TRIAL BY PEERS?

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JCA Colloquium 2019, Darwin. NT.

7-9 June 2019

Introduction

My interest in writing this paper arose following my involvement in many criminal jury trials involving Aboriginal complainants, defendants and witnesses since joining the bench in early 2013. Before that I had spent a significant part of my time as a barrister learning about the laws and customs and characteristics of Aboriginal people in the context of their rights and responsibilities in relation to land. Trials and other hearings involving Aboriginal people have sometimes required the assistance of interpreters and have involved nuances that might only be understood properly by other people with similar cultural and language backgrounds. For convenience I shall refer to these as "cultural issues".

In land rights matters, for example claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) or under the *Aboriginal Land Act 1991* (Qld) and applications for determinations of native title under the *Native Title Act 1974* (Cth) the parties, lawyers and the relevant tribunal are invariably assisted by experts such as linguists and anthropologists and with detailed expert reports. This rarely occurs in criminal matters even where cultural issues are involved.

Where an offence appears to have been committed and an Aboriginal person may have been involved in one way or other, those involved in the investigation, prosecution, defence and trial of a particular matter may need to be aware of cultural issues and how to deal with them. At the outset, police and others involved in investigating the possibility of a crime

involving an Aboriginal person, in the Northern Territory at least, must now be aware of their obligations where the *Anunga Guidelines* are likely to apply. This important part of the criminal process has been the subject of much judicial consideration both before and after the formulation of the *Anunga Guidelines* by Forster J in 1975[1] and their incorporation in Northern Territory Police General Orders[2]. Consequently, investigating officers now have access to guidelines as to how they should go about this important part of the process, particularly in order to obtain an admissible statement from a suspect. Secondly, those involved in the prosecution and defence of a matter involving an Aboriginal person need to look for and manage cultural issues when interviewing and proofing Aboriginal complainants and witnesses, and, in the case of defence lawyers, in order to obtain proper instructions from an Aboriginal client and to advise as to what course he or she should take in relation to the charges. It can be expected and assumed that those lawyers have some knowledge and experience with such matters and also have access to other people with greater knowledge and experience, in some cases experts such as anthropologists and linguists.

However, it cannot be expected or assumed that when the matter comes to trial by jury all, even any, of the jurors would have an adequate understanding and appreciation of relevant matters involving such cultural

[1] *R v Anunga* (1975) 11 ALR 412 (***Anunga***).
[2] See in particular Northern Territory Police General Orders Q2, 3.1.2 and 3.1.3. See too discussion in authorities such as *R v Jabarula* (1984) 11 A Crim R 131; *R v Nundhirribala* (1994) 120 FLR 125; *Dumoo v Garner* (1998) 7 NTLR 129; *The Queen v BM* (2015) 255 A Crim R 301 and *The Queen v Bonson* [2019] NTSC 22.

issues. It is rare to have an Aboriginal person on a jury and, even then, that person may not have particular knowledge or appreciation of matters that might be peculiar to only one or some Aboriginal community or language group. Jurors are selected from people who are enrolled on electoral lists in Darwin and Alice Springs. However, a large percentage of crimes involving Aboriginal people are committed in remote areas and or involve Aboriginal people who live in remote areas and rarely, if ever, spend time in Darwin or Alice Springs.

My interest in the more general topic concerning the make-up of and influences upon a jury was also raised in the course of a trial in which I was involved last year that involved a (non-Aboriginal) accused who was clearly of a particular minority ethnic background. The jury found him not guilty of anally raping a young woman who was not of that ethnic background. During the trial there were a number of the accused's friends and relatives sitting in court, all apparently of the same ethnic background as the accused. Some of them were making notes when the jury was empanelled and during the trial and others were, albeit unconsciously, making gestures at various times which would have been observable to members of the jury. One of the jurors appeared to me to be of the same ethnic background as the accused. Whilst I have no reason to think, and do not suggest, that particular juror said or did anything improper in the jury room, one might wonder whether he may have felt intimidated by the presence and conduct of the accused's family and friends and whether there may have been some

cultural issues at play in his mind. Alternatively, the juror may have explained some cultural matters to the rest of the jury, who may not have understood. Even if that juror did not feel intimidated, the complainant and others might wonder whether and to what extent the jury was influenced by those kind of matters.

Of course this broader issue concerning the make-up of and influences upon a jury arises commonly in a wide range of cases. These include cases involving members of a particular ethnic background, cases involving members of gangs, and cases concerning high profile people who belong to a particular race or profess a particular faith. The recent conviction of Cardinal Pell resulted in media speculation about the relevance and role, if any, of his membership of the Catholic Church in the context of serious allegations and findings of the kind made during and by the Royal Commission into Institutional Responses to Child Sexual Abuse. The race of particular jurors, and the apparent racial prejudice of a key prosecution witness, played a prominent part during the lengthy trial of OJ Simpson. The recent trial and conviction of Mohamed Noor, an American Black police officer, for the murder of Justine Ruszczyk, a white Australian woman, also involved the misconduct and alleged bias of a senior police officer who attended the scene of the crime and allegations of racial prejudice on the part of prosecuting authorities.

In the Northern Territory the issue of race-based prejudice was the subject of an application to change the venue of the trial of two Aboriginal men

charged with the murder of a non-aboriginal man in *Woods & Williams v The Queen*[3] and subsequently a challenge to the array before the Full Court in *The Queen v Woods & Williams*[4] (together, ***Woods & Williams***). The Full Court recommended that whole of the *Juries Act* be reviewed and that a reference be made by the Attorney General to the Northern Territory Law Reform Committee (**NTLRC**).[5] Such a reference was made and resulted in a report in March 2013 entitled "*Report on the Review of the Juries Act*"[6] (**NTLRC Report**).[7] The NTLRC made a number of significant recommendations for reform, but none of those were implemented by way of amending legislation.[8] After deciding to write this article I became aware of the excellent article by Mr Russell Goldflam entitled "*The White*

[3] [2010] NTSC 36.
[4] [2010] NTSC 69.
[5] Ibid at [119].
[6] Northern Territory Law Reform Commission, *Report on the Review of the Juries Act,* Report 37, March 2013.
[7] The Northern Territory Law Reform Committee *Report of the Review of the Juries Act* was prepared and written by the Sub-committee comprising Honourable Austin Asche AC QC, Honourable Dean Mildren, former Justice of the Supreme Court of the Northern Territory, Professor Les McCrimmon, Northern Territory Bar and Charles Darwin University, Superintendent Sean Parnell, Police Prosecutions Division of the Northern Territory Police; and Mr Russell Goldflam, Barrister and Solicitor of the NT Legal Aid Commission.
[8] The recommendations included: amending s 27 of the *Juries Act*; amending s 27A of the *Juries Act* (to require a juror to be "able to understand and communicate in the English language"); repealing s 43 and amending s 44 of the *Juries Act* (regarding standing aside and challenging of potential jurors); repealing and replacing s 356 of the *Criminal Code* (regarding challenges for cause); adding s 356A to the *Criminal Code* (to give the trial judge the power to discharge a jury if "the exercise of the rights to make peremptory challenges has resulted in a jury whose composition is such that the trial might be or might appear to be unfair"); amending s 30 of the *Juries Act* (to enable the Sheriff to serve a jury summons by other means); expanding the 'catchment pool' of potential jurors, widening the jury districts to include some Aboriginal communities, providing transport and accommodation for potential jurors; placing all provisions relating to juries, in particular ss 351 to 359 of the *Criminal Code*, into the *Juries Act*; amending s 10(3)(a) & (b) of the *Juries Act* (to reduce the number of people disqualified on account of convictions); amending ss 37 & 39 of the *Juries Act* (to give a judge broader powers to discharge a juror without discharging whole jury); and amending regs 8 & 9 of the *Juries Regulations* (to provide additional allowances for jurors in some circumstances). The Committee also recommended the taking of a number of steps by government designed at better informing people, particularly Aboriginal people, of the legal system in the Northern Territory and in particular the jury system.

