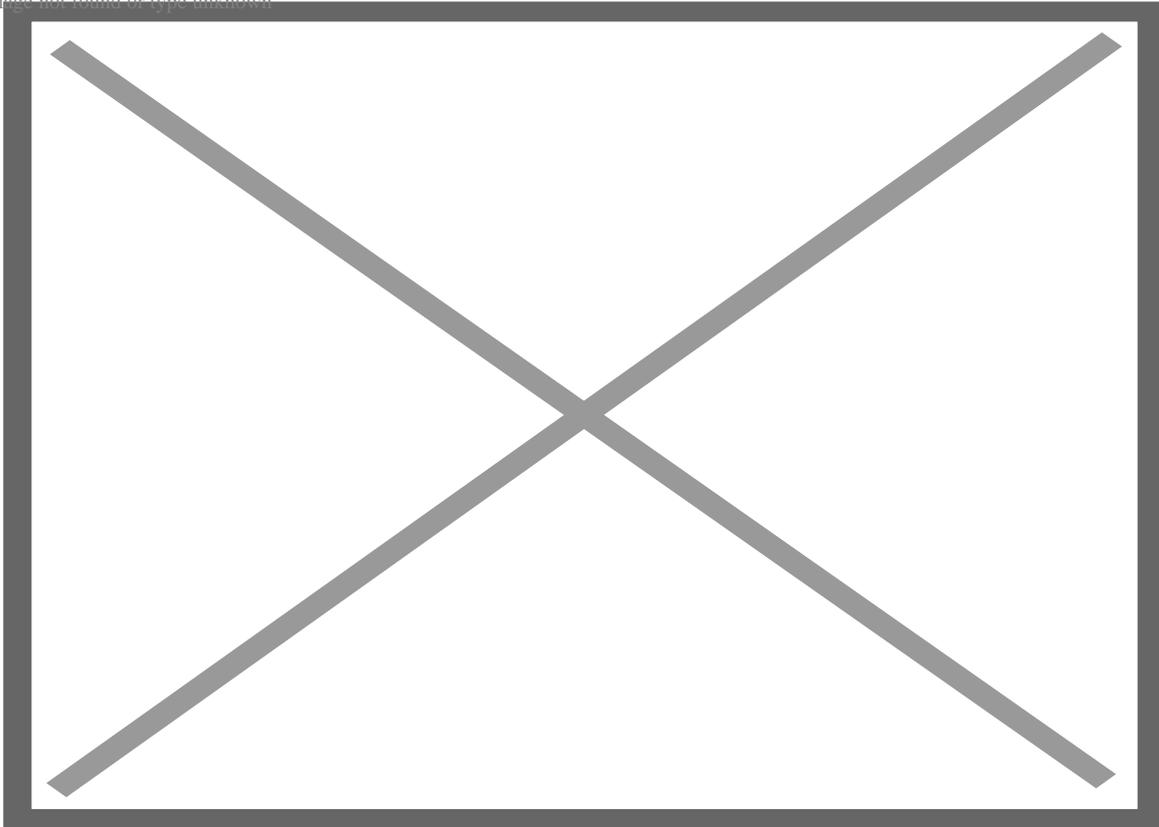


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The Sunday Debate: Are Juries A Waste Of Time?

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Ainslie Van Onselen and Tim Wilson go head-to-head on whether or not juries are a waste of time.

AINSLIE VAN ONSELEN:

Ask anyone who has sat on a jury trial and you will hear spine-chilling stories: jury members changing their minds at the 11th hour because they want to get home for the weekend; assumptions of guilt due to race or other prejudice; duress from members of the jury panel, or prohibited nocturnal visits to crime scenes to find out what really happened.

Earlier this month we learnt that the jury for the former NSW crime-fighting boss turned convicted drug dealer, Mark Standen, complained about the impact the five-month long trial was having on their lives.

They delivered a stinging rebuke of a jury process that expects citizens to put their lives on hold for so long.



Last month the new Governor of Western Australia, Malcolm McCusker, was sworn in at the ceremony where it was noted that his new role would preclude him from achieving his life-long ambition of abolishing jury trials.

The jury versus judge trials in the court room is a common debate in the legal profession. McCusker has written and spoken extensively on the subject. A long-serving QC, his record includes countless successful High Court matters overturning decisions made in his home state of WA, including the case of Andrew Mallard (who was wrongly imprisoned for 12 years).

The primary tenet of the argument against jury trials is the lack of transparency. No written reasons are given, the decision is deliberated upon in private and no one (including the presiding judge) knows what happens behind closed doors.

