THE WHITE ELEPHANT IN THE ROOM:

JURIES, JURY ARRAYS AND RACE

by Russell Goldflam

This article reflects on the issues agitated, ventilated, decided – and not decided – by the Full Court of the Supreme Court of the Northern Territory in *R v Woods* [2010] NTSC 69.[1] In 2009, Ed Hargrave, a widely admired non-Aboriginal Alice Springs sporting identity, was fatally stabbed, provoking a surge of grief, support and soul-searching, prominently reported in the local media. Graham Woods and Julian Williams, two young Aboriginal men, were soon arrested and charged with his murder.[2]

A few weeks later, Alice Springs community anxieties were further heightened when a group of five non-Aboriginal young men were charged with the murder of an Aboriginal man, an event which attracted far broader and more intense media attention, both locally and nationally.

In these circumstances, Graham Woods and his family doubted that he could get a fair trial by a local jury who, he reasonably apprehended, would probably all be white. It was subsequently agreed by the parties to the proceedings that '[t]he usual experience is that the proportion of Aboriginal people on a particular jury in Alice Springs is substantially lower than the proportion of Aboriginal people in the total population of Alice Springs'.[3]

Accordingly, before their jury was empanelled, Graham Woods, together with his co-accused Julian Williams, applied to quash the jury array.[4] They contended that there was a systematic exclusion of Aboriginal people from Alice Springs district jury arrays, giving rise to a reasonable apprehension of bias in their trial, such as to make it fundamentally unfair.

The matter was referred to the Full Court, which endorsed the quashing of the jury array, but not, it should be emphasised, on the basis that the racial composition of the jury gave rise to unfairness or an apprehension of bias. The Court found that there were irregularities by the Sheriff sufficiently serious to amount to 'unindifferency', to use the quaint term found in the authorities, requiring the quashing of the array, namely: actions to summon the jury taken by the Sheriff without proper authority; and the unauthorized involvement of an arm of the Northern Territory ('NT') Police (who have an interest in the prosecution) in conducting criminal record checks leading to the disqualification of jurors.[5]

The Sheriff had compiled a jury list by random selection from the Electoral Roll, and sent it to NT Police to 'cull' disqualified persons. Twenty-five per cent of people on the list were found to have disqualifying criminal records. The court described this as a 'rather alarming statistic'.[6] By comparison, 0.3 per cent of jurors in a sample Victorian panel of 12,000 had been disqualified or exempted,[7] and in New South Wales, it is reported that the equivalent rate was 0.5 per cent of persons aged 21 years.[8]

Woods and Williams argued that as 21 per cent of the Alice Springs population and 83 per cent of the Northern Territory prison population are Aboriginal, it could be inferred that a disproportionate number of Aboriginal people had been disqualified from being available for empanelment from the jury list.

They further contended that the practical operation and effect of the *Juries Act 1979* (NT) resulted in an impairment or limitation on their enjoyment of their right to a fair trial, in comparison to that right as enjoyed by non-Aboriginal people facing a jury trial in Alice Springs in otherwise similar circumstances. This in turn raised a question as to whether or not the *Juries Act* should be struck down for inconsistency with s 10 of the *Racial Discrimination Act 1975* (Cth), which guarantees the right of persons of a particular race to enjoy a right to the same extent as persons of another race, notwithstanding a provision of a Northern Territory law.

The Court rejected these contentions, concluding:

> 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, particularly as it is not an easy matter to identify who is, or is not, a member of a particular racial group.[9]

In fact, Woods and Williams had not contended that the jury of twelve should be racially balanced or proportionate. Instead, what they had sought to argue was that the panel of 300 or so from which the jury would in due course be selected should not itself be arrayed using a process which was, in its effect, racially discriminatory. Or to put it more simply, the accused did not complain that the pack was not properly shuffled before their hand was dealt. What they complained of was that the pack from which their hand was dealt was not the full deck. There is some High Court authority to support this proposition:

> The object, as the Court's statement in *Cheatle* makes clear, is to have a *panel* that is randomly and impartially selected rather than chosen by the prosecution or the State (emphasis in the original).[10]

Nevertheless, the 'enormous practical difficulties' adverted to by the Full Court presented the accused with a formidable, and ultimately insuperable, obstacle. One practical measure to address these difficulties would be the amelioration of s 10(3)(a)(ii) of the *Juries Act* 1979 (NT), which disqualifies a person from jury service for seven years following the completion of a term of imprisonment. This is substantially stricter than the provisions in force in some other Australian jurisdictions,[11] and was criticised by the Full Court as being unclear and possibly anomalous.[12]

The application by Woods and Williams was extraordinary, but not unprecedented. On at least three previous occasions, similar applications made elsewhere in Australia have been refused,[13] although in each of those cases the community in which the Aboriginal defendants were being tried was not one with a substantial proportion of Indigenous people. There appears to be only one recorded Australian decision in which a judge discharged a jury because of its racial imbalance, after the Crown had challenged each of the three Aboriginal jury panel members who had been selected in the 1982 trial of an Aboriginal accused in the outback New South Wales town of Bourke.[14]

The conclusion in *R v Woods* also accords with English authority.[15] This contrasts starkly with the approach taken by United States courts, which pursuant to the constitutional guarantee provided by the Sixth Amendment to trial 'by an impartial jury', have developed a doctrine that juries must be drawn from a representative cross-section of the community.[16] However, having regard to the radically different procedures involved in the selection of United States juries, this US jurisprudence is generally inapplicable in Australia.