Elephant in the Room: Juries, Jury Arrays and Race"[9] (**Goldflam**) written soon after the *Woods & Williams* matters had been concluded.

The Australian Law Reform Commission (**ALRC**) had previously considered the relevance and application of Aboriginal customary law to criminal matters, including the broader issues relevant to trial by jury of Aboriginal persons. In its report tabled on 12 June 1986[10], the ALRC identified and discussed three important issues:

> These are, first, whether trial by jury is appropriate at all for traditionally oriented Aborigines, secondly, whether steps should be taken to ensure greater representativeness of juries hearing cases involving Aboriginal defendants, and, finally, the particular problems that can arise in some cases with customary law elements where members of the jury are disqualified under the relevant customary laws from hearing certain evidence.[11]

Much has been written and continues to be written about many of the broader issues concerning the trial of non-English speakers in various countries over the last century or more.[12] Many of those broader issues fall within the general description of "race-based prejudice". This was the main

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[9] This article was based upon Mr Goldflam's presentation to the 13th Criminal Lawyers Association of the Northern Territory Conference on 28 June 2011. He appeared as counsel in the *Woods & Williams* matters and was also a member of the NTLRC Juries Act Sub-committee.
[10] Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, ALRC Report 31 (the **ALRC Report 31**).
[11] ALRC Report 31 at [586].
[12] I have derived considerable assistance from Vidmar N, *World Jury Systems*, Oxford University Press, 2000 (**Vidmar**) and also from Darbyshire P, Maughan A and Stewart A, *What can the English Legal System Learn from Jury Research Published up to 2001?*, Occasional Paper Series 49, Kingston University, February 2002 (**Darbyshire et al**). See too Lord Devlin, *Trial by Jury*, The Hamlyn Lecture Series, Eighth Series, 1966; Barker I QC, *Sorely tried: Democracy and trial by jury in New South Wales*, Frances Forbes Lectures, 2002 (**Barker**); Valerie French, *Juries – a Central Pillar or an Obstacle to a Fair and Timely Criminal Justice System* (2007) 90 Reform 40 at 41; and Horan J, *Juries in the 21st Century*, The Federation Press, 2012 (**Horan**).

focus of the *Woods & Williams* cases. During their reasons their Honours quoted with approval the following observations by the English Court of Appeal in *R v Smith*[13], at [40]:

> We do not accept that it was unfair for the defendant to be tried by a randomly selected all-white jury or that the fair-minded and informed observer would regard it as unfair. We do not accept that, on the facts of this case, the trial could only be fair if members of the defendant's race were present on the jury. It was not a case where a consideration of the evidence required knowledge of the traditions or social circumstances of a particular racial group. The situation was an all too common one, violence late at night outside a club, and a randomly selected jury was entirely capable of trying the issues fairly and impartially. Public confidence is not impaired by the composition of this jury.
>
> [Emphasis mine]

I do not intend to spend much time on broader issues such as race-based prejudice in this paper. However the passage quoted above, and various authorities to which I shall refer below when I briefly discuss race related prejudice, make it clear that a jury is not intended to comprise one's peers, as had been decreed by clause 29 of the *Magna Carta*.[14] Hence the question mark in the title to this paper.

Rather, my primary purpose is to identify the kind of cultural issues that may arise in some cases involving an Aboriginal complainant, witness or accused and then to raise for discussion what can and should be done in

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[13] *R v Smith (Lance Percival Smith)* [2003] 1 WLR 2229 (***Smith***).

[14] Clause 29 of the *Magna Carta* proclaimed that "[n]o freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgement of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any many either Justice or Right."

order to assist the jury to better appreciate some of the subtleties that might be involved in a particular matter where cultural issues may be relevant. As reflected in the passage in *Smith* that I have quoted above, there have been, and will continue to be, many criminal trials where cultural issues will not be so relevant notwithstanding that one or more of the participants are Aboriginal.

Under-representation of Aboriginal people on juries

It is well established that very few Aboriginal people are empanelled as jurors.[15] The disproportionate representation of Aboriginal people on juries is particularly stark in the Northern Territory where Aboriginal people comprise approximately 25.5% of the total population (of approximately 245,700 people)[16] and approximately 84% of the people in prison.[17]

Under-representation of Aboriginal people on juries in Alice Springs was the main feature of the *Woods & Williams* applications in 2010. At that time the trial by jury of a person charged with an indictable offence committed in "Central Australia" was conducted by the Supreme Court sitting in Alice Springs. Aboriginal people comprised about 45% of the

[15] This issue was discussed by the ALRC in the ALRC Report 31 at [590] – [594]. See too Goldflam at 12; and Mildren, D, *Big Boss Fella All Same Judge - A History of the Supreme Court of the Northern Territory*, The Federation Press, 2011 (**Mildren**) at pp 178-9. See, too Horan at pp 31-33; Trembath O, *Judgment by Peers: Aborigines and the Jury System*, (1993) 123 Law Inst. J. 44; and Westling W and Waye V, *Promoting Of fairness and Efficiency in Jury Trials*, (1996) 20 Crim LJ 127 (**Westling & Waye**) referred to by Vidmar at p 139.
[16] Australian Bureau of Statistics 2016, *Northern Territory: Region Summary*, accessed 29 May 2019, <http://www.abs.gov.au>.
[17] Australian Bureau of Statistics 2016, *Prisoners in Australia*, Dec 2017, Cat. no. 4517.0, Australian Bureau of Statistics, Canberra, accessed 29 May 2019, <http://www.abs.gov.au>. In 2008 approximately 83% of the Northern Territory prison population was Aboriginal. See agreed fact #36 in *Woods & Williams*.

population of Central Australia. However, only about 21% of the population of Alice Springs, and thus potentially eligible for jury service, were Aboriginal. About one third of those Aboriginal people lived in one or other of the Alice Springs town camps. Australia Post did not deliver mail directly to residents in those town camps, but delivered mail to the address of the Tangentyerre Council where it was collected by town camp residents if they wished. Only a small proportion of the mail held by the Council was collected by town camp residents.

There are many reasons why a significant number of Aboriginal people will not end up serving on a jury. Most of those reasons are similar to those that exist in numerous other countries which have trial by jury, and have been identified and discussed in numerous publications such as Vidmar and Darbyshire et al. Those reasons include the fact that many members of a particular minority group are not on relevant electoral rolls, many come from a lower socio-economic background, some have disqualifying features such as criminal histories, some do not receive jury summonses, some cannot or do not read the summons, and others are reluctant to respond and appear on a jury. Some of those who do attend for jury service might be excused or challenged on the basis of their unfamiliarity with English.

In the Northern Territory there are two jury districts, one for Darwin and the other for Alice Springs. For Darwin the jury district comprises the areas of land in specified divisions under the *Electoral Act 2004*, in effect areas in and near Darwin itself, and for Alice Springs the municipality of Alice

Springs.[18] Each year the Sheriff prepares a jury list for each of the jury districts based upon information contained on the electoral roll maintained by the Australian Electoral Commission. Only a person whose name is on the electoral roll is qualified to serve as a juror.[19] Effectively this means that one must reside within one of the electoral divisions of Darwin or within the municipality of Alice Springs in order to be a juror in the Northern Territory. Only about 30% of the Aboriginal people who live in the Northern Territory live in Darwin or Alice Springs. Consequently more than 70% of the Aboriginal population of the Northern Territory would not live within a jury district. Further, only about two thirds of Aboriginal people in the Northern Territory are enrolled to vote.

