

Trial by Peers?

Justice Graham Hiley



Magna Carta, cl 29

No 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 man either Justice or Right.



1st jury trials in Palmerston

- R v Ah Kim – Feb 1875
 - Jury de medietate – 6 English, 2 Malays, 4 Chinese
 - Stealing – remand - buggery
 - Outcome
- Previously – Adelaide
 - Eg stolen horse – unlawful use



Some common characteristics

- Words & concepts:
 - jealousing; growling; humbugging; gammon; horrors; bit drunk; mobs; kill; scar; sleep; “he”
- Relationships:
 - brother, cousin, cousin brother, aunt, daughter etc – “grown up”
- Responses to difficult questions:
 - silence; “yes”; “I don’t know”



How would you feel?

- As a juror hearing and understanding this kind of evidence?
- More importantly – about a jury's capacity to understand this kind of evidence if you were:
 - a complainant;
 - an accused?



Trials involving Aboriginal people

- Complainants
- Witnesses
- Defendants



Northern Territory – some statistics about Aboriginal people in NT

25.5% of the total NT population

- 30% live in Darwin or Alice Springs
- about 1 / 3 not on any electoral roll
- 84% of the people in prison - many are from remote communities



Kriewaldt J in 1950s

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

ALRC Report 31 [586]



Some improvements since then

- Linguists and anthropologists – land claims & native title claims
- Interpreters
- Education – incl bi-lingual education
- Anunga rules



ALRC Report 1986

- ALRC Report 1986 – identified 3 issues:
 - 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.



Main focus of this paper

- Trials which may involve “cultural issues”
 - - to identify some typical “cultural issues that may arise
- Note: not all trials will involve cultural issues



Language groups in Top End



“Cultural Issues”

- Language – interpreters
 - >100 languages and dialects in NT
- Laws and customs
- Cultural differences and nuances



Laws and Customs

- Clans, moieties, skins
- Hierarchies of rights and responsibilities
 - - both within and outside their own group
 - - access and rights to knowledge
 - - use of and access to land and resources; sharing of resources
 - - male / female rules – marriage, avoidance rules
 - - respect for elders



Special features of some Aboriginal people

- Language
 - - difficulties with English language
 - - use of Aboriginal English
- Local customs and practices
- Particular characteristics – incl:
 - - responses to questions – silence, gratuitous concurrence, I don't know
 - - eye contact; gestures
 - - time and direction
- R v Anunga 1975



Assistance and Guidelines

- Experts
 - - interpreters
 - - linguists & anthropologists - admissibility?
- Police
 - Anunga Guidelines – *R v Anunga* (1975) 11 ALR 412
 - Police General Orders
- Lawyers and field officers



Jury Composition – risks of having particular group represented on jury

- Aboriginal people – especially a member of a relevant language group
- Member of a particular ethnic group
- A juror with special knowledge of a relevant topic
- Prejudices



Aboriginal People on Juries

- *Woods & Williams* cases
 - Change of venue
 - Challenge to array
- NTLRC Report 2013



Under-representation of Aboriginal people on juries

- Alice Springs statistics in 2010:
 - 21% of people eligible to be on the AS electoral roll were Aboriginal
 - 45% of the population of people within the coverage of the Supreme Court sitting in AS were Aboriginal
 - One third of Aboriginal people in Central Australia lived in town camps in AS - mail was not received by people in town camps
- Studies elsewhere – Vidmer etc
 - lower socio-economic background; criminal histories, not receive or understand jury summons, literacy



Some reasons why Aboriginal people not on jury list

- Jury districts:
 - Darwin
 - Alice Springs
- Jury lists – electoral roll
- Enrolment rates low
 - 32% of Indigenous population of the Northern Territory are not enrolled to vote
- Criminal history
 - Over 25% of potential jury panel members in the Northern Territory subject to prisoner disqualification
 - Cf only 0.5% in Victoria and New South Wales



Many who attend seek to be excused or are challenged

- Literacy – including failure to understand purpose of summons
- Cultural reasons – include:
 - Kinship or potential family links
 - Languages
 - Gender issues
 - Particular customs or beliefs



Race related objections

- *Woods & Williams* cases
 - Perception of bias



What can and should be done?

- Historical importance of juries
- NTLRC recommendations in 2013 – included:
 - education of potential jurors about the jury system
 - expand catchment pool
 - service of jury summonses
 - reduce period of disqualification for prior imprisonment



What is done?

- Excusal and disclosure process
- Challenge and stand aside
- Judge's directions
 - At start of trial
 - During trial – how far should they go?
 - Summing up



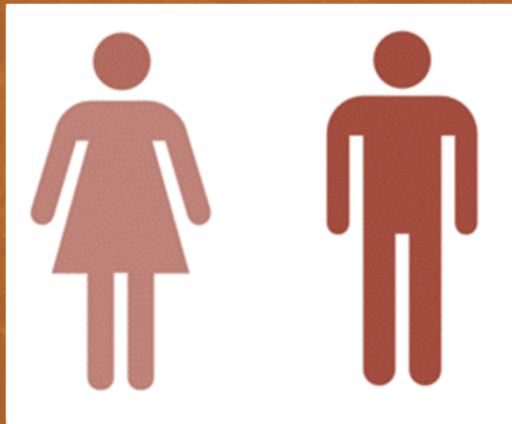
Special juries and juries *de medietate linguae*

- Origins – England
- NSW 1871 case
- NT 1874 case
- NT until 1962
- USA, Canada and New Zealand until 1962



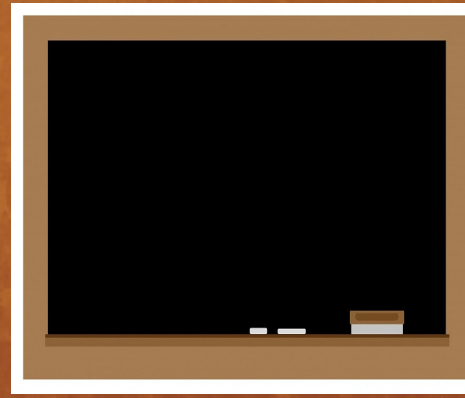
Amend *Juries Act*?

- Require at least one Aboriginal person on jury?
- Gender issues?



Facilitate greater access

- Adopt recommendations of NTLRC in 2013 – incl:
 - - broaden the catchment pool
 - - enable other means of serving jury summonses – eg email
 - - amend the criminal disqualification provisions
 - - education and encouragement



Conclusions

- Jury system should remain – but with changes
- Other considerations
 - eg judge alone trials? Use of experts?
- Need to consult Aboriginal people

