr McCUSKER: Yes.

Hon NICK GOIRAN: What was the outcome of that case?

Mr McCUSKER: I think in the end—it is some years ago—my recollection is that at that stage the DPP said enough is enough and dropped it.

Hon NICK GOIRAN: So there was no sentence against the person as best as you can recall?

Mr McCUSKER: The best I can recall.

Hon NICK GOIRAN: It is interesting because this issue of hung jury has exercised my mind a little. If we think about that particular case, it means that there were a number of individuals on the jury on multiple instances who actually thought that the person was guilty.

Mr McCUSKER: Yes.

Hon NICK GOIRAN: If one judge was to share the same mind as those individuals, this particular person would have been found guilty and not have benefited from the existing system, so I can see it can go both ways.

Mr McCUSKER: It can, but the problem is that, for a start, thinking of the position personally of the accused, going through any trial is a heart-wrenching kind of experience. To do it three times must be seriously damaging to the person's psyche. If a judge finds the person guilty, at least you know the reasons. If a jury is simply hung, you do not know why. You do not know whether it was 9–3 or one standout if it is a serious case.

The CHAIR: Just to close off on the issue of hung juries, it has been suggested to us by previous witnesses today that the outcome of a hung jury is actually a sign that the system is working—that you have got up to 12 individuals exercising their responsibilities accurately in line with the judge's advice. Do you have a comment about that?

Mr McCUSKER: I do not think it bears analysis frankly, with all respect to that comment. Someone said to me once about, say, the Mallard case, "Look it proves the system works because eventually we got him acquitted." My God, it took a long time of hard work to get there. It does not prove the system is working; it proves that sometimes you can get a group of people who cannot agree. That is all it does. The premise sometimes used as a basis for supporting the jury system is that you are going to always get 12 reasonable people on a jury. You cannot be sure that that is the case. You may, if you are lucky. But with a trial by jury, the selection of a jury, of course, is entirely random. Theoretically, although I do not think it has ever happened, you could get 12 people of very limited education, 18 to 20, with no life experience and no job, and they are your jury of peers. It is important, I think, for the committee to look at the reality as distinct from the shibboleths that are often used with jury systems.

Hon NICK GOIRAN: Was the original Mallard trial a jury trial?

Mr McCUSKER: It was a jury trial, yes. The problem for Mallard in that jury trial was there were several problems. One was that vital evidence that would have exonerated him was withheld—there is no question about that—from the defence and from the court, so the jury were never told. Another problem was that Mallard—you can understand this—was extremely emotional and angry and therefore did himself no credit, partly due to the fact that he was bipolar. So he got terribly exasperated and was screaming out and so forth. To a jury who did not know any of that background, that person appears to be awful. In fact, the suburban *Post* editor, Bret Christian, later said how terribly sorry he felt about it. At the time, the suburban *Post* wrote a series of articles about the trial saying that he just had all the appearance of an evil killer, or words to that effect. Judges are trained—some very well; some perhaps not so well—to disregard all this emotion. People who have not done this kind of job and are simply plucked out at random and called to judge someone often have had little, if any, experience in objective evaluation.

I have had so many horror stories from ex-jurors. You would not believe how bad some of these people thought the experience was. There are some people who say, "It was good; I felt as though I was serving", and that is great. To give you just one instance, because it jerked in my mind, a woman juror told me—she should not have perhaps, but she did—that when the jury had retired to consider their verdict, one of the women immediately started talking about what shopping she had done that day and another one joined in and talked about where the bargains were. At last, when they got to talking about the issues and the facts, this woman said, "But, look, we've got to be satisfied of this beyond reasonable doubt", to which several of the jurors said, "Where'd you get that idea?" The judge had probably told them a dozen times. It is a real problem.