The alternative to jury trials is to have cases determined by a single judge or a panel of three judges. Written reasons would be provided, enabling decisions to be appealed with more clarity and improving transparency in the process.

In the law, anecdotes abound about the flaws in the jury process – and these aren't speculative fictions.

One experience quoted at the 2009 Australian Legal Conference was of a professor who wrote to McCusker in support of his quest to abolish juries.

“I would never myself want my innocence or guilt to be determined by a jury such as I sat on,” the professor said. After the first day of a week-long trial, at least five members had determined the guilt of the accused and discussion then turned to the problems with the tone and presentation of the lawyers.

Abolishing juries for Commonwealth trials is difficult, requiring a constitutional change. This is unfortunate, because some Commonwealth trials are extremely complex – Corporations Act prosecutions in particular.

State courts do not face this problem. How can we expect a jury member (whether tertiary-educated or schooled in life experiences) to understand the intricacies of a case that requires the calling of vast tracts of technical expert evidence, when it has taken barristers and solicitors months to understand it?

This inevitably leads to conclusions of guilt or innocence based on appearance, subjection, or how emotively a particular barrister presents his or her argument.

Our adversarial system lends itself to the latter.

Like society in general, why should we be surprised if the will of the most dominant personality sitting on the jury prevails? Moreover, those who understand the law (lawyers) are excluded from sitting on jury trials. This at a time when there are more lawyers (24,801) in NSW than police



officers (16,177).

Maybe the only good reason to maintain jury trials is the sense of involvement in the process it gives the community. But let's not kid ourselves that juries have anything to do with good jurisprudence.

A jury brings together a collective of varied life experiences representing the general views of society. Individual prejudice should be stamped out, so the theory goes, by the 11 others sitting on the panel. But we will never know what really goes on in any jury room ... an odd lack of transparency in this modern age.

TIM WILSON:

A convincing case for dumping juries simply hasn't been made.

After many years of pondering, I recently lapsed as a believer in an Australian Republic. I could no longer find there was sufficient benefit from toying with our Constitution over the simple conservative reality that our current system works.

And the same is true of jury trials.

Currently jury trials are required under the Constitution built on the traditions we inherited from England and the United States.

Juries aren't perfect. They don't always deliver desirable outcomes.

They're open to manipulation and can delay justice. But their imperfection isn't enough to have them scrapped. Juries can be biased and prejudiced and that bias can swing either way.

But the reason juries are fallible is because they're human. Not necessarily because of their design.

If we applied such a loose test universally to our institutions we'd probably abolish our Parliamentary democracy with all its shortcomings.

Juries play an important role in the extension of natural justice – that everyone is innocent until they are proven guilty.

A court finding someone guilty is a judgment that should not be made lightly, especially in serious criminal trials, because of the potential penalties that can apply.

Agree or not, in our judicial system it is morally accepted that it is better to allow reasonable doubt to allow a guilty murderer to go free rather than to convict someone who is innocent of the same crime.



Juries ensure that the number of people who need to be convinced beyond reasonable doubt is risk-pooled, reducing the likelihood that the poor judgment of one individual can have a disproportionate impact.

It's far fairer for a wrongly accused innocent person to face the majority judgment of a dozen of their peers than a well-educated but similarly fallible individual. No one disagrees that judges have strengths; not least knowledge of the practice and application of the law.

But in cases where establishing that certain events occurred without clear facts, the judgment of the many is more comforting than the few.

But the primary reason juries should be supported is for the same reasons they were created in our modern judicial system.

While we currently live in an age where the independence of the judiciary isn't really questioned, we haven't always lived in that world.

There was a time when judges were often perceived as the extension of those in positions of influence, particularly the monarch.

The division of powers in our parliamentary system of governance between executive government, the parliament and the courts is a system designed to ensure power is never centralised and cannot be abused.

The point is to make sure that no single agency ever has too much power because, in our democracy, the people have a government, not the other way around.

Especially since the government has the power to force its will upon the people.

Juries were introduced to reduce the tyrannical concentration and reach of those in power and ration it back to the people.

The check and balance against this abuse of power is the right to pass judgment on our government through universal voting.

Juries operate in the same spirit, devolving the power of an arm of government towards the people by allowing them to make judgments. While Her Majesty isn't likely to attempt to seize back control of our dominion, every component of decentralised government power decreases the likelihood that the sovereign could ever try.

We aren't at the end of history.

Australians should be passing the structures of democracy on to future generations instead of the consequences of rash abandonment of an imperfect component of a working judicial system.



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