Notably, for over half a millennium the common law utilised the jury *de mediate linguae* ('of the half tongue'), which provided to parties of foreign stock the protection of a jury, half of whose members were of the same race and language as the foreign party to the cause. Such juries have long since been abolished in Australia[17] and New Zealand (where until 1962 Maori defendants were entitled to be tried by an all Maori jury).[18]

An English study by researchers from Kingston University concludes that, in contrast to the mixed and inconclusive picture which emerges from the research into the effect of gender and age of jurors on verdicts, there is a demonstrable relationship between the racial composition of juries and their verdicts: white jurors are more likely than non-white jurors to convict non-white defendants.[19]

Auld LJ referred to and adopted many of the findings and recommendations of the Kingston University study in his influential 2001 review of the English criminal justice system,[20] which has been frequently cited by various Australian law reform bodies in recent years.

Auld did not shrink from acknowledging the white elephant, stating that:

> Our randomly selected and uninvestigated juries are clearly at risk of one or more of their number bringing prejudice of one sort or another to their task. Such prejudice is usually invisible, and we are content to assume that it will be overcome or cancelled by differing views of the other members. But membership of a particular racial group is usually visible, and, as... studies suggest, white juries are, or are perceived to be, less fair to black than to white people. It is this quality of visible difference and the prejudice that it may engender that singles out race for different treatment from other special interest groups in the courtroom.[21]

He then went on to make a radical proposal to deal with the problem:

> I recommend that a scheme should be devised, along the lines that I have outlined, 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.[22]

This proposal is most unlikely to be adopted, at least in Australia. However modern it might appear at first blush, there is nothing new about it. The same recommendation had been made by England's Runciman Royal Commission on Criminal Justice back in 1993. Indeed, in a sense it is very old-fashioned, in that it revives the ancient model of the jury *de mediate linguae*.

A theme which emerged from a recent study published by the English Home Office is that jurors themselves highly value the experience of being citizens of a little multicultural republic:

> The importance of being 'tried by your peers' and the belief that 'twelve heads are better than one' were comments that were made frequently. Moreover, the *nature* of the make-up of the jury was also seen as a pivotal factor generating confidence.
>
> The apparent randomness of jury selection and the inclusion, in principle, of all sections of the community was seen as important in establishing impartiality while giving the decision-making process a sense of balance. There was a strongly held belief that bringing people together from different social and economic backgrounds was the best way to generate a viable and equitable system.[23]

In contrast, however, where diversity was less evident, jurors' confidence was undermined. The study's authors noted:

> In cases in which it was felt that the jury was not representative of the community as a whole, reservations about the benefits of jury trials arose. Where the composition of the jury was seen as being skewed the safeguards which were widely attributed with jury trials were seen as being eroded. It was evident in many of the interviews which were carried out that the emphasis on justice through diversity was closely bound up with conceptions of fairness.[24]

The finding that 'the *nature* of the make-up of the jury was pivotal in generating confidence' resonates strongly with the contention advanced (albeit with only partial success) by Woods and Williams. At the core of their claim that the jury array was flawed was their assertion that, as the High Court stated in *R v Webb* (a case also involving an Aboriginal accused charged with killing a non-Aboriginal man), the process would give rise to 'a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that the juror or jury has not discharged or will not discharge their task impartially'.[25] As Deane J observed in that case, 'clearly, [it] was one in which special vigilance was necessary to safeguard the appearance of impartial justice.'[26]

Also relevant to the findings of the Home Office study was the claim, strongly asserted (although unproven) in *R v Woods*, that Aboriginal people are systematically under-represented as participants in Alice Springs jury service. A partial remedy to this problem is suggested by the Kingston University report:

> The *Juries Act 1974* should be amended to require that the roll be merged with other lists, such as those compiled by the [Driving and Vehicle Licensing Centre], the [Department of Social Security] and Inland Revenue and/or telephone directories, mobile 'phone subscriber lists and mailing lists.[27]

There is another reason to embrace measures aimed at increasing the participation of Aboriginal people on juries. A pervasive and profound problem for the administration of criminal justice in Central Australia is the extent to which so many of its participants – offenders, victims, witnesses and their families and communities – experience the criminal justice system as thoroughly alien, baffling, frightening and often hostile.