In this day and age, it is even worse. Not only should we by now have a completely transparent system of adjudication—magistrates do most of the adjudication in our community; no-one ever says that somehow this lessens the justice system in the eyes of the community—but also in this day and age, we have got the big problem, and I know that the

Lawyers Alliance have raised this in their submission, of the internet. Judges are a bit divided on this—maybe my two predecessors here have told you—as to whether they should tell the jurors not to look on the internet for fear that they will, or if they do not tell them not to look on the internet, they will say, "No-one told me not to." If you look on the internet at a person's background, you might find that the accused has done something awful, or the internet says that that person has done something awful and you cannot be sure it is right, and then they convey that to the rest of the jury. You have immediately got an affected jury.

The CHAIR: You have talked about the competence of jurors. Are you aware of any interference with jurors?

Mr McCUSKER: Yes, I am, both anecdotally and my personal experience, but it goes back a long time. Back in 1981, when I used to do quite a few briefs for the prosecution for the Crown, I did an eight-week trial prosecuting four drug squad detectives and a prostitute, who rejoiced in the name of La Donna Pelham, for a conspiracy to sell drugs. After about the first week or so, I had to go to the judge in chambers with the defence counsel and I said to the judge, "Look, this jury is being intimidated." He said, "What do you mean?" and I said, "When they were walking outside the court to leave the court, there was a phalanx of very tough looking people on each side of where they were departing." They did not say anything and they did not threaten; they just looked threatening. I said, "You really have to do something about this to stop this." The judge, and I remember it well, said, "Well, there's nothing I can do." The evidence that was produced in the prosecution was extremely strong; there was a great credit to the internal investigators—what they did. They were so thorough. The jury retired, looking very, very worried and troubled and they returned within about half an hour after an eight-week trial with their heads down and the foreman said, "Not guilty." As they walked out looking very, very troubled, a woman juror turned to me and said to me, "We're sorry, Mr McCusker; it's not your fault." That to me conveyed a very clear message that that jury had been intimidated. It is very easy to intimidate jurors, because an accused does see the jury list and knows where the jurors live, or did live at the time of the electoral roll. It is very easy for a criminal to get one of that person's mates to ring up a juror and say, "You'd better do the right thing or else." Now, I am not saying that I personally know that, but it is so open to that possibility that we should try to avoid it if at all possible. In trials by judge alone, if that happens to a judge, a judge, first, is trained to resist it and, second, can get the police to come and assist.

[4.40 pm]

The CHAIR: The second reading speech suggests that an increase in judge-alone trials would cut down on appeals. Do you agree with that?

Mr McCUSKER: No, I really think that is speculation. It may, but probably not, for this reason: that if a jury gives a decision of not guilty, then the prosecution has no right of appeal. That is it. If a judge gives a decision and gives reasons, a prosecution does have a right of appeal, so it is more likely than not that there will be an increase—not a huge increase, but some increase—in appeals.

Hon AARON STONEHOUSE: But do you think that that increase in appeals would be in the interests of justice—that that would assist in the administration of justice?

Mr McCUSKER: I certainly do. This is the crux of it all: I think that if you have reasons given by a judge and they are open to appeal, and there are strong grounds for appeal, then there should be an appeal in the interests of justice, because judges do not always get it right. I am not suggesting that they are always right, least of all judges.

The CHAIR: The committee has received submissions that the requirement to prepare reasons in a trial by judge alone will enhance the quality of the criminal justice system, as any possible errors can be identified in the reasons and fully reviewed by an appellant court. Do you agree with that statement?

Mr McCUSKER: Totally. I would add this: not only would it in that way enhance the justice system, but I think the experience of everyone here, I am sure, is that if you are compelled to write reasons for something, you focus. You do not do it off the cuff; you have to focus on it and carefully explore all the pros and cons. Now, I know parliamentarians do that as part of their job, but jurors—I will not mention who, but it is a relative of mine, went on one jury trial and he said, "Dad, you wouldn't believe what happens on juries." He said two of the jurors stood at the window and said, "We don't care what you say; we'll just go along with you."