Problems have also arisen because potential jurors are usually summonsed by mail, with addresses obtained from the electoral roll. However, at the time of the *Woods & Williams* decisions, the electoral roll did not record house numbers for addresses in town camps, where a substantial majority of Aboriginal people live. Nor will the roll be accurate in relation to Aboriginal people who may have changed address without notifying the Electoral Commission.

The *Juries Act* also provides that a person is not qualified to serve as a juror if he or she has been sentenced to a term of imprisonment and a period of less than 7 years has elapsed since the person completed the sentence

[18] *Juries Regulations 1983* (NT) regs 4 and 5.
[19] *Juries Act 1962* (NT) (**Juries Act**) s 9.

(which includes the duration of a suspended sentence).[20] This prohibition applies irrespective of the length of the sentence or of the nature of the relevant offence, and is thus particularly relevant to much offending in the Northern Territory where imprisonment is mandated by legislation, including for minor offending which would not normally justify imprisonment. Even though in some cases the requirement for a particular mandatory sentence can be met by ordering imprisonment "to the rising of the court" such a sentence is still a sentence of imprisonment[21], and therefore would fall within the scope of s 10(3) if it occurred within the preceding 7 years. At the time of the *Woods & Williams* matters over 25% of the potential jury panel members, a very substantial majority of whom were Aboriginal people, were subject to prisoner disqualification.[22] This compared to statistics from Victoria and New South Wales showing that only about 0.5% of the general populations would be so disqualified in those States.[23]

Even when Aboriginal people are successfully summonsed and attend Court for empanelment, many seek to be excused, or are challenged or stood aside. This is often for cultural reasons, even if the potential juror does not know the accused, or a particular member of his or her family, or a particular witness. Such reasons might include perceived family, clan,

[20] *Juries Act* s 10(3)(a).
[21] *White v Brown* (2003) 13 NTLR 50 at [19].
[22] Similarly, referring to Victoria, Westling & Waye stated, at p 129, that "the arrest and imprisonment rates of Aboriginal persons for minor offences is [sic] almost 15 times higher than those of the white majority."
[23] *Woods & Williams* at [43].

moiety or other kinship links, particularly if the potential juror belongs to the same or a similar language group or comes from the same community as the accused or an important witness. Other reasons include particular customs or beliefs, for example prohibitions against an Aboriginal woman being told about certain things that might be the subject of evidence in a rape case or other things that should not be disclosed to women, or prohibitions against an Aboriginal women speaking to a male about particular matters, such as those pertaining to female genitalia.[24] And, as I have said, some Aboriginal people do not have a sufficient understanding of English to be able to participate as jurors. In any event, for those and other reasons, it may not be appropriate to include on the jury members of the particular community where the offending occurred or where the accused or a relevant witness lived.

Special features of some Aboriginal people

In the process of discussing whether Aboriginal people should be tried by a jury the ALRC quoted the following concerns expressed by Kriewaldt J, who was the Northern Territory Supreme Court Judge between 1952 and 1960:

> The factor which makes a jury a good tribunal in an ordinary run of cases, the ability to discern whether a witness is speaking truly, vanishes when the jury is confronted with witnesses of whose thought processes they are ignorant. It was the consciousness of my own defects in this respect which made me adopt the view that the average

[24] For these kinds of reasons an Aboriginal male may object to having a female interpreter and vice versa, and objections might be taken to having members of a particular gender sit on a jury. This kind of issues were discussed in the ALRC Report 31 at [595] in the context of empanelling jurors of one particular gender.

> person called on for jury duty, where the accused is an aborigine, is faced with a task which is beyond his powers.[25]

Of course things have changed considerably since Kriewaldt J's time as a Judge in the Northern Territory, particularly with the advent of land rights and the involvement of anthropologists and linguists and of course improved government services, particularly with the provision of bilingual education and interpreters. However, some of those concerns expressed by Kriewaldt J remain, particularly where cultural issues are present.

As I have said a significant number of Aboriginal people who appear in Northern Territory courts do not have English as their primary language. Rather their main, and sometimes second, language is one of the 106 or so languages and dialects spoken in the Northern Territory. Even if they have some ability to "read, write and speak the English language" (as contemplated by s 27A(3) & (4) of the *Juries* Act) their ability to understand and communicate in the English language may be insufficient for the purposes of participation in a jury trial.[26] Many Aboriginal people require the assistance of an interpreter provided by the Aboriginal Interpreter Service[27] in order to properly understand what is being said in English.[28] Unfortunately, many of the people who do require the assistance

[25] ALRC Report 31 at [586].
[26] Note the NTLRC's recommendation in that s 27A be amended.
[27] The Aboriginal Interpreter Service engages over 30 staff members and 400 casual interpreters.
[28] 63% of Aboriginal and Torres Strait Islander legal services practitioners reported experiencing difficulty in understanding what their clients were saying. See Hale S, *Communication success: Judicial officers and interpreters working together*, (Paper presented at Language and the Law III Conference, Alice Springs, 5 April 2019).

of an interpreter are youths and young adults. So this issue is not likely to go away. Further, it is unlikely that an interpreter would be allowed in the jury room.[29]

Many Aboriginal people live and spend most of their time with others who live in remote communities, and only need to meaningfully engage with other people and cultures, including members of other aboriginal groups, when they travel outside their own communities, predominantly to Darwin and towns such as Alice Springs, Katherine, Tennant Creek and Nhulunbuy. The main background and experiences of many Aboriginal people living in remote communities will be based upon rules, customs and practices relevant to their own community and language group and in some cases to their traditional country. These will include their membership of particular clans and moieties and their respective rights, roles and responsibilities both within their own groups and in relation to members of other clans and moieties. Factors such as these will play an important role in relation to a person's relationships with other individuals and a person's rights to access and use particular areas of land.

The circumstances underlying many criminal cases will often involve aspects of such rules, customs and practices.[30] These include perceived

[29] In *Lyons v The State of Queensland* (2016) 259 CLR 518 the High Court of Australia held that a person who required the services of an interpreter to communicate with others was not eligible for jury service. Queensland law did not permit an interpreter to be present during deliberations.

[30] See for example Gaykamangu J, *Ngarra Law: Aboriginal Customary Law from Arnhem Land* (2012) 2 NTLJ 236; and Kelly D, *Foundational Sources and Purposes of Authority in Madayin* (2014) Victoria University Law and Justice Journal 33.

breaches of marriage rules and or avoidance rules, “payback” and failures to observe other customs such as “sharing” and “respect for elders”. Some cases, particularly domestic violence and sexual assault cases, involve rights said by some to be customary rights, for example to physically punish one’s tribal wife or child or to have sex with a woman, sometimes under the age of 18, without her consent. Perceived breaches of laws and customs will often involve or result from “growling” and “jealousing” and arguments aggravated by other factors such as alcohol.

Friction and violence sometimes occurs within communities for other reasons. Some of the larger communities, such as Yuendumu, Wadeye and Ali Curung, include two or more different language groups each of which will have its own, and different, customs, practices and beliefs. Unfortunately, some serious criminal offending occurs in the course of arguments between members of different clans, factions, families and or gangs within a particular community.

In addition to, and quite apart from, juries hearing and understanding the evidence about the offending itself, juries will often be unaware of particular features of a particular Aboriginal person which will be on display when that person gives evidence in court or has previously answered questions during a police interview that has been recorded and tendered in court.

Indeed two of these features were expressly recognised by Forster J in *Anunga*. First, even if an Aboriginal person understands English, he or she may not understand the concepts which English phrases and sentences express, because his or her "concepts of certain things and the terms in which they are expressed may be wholly different to white people". Secondly, at 414:

> …most Aboriginal people… will answer questions by white people in the way in which they think the questioner wants…there is the same reaction when they are dealing with an authority figure such as a policeman…Some Aboriginal people find the standard caution quite bewildering, even if they understand that they do not have to answer questions, because, if they do not have to answer questions, then why are the questions being asked?"