Participation in juries, as the Home Office study found, offers an opportunity to address this problem:

- Jury service can be a factor promoting social cohesion and citizenship.
- Young people and minority ethnic groups show a greater willingness to repeat their service.
- This is potentially significant, as these groups are regarded as experiencing a greater degree of alienation from the criminal justice system and other state institutions.[28]

Aboriginal people are citizens. Jury participation is an incident of citizenship. There have long been programs to encourage Aboriginal people to get onto the Electoral Roll. Similarly, active steps should be taken to remove the practical and regulatory barriers to the performance of jury service by Aboriginal citizens. Some of these barriers are apparently insurmountable. For example, it would be impracticable to extend Northern Territory jury districts to the remote areas in which the events the subject of many jury trials take place, and where most Aboriginal Territorians live. Another intractable barrier is that many Aboriginal people in the Northern Territory are inadequately proficient in English to be able to perform jury service. However, other barriers, including the ineffective service of juror summonses, and unnecessarily exacting disqualification rules, can and should be addressed.

Graham Woods was eventually tried by a jury which included at least one Aboriginal member. He was acquitted of murder, and convicted of manslaughter. Had he been convicted by an all-white jury of murder and sentenced to life imprisonment, would an informed, fair-minded, disinterested observer have had serious doubts about the fairness of that hypothetical trial?

Of course, we would not have been allowed to scrutinise that hypothetical jury to see if they had in fact deliberated

fairly. A fundamental feature of our jury system is its inscrutability, its lack of transparency. Thus, any efforts to evaluate and improve it are made, to a significant extent, in the dark, by the blindfolded. That is a price well worth paying for the safeguards provided by the jury system. Nevertheless, it should not deter us from working rigorously towards enhancing and strengthening that system. Justice may be blind, but not so blind that she cannot see the white elephant in the room.

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1 [2010] NTSC 69 (unreported, Mildren ACJ, Blokland and Reeves JJ, 14 December 2010).

2 In the Northern Territory, murder attracts a mandatory sentence of life imprisonment with (except in specified exceptional circumstances inapplicable in this case) a non-parole period of at least twenty years.

3 Above n 1, paragraph [2], item 37.

4 Pursuant to s 352 of the *Criminal Code 1983* (NT).

5 Above n 1, [116].

6 Ibid, [94].

7 *Katsuno v The Queen* (1999) 199 CLR 40, 52 [14].

8 New South Wales Law Reform Commission, *Report 117 Jury Selection* (September 2007), 37.

9 Above n 1, [59].

10 *Katsuno v The Queen (1999)* 199 CLR 40, 65 (McHugh J), citing *Cheatle v The Queen* (1993) 177 CLR 541, 560.

11 For example, the *Juries Act* 2003 (Tas) permanently disqualifies from jury service persons who have been sentenced to imprisonment for 3 years or more, and disqualifies for 5 years persons who have been sentenced to imprisonment for 3 months of more. Victoria has a similar, but rather more stringent 'sliding scale'.

12 Above n 1, [95- 96].

13 *R v Grant and Lovett* [1972] VR 423; *R v Badenoch* [2001] VSC 409 (unreported, Coldrey J, 9 October 2001); *R v Buzzacott* (2004) 149 A Crim R 320.

14 *R v Smith* (Unreported, District Court of New South Wales, Martin J, 19 October 1981). See Neil Rees, 'Casenote: *R v Smith*' (1982) 1(3) *Aboriginal Law Bulletin* 11.

15 See *R v Ford (Royston)* [1989] 3 WLR 762; *R v Smith (Lance Percival)* [2003] 1 WLR 2229; but see *Rojas v Berllaque (Attorney General for Gibraltar intervening)* [2004] 1WLR 201.

16 See *Taylor v Louisiana*, 419 US 522 (1975); *Duren v Missouri*, 439 US 357 (1979).

17 See, for example, *Juries Act 1979* (NT), s 65.

18 *R v Pairama* (1995) 13 CRNZ 496, 501.

19 See Penny Darbyshire, Andy Maughan and Angus Stewart, 'What Can the English Legal System Learn from Jury Research Published to 2001?' (2002) *Kingston University, Occasional Paper Series* 49, 16.

20 Auld LJ, *Review of the Criminal Courts of England and Wales* (2001).

21 Ibid 158.

22 Ibid 159.

23 Roger Hancock, Lynn Matthews and Daniel Briggs, 'Jurors' perceptions, understandings, confidence, and satisfaction in the jury system: a study in six courts' (2004) *Home Office Online Report* 05/04, 46.

24 Ibid 47.

25 *Webb v The Queen* (1993 – 1994) 181 CLR 41, 42.

26 Ibid 78.

27 Darbyshire, above n 19, 63.

28 Hancock, above n 23, 66.

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Dorsey Smith

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