I had a story sent to me by a very eminent writer, an academic, who said he had the horror experience of being the foreman of a jury in New South Wales, where I think at that time you were allowed to say what happened. He said that at the first retirement of the jury, three women on the jury said, "These two blokes who are charged with fraud are guilty." He said, "Why do you say that?" Do you know what the answer was? "They're Lebanese; we know they're all crooks." That is the kind of thing you can get. Now, he talked them around and ultimately got them back on track, but on another case, another person said to the foreman, "I'll go along with you. I think that you know what you're doing, but the rest of the jury want to convict this man." So, the foreman said, "Well, the evidence is not there to support that

conviction. Why do you go along with me instead of the other 10?" The fellow said, "Well, I don't believe anyone should be punished for using a knife." You get some incredible stories!

Kim Macdonald, who I think is still a journalist at *The West Australian,* wrote a two-page article, which I think I mentioned in my submissions, saying what a horrible experience it was. Her experience as a juror was so bad that when she got to the station to go home, she started crying. She said, "I was so disillusioned by my experience on the jury."

Hon NICK GOIRAN: Mr McCusker, that is interesting, because the Department of Justice gave us some statistics, I think maybe out of the Sheriff's Office. I am not too sure about the qualitative nature of the information, but the information that they gave us anyway seemed to suggest that a majority of people that were involved in the jury process actually found that it enhanced their appreciation for the system. I have no doubt that the case that you referred to with Ms Macdonald transpired exactly as you have said, and as you say, she has even documented it in some article, but I wonder whether it is an outlier or whether it is common.

Mr McCUSKER: It is very hard to say, and I agree: has a qualitative assessment been made? The possibility that that can happen is enough, in my view, to question the use of a jury system for adjudication in a fairly small number of cases in terms of criminal trials, when most criminal trials are presided over by magistrates, who do not have the benefit of juries and they have to give their reasons. One of my very close friends is Denis Reynolds, who is the former President of the Children's Court here. He was without a jury, of course, in the Children's Court and he has given decisions on murder trials—very serious matters; kids get involved in some terrible things—and he always had to give reasons. I asked him, "Do you find this a burden?" He said, "No. You've got to think about the case anyway, so writing about it is just a further discipline to make sure that you've really carefully studied what is a very important decision."

Hon NICK GOIRAN: Albeit that the heads of jurisdiction say that that will then create some resource implications for them because of the time that it takes for judges to give these things proper consideration and document it.

Mr McCUSKER: Well, first of all, if it takes more time to document, that is good, because it means that careful consideration is being given to a decision which is going to affect the lives of their fellow citizens. Second, I find it hard to actually understand why that is said. I know the Chief Judge of the District Court has that very strong view, but a judge in a jury trial must, if the judge is doing the job properly, keep careful notes as the trial progresses, make notes and observations about what kind of evidence is doubtful in terms of supporting and what kind of evidence is contrary to the prosecution and so on, and must of course in any event be prepared to give a full address to the jury—a proper, full direction to the jury—immediately after the trial finishes. Now, that is pretty close to writing a decision. You have got all of the material at hand, or you should have. If you are doing your job properly as a judge, you have to be able to expound to the jury all of the relevant legal principles. If you put all that in writing, as a lot of judges do anyway—they have it written out for them, perhaps in note form—well, it is not far different, really, from writing a decision after you have sat as a trial judge alone. Magistrates do it all the time, as I say. Denis Reynolds and the current President of the Children's Court, they have to do it.

Hon AARON STONEHOUSE: There is perhaps a bit of contention from different people in the profession as to the amount of additional work that might be required, so I am willing to accept on face value that this would add to the burden of judges, especially in the District Court, where they are seen to be spread thin as it is. Playing devil's advocate, is it fair to say that a reform such as this, which would add such a burden to the District Court in particular, should be put on hold at least until we can properly resource that jurisdiction—properly resource the court and bring on new judges—or are these sort of two separate matters that should be discussed on their merits, apart from each other?

Mr McCUSKER: I think they are two separate matters. The major objective is to get the best possible justice system. We are never going to get it perfect, but we can at least improve it. If you are going to have a bit of extra time taken by a judge, I frankly think that a really good judge could give a decision on the spot. In England, and I know some judges in Australia, they give what is called ex tempore decisions in quite complex trials—not criminal trials; I am talking about civil trials. Of course, our judges have to adjudicate and give decisions in civil trials, and they should be able to do so well and quickly. Some do not do it all that quickly, lamentably. But the point is: what is the difference, really, between a criminal trial and a civil trial in terms of the burden on the judge?