The latter is generally referred to as "gratuitous concurrence". Other features include the fact that many Aboriginal people speak a form of English, sometimes referred to as "Aboriginal English", which a non-aboriginal person may not understand or will misinterpret. Common examples are references to relatives such as "brother", "aunt", "grandmother", "daughter", "cousin brother" and "cousin" in a classificatory rather than literal way, or the use of the word "he" to refer to any person irrespective of gender. Others include grammatical differences and a tendency by some Aboriginal speakers to use some consonants such as a *p* or a *b* instead of other consonants, such as an *f*, *v* or *th*. Much has now been written about this general topic and includes work done by Diana

Eades most recently in her publication "Aboriginal Ways of Using English".[31]

Other common features include: the avoidance of eye contact with those speaking to them, because in many Aboriginal societies it is considered impolite to stare; long lapses of silence before answering a question; difficulties understanding questions which involve alternative propositions; a tendency to say "I don't know" or "I don't remember", to be polite, instead of saying "I don't understand your question, please put it another way" or "I am not allowed to use the name of that deceased person" or "I am not allowed to talk about that"; use of gestures such as very slight and quick movements of the eye, head or lips to indicate location or direction; and difficulties with responding to questions about dates, times, numbers, compass directions and other features that may not be present in their daily lives.

Many Aboriginal people have substantial hearing loss and thus may have difficulty hearing a particular question and therefore understanding the question. Many are softly spoken and or particularly shy. Many would have had no previous experience with jury trials and with the formalities that process involves, such as being expected to promptly and accurately respond to questions put by bewigged lawyers.

[31] Eades D, *Aboriginal Ways of Using English*, Aboriginal Studies Press, 2013. See too Grimes B, *Two languages walk into a bar and see a fight: differences in Aboriginal and Standard English narrative styles and implications for judges and juries*, (Paper presented at Language and the Law III Conference, Alice Springs, 6 April 2019).

Any number of these features could well affect the jury's assessment of the evidence of such a witness or accused. In most cases the trial judge will give the jury special directions about some of these matters when it is apparent that they may be relevant.[32]

Race related objections

As I have said there have been numerous studies and reports written about, and judicial consideration of, perceptions of bias on the part of a jury, particularly on the basis of race. These include Darbyshire et al who considered the effect of jurors' characteristics such as sex, age, socio-economic status and race on the outcome. In relation to race the authors stated that: "The OJ Simpson trials and that of the four white police officers acquitted by a state jury with no black members in the first 'Rodney King' police brutality trial would indicate that race is a factor influencing a juror's decisions."[33] They proceeded to refer to various cases, studies and analyses in America and England and Wales concerning the relationship between racial make-up and jury acquittal rates and concluded that: "It appears that the racial composition of the jury can affect its verdict."[34] Notwithstanding those and other studies leading to conclusions about the under-representation of certain races on juries and that race may be relevant

[32] Such directions are commonly given in the Northern Territory. See too *Stack v WA* (2004) WAR 112; and *R v Knight* [2010] QCA 372 at [282] – [284].
[33] In the OJ Simpson trial the key prosecution police witness falsely denied that he had previously used the "N" word in the context of criticising a group of Afro-American people, and both parties spent considerable time and effort attempting to belatedly have certain people excluded from the jury on the basis of their race.
[34] Darbyshire et al at p 16.

to the outcome of a jury trial, in most cases where objection has been taken on account of the racial composition of a particular jury such an objection has not been upheld.

I have mentioned the two Northern Territory decisions involving the prosecution of two Aboriginal men, Graham Woods and Julian Williams, for the murder of a Caucasian man, Edward Hargraves. These decisions involved consideration as to whether Woods and Williams could obtain a fair trial in Alice Springs. One of the issues concerned the fact that very few Aboriginal people would be on the panel because of the disproportionate number of Aboriginal people on the Alice Springs district jury list. Another issue concerned sentences, said to be very lenient, recently given to five European men for their manslaughter of an Aboriginal man in circumstances which were said to be racially motivated.[35]

The first decision was that of Blokland J in *Woods & Williams v The Queen* [2010] NTSC 36 dismissing an application on behalf of the two accused to change the venue of the trial to Darwin. The deceased was a prominent member of the Alice Springs community. There had been much public expression of sympathy for him and there had been extensive media reporting highlighting racial issues, including a juxtaposition of this case with the earlier case of *Ryder*. Her Honour concluded that concerns

[35] *R v Scott John Doody, Timothy James Hird, Anton Thomas Kloeden, Joshua Ben Spears and Glen Anthony Swain* (SCC 20925481, 20925478, 20925476, 20925496 and 20925503), 23 April 2010 per Martin CJ (***Ryder***).

regarding prejudice could be appropriately dealt with by the trial judge at the time of jury selection and through directions during the course of the trial.

Similar issues were raised before the Full Court (in *The Queen v Woods & Williams* [2010] NTSC 69). That Court did quash the array on account of legal irregularities but made it clear that the under-representation of Aboriginal people on the jury list was not a basis for preventing that matter from proceeding to trial in the normal way, in Alice Springs.[36]

After referring to a number of English authorities including the passage in *Smith* quoted earlier in this article, the Full Court said, at [58] – [61]:

> 58 We respectfully agree with the principles expressed in these authorities. They show that an accused person is not entitled to be tried by a jury that is racially balanced or comprised of the same proportion of people of a particular race, as occurs in the broader community from which the jury is selected. Instead, they show that an accused person is entitled to be tried by an independent and impartial jury selected in accordance with the law. In essence, in this case, that means an accused person is entitled to be tried by a jury of 12 persons who are randomly selected in accordance with the Act from a jury array that is itself randomly selected from the local community.
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> 59 To impose some overriding requirement to the effect that a jury, once randomly selected in this way, has to be racially balanced or proportionate would be the antithesis of an impartially selected jury, not to mention the enormous practical difficulties that would be associated with attempting to meet such a requirement,

[36] Challenges to the array on the basis of the absence of any Aboriginal person on a jury trying an Aboriginal accused was also unsuccessful in Victoria in *R v Grant and Lovett* [1972] VR 423 and in South Australia in *R v Gibson*, unreported, SA Supreme Court, 12 November 1973.

particularly as it is not an easy matter to identify who is, or is not, a member of a particular racial group.

60 Insofar as the accused in this case appear to be concerned that racial prejudice may influence the deliberations of the jury in their trial, it should not be forgotten that there is a range of steps and measures taken before and during a criminal trial that are apt to avoid that happening. They include the following. At the outset of the process of empanelling a jury, the jury array will be informed by the presiding judge that, if any of them considers for any reason that they will be unable to approach their task of determining the guilt of the accused impartially, they should seek excusal. Then, during the process of empanelling the jury, each of the accused will be entitled to twelve peremptory challenges[37] and an unlimited number of challenges for cause. The latter will allow the accused to challenge a potential juror if, for example, they can produce evidence to the satisfaction of the jury members who are determining that issue, that the potential juror concerned may not be able to determine the case free of racial prejudices.

61 Once the jury panel is selected, each member of it will be required to take an oath that: "I swear that I will faithfully try the several issues joined between our Sovereign Lady the Queen and the prisoner at the bar and will give a true verdict according to the evidence … So help me, God!".[38]

62 As was observed in the authorities to which we have referred above, there is no reason to expect that those selected to serve on the jury will not abide by this oath or affirmation and determine the guilt of the accused according to the evidence, whatever racial, religious or other aspects may arise during the trial. Finally, to reinforce the previous point, during the course of the trial, the jury will be instructed by the presiding judge to determine the guilt (or otherwise) of the accused on the evidence given in court and according to law, not on extraneous materials such as inflammatory media statements, or personal prejudices. The overriding effect of these steps and measures (and others) was summarised by Deane J in *Kingswell v The Queen*[39] as follows:

[37] For a capital case, see s 44(1) (a) of the Act.
[38] See s 58 and Sch 6 of the Act. Alternatively, a juror may take an affirmation attesting to the same.
[39] (1985) 159 CLR 264 at 301–302.