[4.50 pm]

In a civil trial, the judge has to give a decision and it should not be delayed, because justice delayed is justice denied, as they say. Judges should impose on themselves a discipline of being ready to give a decision as quickly as possible. I did a trial before a judge alone—it is a long time ago now—acting for Brian Burke. And Brian Burke opted for and got—not opted, but we applied for and got a trial by judge alone because of the enormous adverse publicity that surrounded him at that time with WA Inc and so forth. The judge took four days, it is true, to write his reasons and convicted Brian Burke. We had the reasons and I took it on appeal. The Court of Appeal looked at the reasons and looked at our argument,

called up Brian Burke and allowed the appeal—told him he could go free at once. If that had been a jury trial, it could not have happened.

Hon NICK GOIRAN: The jury might have found him not guilty.

Mr McCUSKER: The jury might have. His apprehension was, like the apprehension of Lloyd Rayney, who told me before his trial started—before he got, quite rightly, a trial by judge alone, Brian Martin—he said, "If I go before a jury, I'm convicted before I go in the witness box." I said, "Why is that, Lloyd?" He said, "Look at me. I look criminal. That's enough." That was his perception, as a former very senior prosecutor.

The CHAIR: I am going to take questions 6 and 7 as already having been answered by you, Mr McCusker.

Mr McCUSKER: I think I have, yes.

The CHAIR: Perhaps I could just ask you, though, to make some comments about question 8, which is whether you anticipate that any savings might be made to the state as a result of changes made to the bill.

Mr McCUSKER: I do think so. There will be savings in a lot of ways. For a start, the state does not have to pay both the judge and 12 jurors and the sheriff's officer who shepherds the jurors around the place and morning tea and afternoon tea and all those kinds of things. Admittedly, the jurors do not get paid all that much, but it is all an expense. I think there would be a real saving in that regard, not that savings should really drive the decision on whether or not to have trials by judge alone. But I think there would definitely be a saving.

Hon NICK GOIRAN: I think you mentioned that particular case of Burke and it was four days to write the decision.

Mr McCUSKER: Yes.

Hon NICK GOIRAN: That seems quite quick. We have been provided with some information to suggest that in the District Court at least in the last five years there have only been eight trials by judge alone, but the information with respect to those eight trials is that the average verdict decision time was 14 days. I think the shortest was two and the longest was 43 days. If we look at the average as 14 days, for what it is worth, that is a lot of days of judges' time. The amount of trials, of course, will be exactly the same as what they are now, whether it is a judge or a jury. The amount of trials is the same. It is a question of how much time it takes.

Mr McCUSKER: To really look at those figures usefully —

Hon NICK GOIRAN: It is only eight.

Mr McCUSKER: You would have to look also at what the trial was about and which judges you are talking about because it is, unfortunately, a fact that sometimes judges take an exorbitantly long time to write a decision. There was one of our judges here—I think he still holds the record—who took two years and three months to write a decision in a civil trial. There was no good reason for it. It could have been done in a week. I think if we had trials by judge alone in criminal cases, judges would need to be urged as far as possible by the Chief Judge or the Chief Justice as the case may be to ensure that they are working on the case as they go and are ready to give a decision promptly.

The CHAIR: This might be an appropriate moment just to raise an issue that we have pointed out to previous witnesses, which is, of course, that the bill does not abolish trial by jury.

Mr McCUSKER: No.

The CHAIR: May I just ask you for your views about the idea that if there is something so fundamentally flawed about the jury system, should we not be trying to bring about a much greater reform to the system.

Mr McCUSKER: Well, one step at a time. I, personally, agree. I think the jury system is totally outdated. It goes back to about, I think, the thirteenth century. It was originally on the basis that a person would be tried by his or her peers, meaning you could not get in the witness box and defend yourself. You had to rely upon 12 people who knew you and knew your character and knew your behaviour. This is old English village stuff. That is where it originated. Then we now have a system where jurors have to be, as far as you can determine, impartial, although there is a recent account of a juror who got on a trial of an alleged paedophile who immediately got on her Facebook and said "Wow. I can now at last convict a paedophile." This is before the trial started.

Hon NICK GOIRAN: We have been told that with respect to commonwealth offences, this is a no-go zone, effectively.

Mr McCUSKER: It is.

Hon NICK GOIRAN: Would you advocate for a change to the Constitution?

Mr McCUSKER: No. That is very ambitious, I think. Look, the High Court decided, and it is not going to change its mind, that what appears in the Constitution—that is, that a person has a right to be tried by jury on an indictable offence—means you have got to be tried by one, which I have always thought was a bit odd. A right turns into a mandatory

obligation. But there it is. But we are looking at the state system and there is no reason why you should, at the moment at least, look at constitutional amendment.

The CHAIR: As far as the reforming steps that might be taken, I am sure you have had a look at the other submissions that we have received which we have made public.

Mr McCUSKER: Yes.

The CHAIR: A couple have arisen which we would like to test with you. One is a requirement for juries to provide brief and informal reasons for their decisions. Another is the automatic provision of assistance to juries such as transcripts, written guidance and recordings. The Chief Justice mentioned that juries are now routinely provided with transcripts in the Supreme Court, which was of interest to us.

Mr McCUSKER: Routinely? I did not know that, actually.

The CHAIR: I am not sure whether he used the word "routinely"—my colleagues might be able to help me—but regularly. You will be able to check the transcript. There is a reference.

Hon AARON STONEHOUSE: Common. I think it was a new addition.

Mr McCUSKER: Common—if they want it. The problem with asking juries to provide answers or reasons —

The CHAIR: Reasons.

Mr McCUSKER: Is that you are going to take a long, long time to distil reasons from a jury—12 different people with 12 different views. It could actually extend the length of the trial, but it would be better than no reasons.

The CHAIR: Yes. That seems to be a view that is widely held; the 12 jurors do not necessarily have the same reasons.

Mr McCUSKER: No.

The CHAIR: May I ask you about the measure in the bill—the bill is proposing to remove a number of criteria set out in the Criminal Procedure Act 2004, upon which it may be in the interests of justice to conduct a trial by judge alone—that is, complexity of the trial, jury interference and factual issues requiring the application of objective community standards. In your view, what would be the effect of removing these criteria?

[5.00 pm]

Mr McCUSKER: Well, I come from a position where I think that if a person wants to be tried by a judge alone, that person should have the absolute right to be tried by judge alone. But if we are to have a trial by judge alone only where those criteria are met, perhaps there should be a more general criterion added to it: that is, "or for any other reason it is thought proper to have a trial by judge alone, in the interests of justice."

The CHAIR: The bill requires the court to make an order by trial by judge alone unless satisfied that the order is not in the interests of justice. Can you envisage any situations where it would not be in the interests of justice to order a trial by judge alone?

Mr McCUSKER: No, I cannot. I saw that proposal and I cannot think of any situation where it would not be in the interests of justice because surely it is in the interests of justice to have a person who wishes to be tried by judge alone to be tried and to have reasons given, ultimately, for the decision. That is in the interest of justice.

Hon NICK GOIRAN: If this bill were to pass—this bill, of course, still retains the right or, if you like, the "default", of jury trials. Could you see a circumstance where you would be advising your client not to make an application for a judge-alone trial?

Mr McCUSKER: The well-known author Richard Dawkins, who sat on three different criminal trials as a juror and said to his absolute horror what went on there, said, "If I were charged with a criminal offence and I were guilty, I would opt for a jury trial. The more wayward the better—preferably a jury like the one in the O.J. Simpson trial—but if I were innocent, I would want a trial by judge alone." To answer your question: would I advise a person to opt for a jury trial? If a person said to me, "I'm guilty", I would say, "You'd better plead guilty. For a start, I'm not going to defend you if you propose to go into the witness box and deny these allegations when you know you're telling a lie. The second thing is that if you're guilty, you should plead guilty at the earliest possible opportunity because you will get your sentence reduced by reason of the early plea."