> The random selection of a jury panel, the empanelment of a jury to try the particular case, the public anonymity of individual jurors, the ordinary confidentiality of the jury's deliberative processes, the jury's isolation (at least at the time of decision) from external influences and the insistence upon its function of determining the particular charge according to the evidence combine, for so long as they can be preserved or observed, to offer some assurance that the accused will not be judged by reference to sensational or self-righteous pre-trial publicity or the passions of the mob.

At [111] the Full Court said:

> Neither the common law nor the Act require any particular element of racial representation, however to achieve fairness the Act must be substantially complied with.

See too [76], [104], [110] and [114]. In short, a right of 'fair trial' in Australia includes a requirement that any jury employed should be reasonably impartial.[40]

Clearly the methods of selection of juries prescribed by relevant legislation in Australia differ from clause 29 of the *Magna Carta* which required "the lawful judgement of his [p]eers". For the most part juries are selected from the electoral lists and, in the Northern Territory at least, only lists of people who reside in the jury districts of Alice Springs or Darwin. Similarly, in other States, potential jurors are selected from jury districts comprising the area near the place where the trial is likely to be heard. As Vidmar points out, at p 136:

[40] See for example Vidmar at p 144 citing *Dietrich v The Queen* (1992) 177 CLR 292; Duggan K, *Reform of the Criminal Law with Fair Trial as the Guiding Star* (1995) 19 Crim LJ 258; and Mason A, *Fair Trial* (1995) 19 Crim LJ 7.

> This loose concept of selecting a jury which 'represents' a geographically defined 'community' does not imply that the jury must be deliberately constructed so as to represent a cross-section of all different types of people within that community (defined, for instance, in terms of race, gender, social status and so on). Reliance on random selection indicates as much. By the same token, Australian courts do not apply the concept that accused persons are entitled to a jury of their 'peers', for example, of members of some 'community', defined other than geographically, to which they belong.

What can or should be done?

Juries have been, since the 12th century,[41] and continue to be, an important part of the criminal justice system in determining the guilt or otherwise of a person charged with a serious criminal offence. Vidmar provides a thorough examination of the history and purposes of juries in many jurisdictions.[42] Historically they were intended to provide for community values to be reflected in the process and as a "guard against the power of the state and the social class or other biases of appointed judges or corrupt officials."[43] Their importance is reflected by the fact that they are now used in over 50 countries around the world.[44] How then can some of these apparent deficiencies in the system be addressed?

As I have pointed out, following the recommendations of the Full Court in *Woods & Williams*, the Northern Territory Law Reform Committee considered a number of these issues, particularly those concerning the

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[41] The Anglo-Norman jury was used extensively during the reign of Henry II (1154 – 1189).
[42] See too Horan at pp 10-15 and Barker.
[43] Vidmar at p 1. Originally, they were from the same village or neighbourhood of the accused. According to Holdsworth W, *A History of English Law*, vol 1 at p 317: "The decision on questions of fact was left to the jurors because they were already acquainted with them, or if not already so acquainted with them, because they might easily acquire the necessary knowledge."
[44] Vidmar at p 3.

underrepresentation of Aboriginal people on juries, and made a number of recommendations in its report of March 2013.

What is done?

There are numerous ways in which many of these issues are and can be addressed once the trial has begun. Potential jurors are informed of the need for them to be impartial and to seek to be excused or to make disclosures if they consider there is any reason why their participation as jurors might be perceived to be inappropriate. In the Northern Territory, and in some other jurisdictions in Australia, the parties will have previously been given a list of the persons on the jury panel which usually identifies them by name and occupation.[45] During the empanelment process counsel for each party has a peremptory right to challenge a particular number of persons and the prosecutor may stand people aside.[46] In addition to those rights, the Crown or the accused may "challenge for cause", either on the basis that the potential juror is "not qualified by law to act as a juror", or

[45] See for example s 351A of the *Criminal Code 1983* (NT). This practice in Queensland did lead to issues about the propriety of agents for an accused using the lists and ascertaining the addresses of people on the panel, then contacting potential jurors and asking them about their political beliefs. It culminated in an investigation by the Official Misconduct Division of the Criminal Justice Commission Queensland and its Report of an Investigating of Hearing into Alleged Jury Interference in March 1991. Barker, at p 173, says that "[i]n New South Wales an accused person has never had the right to see a copy of the jury panel before trial except by order, unless charged with treason. This was the old English practice as outlined by Blackstone".

[46] See for example ss 42-4 of the *Juries Act 1962* (NT) and ss 352 and 355 of the *Criminal Code 1983* (NT). In the Northern Territory each party may challenge up to 12 people in the case of a capital offence and 6 people in any other case – s 44 of the *Juries Act 1962* (NT).

that "the juror is not indifferent as between the Crown and the accused person".[47]

Accordingly, where a party considers that a potential juror might not be impartial the party can exercise the peremptory right to challenge that person and also to challenge for cause. A challenge for cause on the ground that the potential juror is not indifferent would require the challenger to show why that is the case. Accordingly, this right might be available in circumstances where it could be shown that the potential juror is or would be biased, for example on the basis of racial prejudice or the fact that the potential juror's indifference would likely be prejudiced on account of him or her being of the same ethnic background as the complainant or accused. However, even in those jurisdictions where the parties are provided with a copy of the jury list prior to the trial the only information then disclosed is the name and occupation of the potential juror. A party would have little, if any, opportunity to obtain information sufficient to mount a challenge for cause.[48] A party does not have to have or express any particular reason for exercising a peremptory right to challenge a potential juror. Accordingly, it is likely that potential jurors are often challenged on the basis of their gender, age or race. Much has been written about cases, mainly in the United States of America, where a party has taken unfair advantage of the

[47] See ss 354-6 of the *Criminal Code 1983* (NT). According to Sir Edward Coke challenges for cause could be based upon a well-grounded suspicion of bias or partiality, where a juror has been convicted of an offence that affects his credit or where there is some defect in the person's capacity to be a juror. See Barker at p 161.
[48] See McCrimmon L, *Challenging a Potential Juror for Cause: Resuscitation or Requiem?* (2000) 23 UNSWLJ 127.

ability to peremptorily challenge, and in the case of a prosecutor, to stand aside, a potential juror in order to avoid having people of a particular race on the jury.[49] In the ALRC Report 31 the ALRC referred to a court's inherent power to ensure that a fair trial is achieved[50] and referred to a number of cases including one in NSW involving an Aboriginal accused where the trial judge discharged an all-white jury after the Crown had challenged all Aborigines on the jury panel.[51]

Some of these rights no longer exist in some jurisdictions in Australia. The NTLRC recommended removal of the Crown's right to stand aside a potential juror. [52] It also recommended that the trial judge have the power to discharge the jury that has been selected if the judge is of the opinion that "the exercise of the rights to make peremptory challenges has resulted in a jury whose composition is such that the trial might be or might appear to be unfair."[53]

In the case that I previously referred to, involving the accused who belonged to a particular ethnic group, either party could have exercised its peremptory right to challenge the juror who also appeared to have that same ethnic background. However, the accused, and others, may have thought it

[49] See for example Darbyshire et al; Israel M, *Ethnic Bias in Jury Selection in Australia and New Zealand* (1998) 26 Inter Jour of the Sociology of Law 35 at p 45; Noye U, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's office*, Reprieve Australia, August 2015. Paper also delivered at the Criminal Lawyers Association of the Northern Territory Bali Conference 2015.
[50] ALRC Report 31 at [593].
[51] *R v Smith*, unreported, District Court (NSW), 19 October 1981.
[52] NTLRC Report Recommendation 4.
[53] NTLRC Report Recommendation 5.

particularly unfair if the Crown had done that because it would have deprived him of having any members of his ethnic group on the jury. It would have left him without any "peer" on the jury.