Hon NICK GOIRAN: In which case you would only ever act for a person who says they are not guilty?

Mr McCUSKER: No, I have had people come to me and say, "I did it. What should I do?" And I say they had better plead guilty. But if a person says, "Look, I know that the evidence is heavy against me but these are the reasons why I want to defend the case and I didn't do it", then I would say, "Well, depending upon the nature of the case, I would suggest that

you go before a judge alone because if it's complex, the jury may not understand or if it's a kind of a charge that's likely to create emotional antipathy against you, go for a trial by judge alone."

The CHAIR: Before we proceed, it was discourteous of us to keep you waiting at the beginning of this hearing. Can I try to make amends now by asking you whether you are happy to extend past five o'clock with us?

Mr McCUSKER: Sure.

The CHAIR: We have about six other questions.

Mr McCUSKER: Thanks for that. I am not sure when the parking meter stops but I think I am ok for the next quarter of an hour.

The CHAIR: Ok. Let us try to wrap it up by 5.15 pm.

Hon NICK GOIRAN: I will assist by desisting asking questions!

Mr McCUSKER: I appreciate the questions.

The CHAIR: I thought you were going to assist by going and putting money in the meter!

Mr McCUSKER: The very nice lady at the reception said that she thought the committee would pay my fine if I got one!

The CHAIR: That is now on the public record!

Hon AARON STONEHOUSE: Just very quickly, the question about what might produce the best outcome for the accused comes up a lot. If you are guilty, it is suggested by some that you might want a jury trial because the jury could be confused by the weight of evidence, perhaps, and might not reach a unanimous decision of guilt. Or, if you are not guilty, you might want a judge who can cut through the emotionally charged circumstances of the case and reach an appropriate verdict. Are we creating a problem, however, if we give a choice to an accused where they can use that choice tactically to their benefit? Does that in itself undermine the integrity of the system in any way?

Mr McCUSKER: I do not think so. If a person is charged with an offence, that person may say, "I want a trial by judge alone because I want to get the reasons and it's going to be quicker and it's going to be less expensive, and I didn't do it and a jury might be a bit wayward and find that I did do it when I didn't do it. Then I have to try my luck on appeal." I do not think that there is any question of offering a person some kind of way of rorting the system.

I acted in a case—you may remember the name—poor John Walsham was found dead just near the Stirling Bridge and it was called the Walsham case. I was briefed. The three young men who were charged with his murder went on one jury trial and the jury was hung. At that stage I was briefed to appear for one of the accused on the retrial and I went through all of the material and said, "Look, if you go before a jury, you're going to get convicted." So why—we did not do it—"We can show we did not do it", and they could do that by timing and so forth. It was all quite complex, but we could show objectively that they could not have been there. I said, "Well, you're going to be convicted if you go by trial by jury, so we'll see if we can get a trial by judge alone, in which case you'll be acquitted because the evidence, objectively, doesn't support the charge." So, my junior counsel and instructing solicitor applied for a trial by judge alone, and there had been extraordinarily bad adverse publicity about these young men and all kinds of things. The coroner did not help by making very, very adverse comments prejudicial to their defence. But the judge who heard the application for trial by judge alone said no. He thought that it would be reflective of community interests, which later Chief Justice Wayne Martin said, "How could that be so? How could a decision on whether or not these men were guilty of murder in some way be reflective of general community interests?"

Anyway, we did not get a trial by judge alone. We went before a jury and, as I predicted—indeed, as a woman who went down and looked at the trial in the first couple of days also predicted but for different reasons—they were convicted. In the course of the trial, the emotion in the court was extraordinary. The reason why I said they were going to be convicted is that they had misbehaved in the course of the evening when this young man met his death. They misbehaved towards him. Two of them had kicked him, but they had not committed the murder; they had gone. So they were convicted. The prosecutor did things which a judge-alone trial judge would never contemplate allowing. Things like banging a tyre lever on the desk because they had been running after someone with a tyre lever that night and scaring everyone. So we took it on appeal and the Court of Appeal agreed with me that the jury verdict could not possibly stand. It was simply against all the evidence. It could not stand. It was a very lengthy, detailed, meticulously written decision by the Court of Appeal. It covered every possible aspect. Three or four members of the jury were so enraged that they went on public record as saying this was an insult to the jury system because, they said, "We're all intelligent people and we decided this man was guilty and that was that. They shouldn't have been allowed to be released by the Court of Appeal." It stuck in my mind because it just shows you the importance of objectivity in approaching an emotionally charged case, which that was, and it is difficult for people not trained to approach things in that very objective manner and looking at the question of proof beyond reasonable doubt to do so.

The CHAIR: Can I ask you about the anticipated additional costs of adopting the measures in the bill? We have talked about savings. The follow-up question to that was about any anticipated extra cost.

Mr McCUSKER: I cannot see any extra cost. There should not be an extra cost. The judge doing his or her job will write a decision and will write, as you do, notes to prepare for the decision progressively as the trial proceeds, so it should not take all that much longer to write a decision which is based on the notes given them and the judge's knowledge of the law. I should say that the length of the trial in itself would, in any event, be shorter. I know Wayne Martin, the former Chief Justice, thought that the Rayney trial probably took something like 50 per cent less time than it would have in a trial by jury. Certainly, undoubtedly it would be a shorter trial. If the judge sitting alone took even an extra week or 14 days, I think you would still find that there was a saving, particularly in a long trial.

[5.10 pm]

Hon NICK GOIRAN: My colleagues will correct me if have this wrong, but I recall asking the Director of Public Prosecutions earlier today whether she felt that the current high-profile Claremont case, which is being handled by judge alone, would be longer or shorter, and my recollection of her answer is that it is taking longer because it is judge alone.

Mr McCUSKER: I accept that that is what she said. I must say it does surprise me. Did she elaborate on that, to say why it would be so?

Hon NICK GOIRAN: No, we were careful not to go too much into the case while it is still live.

The CHAIR: The Chief Justice referred to the fact that if it is judge alone, there tend to be days of legal argument or people retiring to consider things that would not be done if you had a jury empanelled.

Mr McCUSKER: Than if you had a jury empanelled?

The CHAIR: Yes.

Mr McCUSKER: But in my experience, in jury trials, points of law—whether it is a jury trial or a judge-alone trial, points of law will come up and are debated. If it is trial by jury, the jury has to go out of the room while the matter is being debated, but I cannot for the life of me see how there could be any lengthening of the trial by reason of there being a legal issue that may arise. I would be very surprised. I know that those who are familiar with the Rayney trial are quite sure that that would have taken a lot longer before a jury.

The CHAIR: On the topic of reforms to the existing system, I think in your submission you touched on alternatives to the traditional English jury system, such as a collaborative system where lay adjudicators sit and deliberate alongside professional judges. Do you think the jury system could be improved by drawing on alternative systems like the one you mentioned?

Mr McCUSKER: Yes, it could be. I think if this present bill does not get up, then one improvement would be to arrange for someone who is experienced, like a former judge, to go to the jury room and make sure that they are on track, but that is going to add to the expense and you still will not get reasons.

The CHAIR: We have heard some very enthusiastic endorsements of the jury system and I wrote down something that some previous witnesses said, which was that jurors become ambassadors for the criminal justice system. You have given us a graphically different account of the experience of being a juror.

Mr McCUSKER: Well, it is not universal. I have given instances, and there have been many of them because once it became known, as it did over the years, that I was an advocate for trial by judge alone, a number of ex-jurors have written to me, some a bit naughtily, to say what awful experiences they have had. I have seen from time to time letters written by former jurors to the then Attorney General, complaining about what happened in the jury room. It may well be that 90 per cent of the time these things do not go on, but 10 per cent is still bad.