Once the jury has been empanelled and the trial commences the trial judge routinely gives directions which address many of the kind of matters that might otherwise be prejudicial to a fair trial. These include directions during opening remarks about the need for jurors to put aside any prejudices and emotions and to judge the matter solely on the evidence placed before them. Similar directions are usually given during the summing up. At various stages during a trial directions are given to explain why a particular procedure is to be followed or why particular evidence is being led, where the jury might otherwise be inclined to draw unfair or erroneous inferences against the witness or the accused because of the unusual nature of the particular process. Examples include the use of pre-recorded evidence of a child or a victim of a sexual offence and playing it in closed court and the introduction of particular types of evidence such as tendency evidence.

However, jurors will frequently be drawing inferences throughout the trial, not only about the ultimate facts but also about the credit of witnesses. This will necessarily include the risk of them taking a particular dislike to one witness or extending particular sympathy to another, on account of how that witness presented at trial.

Trial judges also give directions about particular witnesses who might exhibit particular features in the course of giving evidence or responding to questions during a police interview. This may occur where there appears to have been some degree of "gratuitous concurrence" on the part of an Aboriginal witness or some other characteristic of the witness that might appear unusual to an uninformed member of the jury.

And of course during summing up, counsel and the trial judge will have the opportunity of addressing unusual features about a particular witness or group of witnesses, and the trial judge can remind the jury of the need for them to consider the matter impartially and dispassionately and to base their deliberations solely upon the evidence that they have heard.

Hopefully, and presumably, all members of the jury will adhere to their oath and not allow themselves, or each other, to be influenced by extraneous matters, such as the race of a particular witness or of the accused. However there may be some cases which involve cultural issues which are unlikely to be properly understood by a jury, indeed by counsel and the trial judge, notwithstanding the best endeavours of counsel and the trial judge to assist. This takes me to briefly consider various other mechanisms that have been used in the past for cases involving people of a particular race, ethnic background or other category.

Special juries and juries *de medietate linguae*

Vidmar refers to the now abandoned procedures for special juries: a jury composed of persons from a higher class; a jury of experts; and a 'struck jury'. He also refers to another type of jury: a jury *de medietate linguae*.[54] These are said to have arisen in the early 13th century to deal with disputes (primarily civil disputes) involving Englishmen (or the Crown) and Jews and foreigners. Amongst other things it was assumed that a jury of Englishmen might be prejudiced in rendering a verdict against an outsider. This form of jury existed in England until it was abolished in 1870.

Darbyshire et al also referred to the system of juries *de medietate linguae*.

> In 1989, the Court of Appeal in *Royston Ford* held that a trial judge had no power to construct a multi-racial jury; a judge's power was limited to jurors' competency to serve. Prior to this there were a number of cases where the judiciary exercised discretion to ensure a representation of minorities on a jury trying a minority defendant. For over five centuries, until 1870, members of minorities such as Jews, Germans and Italians had the right to be tried by a jury comprised half of foreigners. It was called the jury *de medietate linguae*. This right was abolished on the ground that 'no foreigner need fear for a fair trial in England'. Given the trial data, reported cases and research findings, can we in England and Wales believe this to be true now?[55]

Juries *de medietate linguae* were also imported to the American colonies and used for criminal matters until 1836 when the United States Supreme Court declared that the right to a mixed jury was not guaranteed in the Sixth Amendment to the Constitution.[56]

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[54] *Vidmar* at pp 22-25. See too *Barker* at pp 41-3.
[55] Darbyshire et al at p 15.
[56] Vidmar at p 25.

Canada has two official languages, English and French. Unsurprisingly, the Criminal Code of 1892 provides a right for an accused to be tried by a judge and jury who speak the language of the accused.[57] At the time of Vidmar's chapter entitled "The Canadian Criminal Jury" Canada's Northern Territories had a population of about 60,000 first-nations people. They lived in one or other of 65 communities with an average population of about 500 residents, the majority of whom were aboriginals. There were four major ethnic groups, the largest being the Inuit, and nine different languages. Attempts were made to conduct trials in the community where the offence occurred. However this proved very difficult for various reasons particularly where the community was too small to obtain a jury and when many of its members were related to the victim or the accused. In addition, local political struggles between families and ruling cliques made it difficult to form a jury.[58]

In 1841 New Zealand provided for mixed race juries "where the property or person of any Aboriginal Native of New Zealand may be affected".[59] From 1868 Maori juries could be used in some criminal cases if the accused was Maori and requested that. In civil cases, where at least one party was a Maori and wanted a Maori jury, the court could order trial by a mixed jury composed of six jurors drawn from the Maori roll and six from the common

[57] Vidmar at p 218.
[58] Vidmar at p 246-7.
[59] Cameron N, Potter S and Young W, *The New Zealand Jury: Towards Reform* (**Cameron et al**) in ch 5 of Vidmar at p 175, referring to s 1 of the *Juries Amendment Ordinance of 1844* (NZ).

roll. This form of jury *de medietate linguae* and the right to an all Maori jury were abolished in 1962. At that time Maori people were given the right to sit on ordinary juries.[60] Vidmar says however that "because of continuing concern with Maori under-representation on jury panels the idea of all Maori juries or juries *de medietate linguae* has been revived, though not acted upon."[61]

Applications for trial by juries *de medietate linguae* have been made in (what is now) Australia. In February 1875 a special mixed jury comprised of six Englishmen and six "Chinamen and Malays" heard the trial of a Chinese man Mr Ah Kim at Palmerston (now Darwin, NT) and found him guilty of "performing an unnatural act" while he had been in prison awaiting trial for stealing.[62] It would appear that the lawyers involved in that case, including the judge who had travelled by ship from Adelaide, were not aware of the earlier decision of the Supreme Court of New South Wales in 1871.[63] That matter concerned the right of a native of Italy charged with perjury to be tried in New South Wales by a jury *de medietate linguae*. Counsel contended that Act 28 Ed III, c.13 (1354) (called *The Statute of Ordinance of the Staples*), which first gave foreigners a (statutory) right to a jury *de medietate linguae* in England, became part of

[60] Cameron et al in Vidmar at p 176 referring to s 2 of the *Juries Amendment Act 1962* (NZ).
[61] Vidmar at p 25.
[62] This was in fact the first ever circuit sitting of the Supreme Court of South Australia in what is now the Northern Territory. He was sentenced to life imprisonment but escaped and was on the run for three months before he was shot dead by a police officer. See Mildren D and Pugh, D, *Darwin 1870 and the First Ten Years*, (2019) Darwin, NT.
[63] *The Queen v Valentine* (1871) 10 SCR 113 discussed by Barker at pp 41-43.

the law of New South Wales upon colonisation. That contention was rejected by two of the three judges who determined that matter.

Special juries and juries *de medietate linguae* have now been abolished in most if not all jurisdictions Australia. They were abolished in New South Wales by the *Jury (Amendment) Act 1947* (NSW) and in the Northern Territory in 1962.[64] Until then, only "male adult persons of European race or extraction" and "any male person who [was] a returned soldier and one of whose parents [was] of European race or extraction" were potentially eligible to serve as jurors.[65] Of those people, persons with certain qualification or with particular land holdings were also qualified and liable to serve as a special juror.[66]

Darbyshire et al referred to a survey by the Department of Justice in New Zealand in 1993 which resulted in a serious under-representation of Maori, women and young people on jury panels, as well as certain occupational groups. The official response was to attempt to increase the inclusion of Maori on the electoral roll.[67]

Darbyshire et al concluded their discussion about the question of racial bias with the following comment:

> It appears that the racial composition of the jury can affect its verdict. We might consider permitting the trial judge to draw three or more black or Asian jurors (whichever is appropriate) from the pool to place

[64] See *Juries Act* s 65.
[65] *Jury Ordinance 1912 – 1954* ss 5, 5B.
[66] *Jury Ordinance 1912 – 1954* s 5A.
[67] Darbyshire et al pp 4 and 9; Cameron et al in Vidmar at p 193.