The CHAIR: Yes, so we have these radically different accounts. In light of those different submissions and views about experiences, to what extent do you think that jury trials are necessary to facilitate community confidence in the criminal justice system?

Mr McCUSKER: I have heard that one put forward. I think it is a total furphy. Confidence is not engendered by the jury system, because if that were necessary, every criminal trial would be a trial by jury, yet most criminal trials are before magistrates and no-one complains that there is something wrong with the system because of that.

The CHAIR: Okay. I bring you to the ACT; we understand that changes were made to the law in the ACT in 2011. Since then, the law does not permit judge-alone trials for some serious offences like murder and nearly all sexual offences.

Mr McCUSKER: Yes.

The CHAIR: South Australia does not permit an accused to elect to be tried by judge alone where the accused is charged with certain minor indictable offences. Do you think it would be appropriate to similarly limit the right of an accused to apply for trial by judge alone to certain offences?

Mr McCUSKER: No, and I read that information and, for the life of me, I could not work out the rationale behind it, either in South Australia or the ACT. In fact, they have taken two quite different approaches. Why would you say that you cannot have a trial by judge alone where it is a minor matter? I would have thought that was a case where you would go before a magistrate for a trial by magistrate alone.

The CHAIR: Our final question is: some jurisdictions require the court to be satisfied that an applicant has obtained legal advice before applying for an order for trial by judge alone. In your view, should a similar safeguard be required under the act?

Mr McCUSKER: I am not sure about that. For a start, people may wish to self-represent, and some do, which causes problems with the court, but they do, so why should you compel them to go to a lawyer to get advice that they will probably resist anyway? If they want a trial by judge alone and the lawyer were to say, "No, go for a jury", the person will say, "Well, I've gone through the motions, but I still want judge alone", or vice versa. I do not see that there is any good reason for requiring someone to get advice from a lawyer on the subject. Most people would probably talk to a lawyer anyway if they are facing an indictable criminal offence, and in the course of that they would probably get advice about whether or not they should go for a trial by judge alone.

The CHAIR: That is the end of the questions we have drafted, but I am going to open up to my colleagues to ask follow-up questions.

Hon PIERRE YANG: We have heard the argument that it is sometimes better for the complainant to hear that perhaps the reason that a jury did not support the complainant's version of the story was probably because it was not proved beyond reasonable doubt, and that would be better for the complainant to hear rather than being told by a judge that their credibility was not accepted. What is your response to that?

Mr McCUSKER: This is a proposition that the complainant, the alleged victim, wants to know why the accused has been acquitted?

Hon PIERRE YANG: Yes, in a situation like that.

Mr McCUSKER: I think it is still important that the complainant knows the reason, and if the reason happens to be that the complainant was not believed, well that is tough, but it may be that the reason given by a judge is not that the complainant was not believed, but that there was not sufficient evidence to establish the case beyond reasonable doubt. A judge may decide to acquit, even though the person, the complainant's, evidence is credible and may say the evidence was credible but that there is not sufficient evidence to prove the case beyond reasonable doubt. It is a difficult concept, but that is the case. A complainant who is aggrieved by the fact that the accused person has been acquitted I think would want to know why the acquittal took place, and I would think also that the state would want to know, too. The state might say, "If that is the reason, we can appeal and get that acquittal reversed." You cannot do that with acquittal by a jury.

Hon PIERRE YANG: Thank you, Mr McCusker.

The CHAIR: Okay, that brings us to the end of our hearing. That is only three minutes over what we promised! I have to do some closing formalities. Thank you for attending today. We can end the broadcast now. A transcript of this hearing will be forwarded to you for correction. If you believe that any correction should be made because of typographical or transcription errors, please indicate these corrections on the transcript. Errors of fact or substance must be corrected in a formal letter to the committee. If you want to provide additional information or elaborate on any particular points, you may provide supplementary evidence for the committee's consideration when you return your correction transcript of evidence. Thanks very much for coming in.

Mr McCUSKER: My pleasure. Thank you.

Hearing concluded at 5.19 pm

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