> them on a jury in a racially sensitive case, or where a defendant or victim requests this. Such a facility must apply to victims as well as defendants, since we must remember that the first Rodney King beatings trial (in 1992) was seen as unfair because the all-white jury acquitted in the face of overwhelming evidence of a vicious assault by white police officers on a black victim. The jury were undoubtedly the peers of the four defendants and representative of their community.

Cameron et al discussed a similar idea. At pp 194-5 of Vidmar they wrote:

> In 1993, the UK Royal Commission on Criminal Justice recommended [a legislative] amendment. On the application of the defence or prosecution, and in exceptional circumstances, a judge would be able to order that a jury include up to three representatives of racial minority communities. In addition, counsel should be able to ask the court to designate that one of the three be of the same racial background as the accused or the victim.[68] As the New Zealand Law Commission has pointed out in its 1998 discussion paper, this recommendation fails to address either the issue of representativeness or the lack of jurors of the same ethnic background as the accused.[69] Three jurors randomly selected from three different minority racial groups will not necessarily render the jury 'more representative', nor will one juror of the same racial background as either the accused or the complainant satisfy the demands of the accused for a more appropriate tribunal of fact. Furthermore, the need to show 'exceptional' circumstances, which the Royal Commission defined as existing only where the accused can persuade the court that the 'unusual and special' features of the case are such that it is reasonable to believe that the defendant will not get a fair trial from an all-white jury, suggests that there will be very few cases indeed in which the procedure would even be arguable, let alone available.[70]

Cameron et al added other criticisms of such a recommendation. They include concerns about the effect of such "judicial tinkering" upon the integrity of the judiciary in the jury system in the eyes of jurors and of the general public, and the impracticability of such a system, particularly where

[68] See *Report of the Royal Commission on Criminal Justice*, 1993, Cm 2263, at 207-8.
[69] See *New Zealand Law Commission, Jury Trials Part One*, at 73-4.
[70] *Report of the Royal Commission on Criminal Justice*, supra note 142, at 133.

the numbers and representativeness of those available for selection "would be unlikely to be either representative or a significant force in the dynamics of the jury".[71]

Consistent with these suggestions Mr Goldflam recommended that a scheme should be devised "for cases in which the court considers that race is likely to be relevant to an issue of importance in the case, for the selection of a jury consisting of, say, up to three people from any ethnic minority group."[72] He added that in his view the presence of even only one Aboriginal person on an Alice Springs jury would make a real difference to the dynamics and deliberations in the jury room.[73]

As this paper tries to demonstrate, some criminal trials involving Aboriginal people are likely to involve issues additional to or different to perceptions of racial bias and subconscious influence. Those additional issues may well arise where an accused, complainant or relevant witness lives in a remote community where traditional law and custom is observed and English is not regularly spoken.

It is tempting to suggest that the *Juries Act* be amended to enable one or more jurors to be selected from a particular community or language group associated with the accused, complainant and/or relevant witness. This may mean that that individual, and hence the rest of the jury, would thereby be

[71] Cameron et al in Vidmar at p 195.
[72] Goldflam at p 7.
[73] Goldflam at p 7.

in a better position to understand relevant evidence. It is very unlikely that such an objective could be achieved. As I have said the cultural links between members of a particular community and the members of a small language group are likely to be such as to preclude an individual from being willing to sit on the jury, even if that person did not know any of the key participants. In many cases the cultural matters interlinking the members of the community or language group would or should disqualify such a person from sitting as a juror.

Further, as Horan points out, at 33:

> Any attempt to provide for the 'representation' of traits of the accused and victims will lead to 'endless arguments about what is to be "represented" and by whom'. For example, the Victorian Council for Civil Liberties highlighted that in 'many countries, race and religion are inextricably linked in the relations between people, and so if race is to be a basis of jury selection, religion may need to be another'.[74]

The NTLRC did consider the possible reintroduction of juries *de medietate linguae* or some other kind of proportionate representation such as that discussed by the Full Court in *Woods & Williams* at [58]-[59] but saw no point in pursuing those alternatives. The Committee observed that even if a version of jury *de medietate linguae* was introduced and "[confined] to Aboriginals [there would be] difficulties defining 'Aboriginal' and such a process would tend to 'isolate' Aboriginals."[75]

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[74] Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria: Final Report* (vol 1) (1996) 19 at 21.
[75] NTLRC Report at pp 52-54.

I previously referred to cases where there may be customary laws that prohibit a male Aboriginal person disclosing certain things to a female (irrespective of her race) and vice versa. Such a law may have the effect of preventing a witness from giving reliable evidence before a jury, or for that matter in the presence of lawyers, judges, associates and court officers, if to do so would be in breach of customary law. This issue was considered by the ALRC in the ALRC Report 31 at [595]. The ALRC referred to 2 cases[76] where juries composed of persons of a particular sex were empanelled because it had been submitted that evidence to be called in the trial about Aboriginal customary laws relevant to the offence could not be disclosed to persons of the other sex. In those cases this could only be done by the use of peremptory or other challenges, and in each case it was in fact done by agreement between prosecution and defence with the court's consent.[77] The ALRC recommended that:

> The court should have power, on application by a party before the jury is empanelled, to make appropriate orders to ensure that a jury of a particular sex is empanelled, where under Aboriginal customary laws evidence to be given in the case can only be given to persons of that sex, the order is necessary to allow the evidence to be given, and having regard to other relevant matters (including other evidence to be given) the court considers the order should be made.[78]

[76] *R v Sydney Williams* (1976) 14 SASR 1 (Wells J) and *R v Gudabi*, unreported, NT Supreme Court (Forster CJ) 30 May 1983.
[77] ALRC Report 31 at [595].
[78] ALRC Report 31 at [1008].

Expand the eligibility provisions

Another possibility might be to amend the Act so that any Aboriginal person in the Northern Territory be eligible to be summonsed for jury service. Even if such a person would have a better appreciation of cultural nuances than the average juror because of the similarities between laws and customs between different Aboriginal communities and language groups, that fact alone may not resolve difficulties with language. Also, the person may still be inappropriate because of cultural links that extend beyond an individual community or language group. Added to this would be the considerable public expense associated with serving summonses and paying for panel members to travel and to be accommodated in Darwin or Alice Springs.

The NTLRC recommended that "the jury districts of Darwin and Alice Springs be widened so far as practicable, to allow further representation from Indigenous communities"[79] within reasonable reach of those two places. By way of example the NTLRC suggested including the community of Santa Teresa, which is about 80 km south-east of Alice Springs, acknowledging that this might necessitate additional costs, for example to assist with transport and accommodation. The NTLRC expressed the view that: "The extra expenses would be justified by the greater representation of citizens within the district, and therefore closer to the ideal of impartiality."[80] However that recommendation has not been acted upon. It

[79] NTLRC Report Recommendation 9.
[80] NTLRC Report at pp 21-22 and Recommendations 9 to 11.

is interesting to note that prior to the *Juries Act 1962*, jury lists were to contain the names of all eligible people who resided within 25 miles of the post offices of Darwin and Alice Springs.[81]

This leaves the present situation, which includes Aboriginal people who live in Darwin or Alice Springs. Many of those may have lived in those places all of their lives and may not have had any upbringing or contact with other Aboriginal people from remote communities. They may know little or nothing about any particular language or custom. On the other hand, others will have friends and relatives who do live outside those places and visit the towns and cities from time to time.

The NTLRC also recommended that "the 'Catchment Pool' of the Jury List be expanded by adding to the Electoral Roll names taken from Centrelink and Motor Vehicle Industry databases, and that, in this process it would be useful to refer to the procedure employed by the NSW Electoral Commission."[82] The NTLRC also agreed with the suggestion that the catchment pool be expanded "to include names taken from the Aboriginal Health Services and if practicable the Australian Bureau of Statistics Census databases."[83]

The NTLRC also considered difficulties with serving jury summonses, such as those that had been raised in the *Woods & Williams* cases, where

[81] *Jury Ordinance 1912 – 1954* s 8.
[82] NTLRC Report at pp 19-20 and Recommendation 8.
[83] NTLRC Report at p 20.

summonses were posted to jurors whose address on the jury list was a town camp.[84] The NTLRC recommended that s 30 of the *Juries Act* be amended by adding a provision permitting the Sheriff to use some other means of service provided for in the Regulations. The Regulations could permit service by email for example. The NTLRC also suggested that "Regulations may also provide that the Sheriff may confer with an Aboriginal Legal Service as to appropriate methods of communicating with Aboriginal persons, unfamiliar with jury procedure."[85]

The NTLRC also considered and made recommendations in relation to the disqualifying effect of s 10(3)(a) & (b) of the *Juries Act*. I referred to this provision earlier and the fact that it can disqualify a person who may have committed a very minor offence within the preceding 7 years, even if the sentence involved imprisonment "to the rising of the court" as contemplated by the mandatory sentencing regime in the Northern Territory. The Committee expressed the view that the period of seven years may be unnecessarily long, particularly if the person has not subsequently reoffended or if the conviction was a summary conviction. The Committee recommended that s 10(3)(a) & (b) be amended so that: a) a person who has been convicted summarily but not sentenced to a term of imprisonment not be disqualified once he or she has completed any penalty imposed, for example the term of a good behaviour bond or community work order; and

[84] NTLRC Report at pp 17-19.
[85] NTLRC Report at p 19.

b) a person who has been sentenced to a term of imprisonment of five years or less not be disqualified until at least three years has elapsed since he or she completed that sentence. It is likely that had those amendments been made there would be a significant increase in the number of people qualified be jurors within the jury precincts of the Northern Territory.

The NTLRC also discussed and made recommendations concerning the need to assist people, particularly Aboriginal people living in communities and who may lack English skills and a basic understanding of the legal system, to be better educated about the legal system in the Northern Territory and in particular the function of a jury in the obligation of a citizen to serve on juries if requested.[86] I do not know whether and to what extent these recommendations have been followed up. But unless other amendments are made and steps taken to enlarge the number of Aboriginal people who are permitted to serve as jurors in Darwin and Alice Springs, there would seem to be little to be achieved by so educating people who are not on relevant electoral rolls or who may not be qualified to sit as a juror as a result of a criminal conviction within the last seven years.

It may be that all that can be done is what has been suggested for New Zealand, namely to make special efforts to engage with Aboriginal people who might eligible to serve as jurors and encourage them to have their

[86] NTLRC Report at pp 44-51 and Recommendations 16 to 21.

names recorded on the electoral roll if they reside in one or other of the jury districts.

Judge alone trials

Another suggestion might be to follow the practice adopted in some other jurisdictions and permit a trial to be conducted by a judge alone. This suggestion was considered but not recommended by the NTLRC in the NTLRC Report.[87] In any event, I would not be confident that this would necessarily overcome the kind of issues which are the main focus of this paper, namely what I have referred to as cultural issues.

Most judges, particularly in this jurisdiction and in other parts of northern Australia where cultural issues more frequently arise, will have a greater familiarity and appreciation of such issues than the average juror. This is because of their exposure to some of these kinds of issues in other trials and in the course of sentencing or otherwise dealing with Aboriginal people who find their way into the criminal justice system, and sometimes because of their previous involvement with those kind of issues when practising as legal practitioners, particularly for Aboriginal legal aid organisations. However, even then, such judges may not have a proper appreciation of particular cultural issues that pertain to a particular community or language group. Indeed there is a risk that a judge might erroneously apply his or her understandings based upon his or her experience with one or more particular

[87] NTLRC Report at pp 42-42.

groups to the particular case at hand. Although there are numerous similarities between laws and customs across a wide range of Aboriginal groups, there can be significant differences not only as between those particular groups but also differences from other groups. For example there are significant differences between the laws and customs of the Yolngu people of Arnhem Land and those of people from the Western Desert.

I do not intend to enter into a general discussion about the value or otherwise of judge alone trials.[88] It might be relevant however to state the obvious, such as the fact that apart from their experience as lawyers, judges, like jurors, will also have a wide range of life experiences. These may include particular religious and political beliefs, many based upon their particular upbringing and education and upon their interaction with other people, particularly family and friends. Some may have experienced, or may have family or friends who have experienced, criminal conduct of a kind similar to that with which a particular person has been charged, or criminal conduct by a person with similar circumstances as the accused, for example poor, disadvantaged, and or from a particular ethnic group. Despite their experience as judges and best endeavours a judge might still be influenced, albeit subconsciously, when confronted with similar conduct or a similar kind of accused. For example where a particular cultural issue

[88] See for example the discussion by Horan at pp 61-3 on "The benefits of group decision making." See too Barker at pp 253-6; and the conclusions in Hancock, R, Matthews, L, Briggs, D, *Jurors' perceptions, understandings, confidence, and satisfaction in the jury system: a study in six courts*, Home Office Online Report 05/04 (2004) at pp 46-7 summarised in Goldflam at p 11. See also Goldflam, R 2011, "Juries: Who Needs Them?" *Balance: Journal of the Law Society Northern Territory*, Vol. 6.

is involved the judge might erroneously reject a particular point concerning that issue, or alternatively, erroneously accept the point, by applying that judge's own previous experience with a point or issue that appears to be similar but is actually quite different to the point or cultural issue at hand.

For example, if an accused was to contend that he killed another person in self-defence or in response to provocation that included a cultural issue, such as payback or breach of an important traditional law, a judge might be in no better position to determine the relevant facts and issues than 12 lay people on a jury. Rather the judge might be unduly influenced by his or her limited personal knowledge about such matters.

Other suggestions

In appropriate cases it may be necessary for the court, whether judge alone or judge and jury, to be assisted by one or more witnesses with appropriate expertise in relation to the particular cultural issue involved. This may well involve other Aboriginal witnesses who might have appropriate seniority, knowledge and experience to be called as experts in relation to a particular matter. Alternatively a party might seek to call a linguist or anthropologist with relevant expertise.

It would be very useful, indeed of critical importance, to seek and obtain the views of Aboriginal people involved in the justice system, particularly those from remote communities. Only they can really provide reliable

advice on how best to aim for a fair trial where one or more of the participants are Aboriginal.

Conclusions

Subject to that important reservation, the present system of trial by jury seems to work fairly well. Special juries and juries *de medietate linguae* have been used in the past and in other jurisdictions, but have been abolished. There would seem to be no compelling reason to reintroduce them, at least to deal with cultural issues of the kind that I have spoken about in this paper.

Further, the various attempts made in other jurisdictions to accommodate potential unfairness on account of jury composition and cultural issues would have even less prospects of success in relation to cases involving Aboriginal people who live in remote communities. I say this because of the much higher number of communities, language groups and different laws and customs in Aboriginal Australia, than exist elsewhere, even in the Northern Territories of Canada.

Aboriginal people, particularly those who live in remote communities, should be consulted and their opinions and suggestions sought as to how their particular cultural and other issues could be better accommodated within the criminal justice system.