The White Elephant in the Room: Juries, Jury Arrays and Race

Russell Goldflam[1]

At the outset, I should explain which white elephant I'm talking about here. It's not the jury itself. Juries are never ignored. Indeed, criminal lawyers talk constantly, indeed obsessively, about juries. We don't just acknowledge them. We're unfailingly polite to them, we hang on their every gesture, expression and word. We wait in a cold sweat while they deliberate and pronounce verdict. No, the elephant in the room the subject of this paper is not the jury. It is rather, a particular quality of the Northern Territory jury, namely, its race, and specifically, to put it rather crudely, its whiteness. That is something we have tended not to acknowledge.

This paper acknowledges and reflects on the issues agitated, ventilated, decided and not decided by the Full Court of the Supreme Court of the Northern Territory in the matter of *R v Woods and Williams* [2010] NTSC 69.[2]

Rod Moss, "Standoff"

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[2] The author appeared as junior counsel, led by Jon Tippett QC, for the accused Woods.

This painting, by the way, was executed some years before the events I have just sketched. It depicts the painter's non-Aboriginal son being confronted by a group of young Aboriginal men in a suburban Alice Springs laneway. Fortunately, on that particular occasion no violence ensued. However, such incidents are common and familiar enough in Alice Springs for Rod Moss to choose to document this incident as you see here.

Ed Hargrave was a widely admired and well known sporting identity in Alice Springs, and his killing provoked a surge of grief, support and soul-searching, which was prominently reported in the local media.

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Community anxieties were further heightened when, a few weeks later, 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.

Unsurprisingly, in these tense circumstances, my client Graham Woods and his family were very worried that he would be unable to get a fair trial in Alice Springs. He instructed me accordingly, and so an application was made to move the venue of his trial to Darwin.

Unsurprisingly, that application was unsuccessful, as such applications usually are. An offence ought ordinarily be tried in the locality in which it is alleged to have been committed, before a jury which is selected from the same district.[3]

Blokland J found that there was no good cause in this case to depart from that ordinary course.

> [23] Mr Goldflam also points to the fact that the trial may not be perceived to be fair… his affidavit states:
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> > "I have appeared in Alice Springs jury trials regularly since about 2002. I have noticed that **Alice Springs jury panels always seem to be very predominantly composed of non-indigenous people**…
>
> [24] The Crown do not appear to disagree that Alice Springs jury panels often do not include Aboriginal persons. [Emphasis added]

However, in her judgment, Her Honour did, in passing, acknowledge the existence of the white elephant. Commenting on this issue, Her Honor observed : "the ultimate jury selected and drawn from the array will be subject to the directions of the trial judge. There is no reason to conclude that whatever the racial makeup of the panel, they will not comply with the trial judge's directions."[4]

Graham Woods, who had never been tried by a jury before, and in all probability had never seen a jury trial before, was still worried. Of course, he was facing conviction for murder, which carries with it in the Northern Territory a mandatory sentence of life imprisonment with an effective minimum non-parole period of twenty years.

The situation in which Graham Woods saw himself reminded me of that confronting the hapless defendant in a Gary Larson Far Side cartoon. In it, the defendant and his lawyer are dogs, and the judge and jury are cats. Defence counsel is addressing the jury, saying "Cat killer? Is that the face of a cat killer? Cat chaser maybe. But hey–who isn't?" The cats all look, as cats do, utterly unimpressed. An ordinary member of the public sitting in the gallery of this feline court room would reasonably apprehend that this dog's day in court is going to inevitably end badly. Cats, generally speaking, don't give dogs a fair go.

Recently, in the unfortunate case of the catnapping trial judge, French CJ concisely re-stated the principle underlying this Larson cartoon, as follows.[5]

> If there be a flaw in a fundamental respect such that the appearance of injustice is indelibly stamped on the process and its outcome from the point of view of a reasonable and informed observer, this may be expressed by saying that public confidence would be undermined if the conviction were allowed to stand.

In September 2010, before his jury was empanelled, and in reliance on this principle, Graham Woods commenced an application before his trial Judge pursuant to s 352 of the *Criminal* Code (NT) to have his jury array quashed. At the heart of his application was the contention that there was a systematic exclusion of Aboriginal people from Alice Springs district jury arrays, which, insofar as it affected his trial, constituted, to use the words of French CJ, "a flaw in a fundamental respect such that the

[3] *Woods and Williams v The Queen* (2010) NTSC36 per Blokland J at [5].
[4] Ibid, [24].
[5] *Cesan v The Queen* (2008) 236 CLR 358, 386

appearance of injustice is indelibly stamped on the process and its outcome from the point of view of a reasonable and informed observer." In other words, Graham Woods contended, there would be a reasonable apprehension of bias in his trial, such as to make it fundamentally unfair.

The trial Judge, Reeves J, with the consent of the parties, referred a series of questions of law arising from this application, to the Full Court. The Full Court in effect endorsed the application to quash the jury array, but, it should be emphasised, not on the basis that it accepted that the racial composition of the jury gave rise to an apprehension of bias, or unfairness.[6]

> [A] challenge to the array will not succeed merely because the racial mix of the panel does not reflect the racial mix of the community from which the panel has been drawn.

> In our view, the question of *appearance* of fairness is referable to the compliance with the Act and not to the question of the racial composition of the jury.

Instead, the Court found that there were a number of irregularities by the Sherriff in the administration of the *Juries Act* (NT) which were sufficiently serious so as to amount to "unindifferency", to use the quaint term found in the authorities, requiring the array to be quashed.

Before returning to the weighty matter of the white elephant, I will briefly list the matters of "unindifferency" identified by the Court.

One of the questions referred to the Full Court was whether the Sherriff had failed to summons jurors in accordance with the law so requiring the array to be quashed. In answering this question 'yes',[7] the Court found that there was a material departure from the provisions of the Act in that a practice had arisen whereby the Sherriff arranged for:

1. the random selection by computer of persons from the annual jury list (itself drawn from the electoral roll);
2. the culling of this list by SAFE NT, a division of Police, Fire and Emergency Services, to remove the names of people who were disqualified from serving on juries because of their criminal history;
3. the further culling of the list by removing the names of people apparently exempt by reason of their occupation, and then;
4. the preparation of a precept for execution by the Chief Justice ordering the summoning of the remaining persons on the list.

The effect of this practice was that the issue of the precept by the Chief Justice to summon jurors had become a mere formality.

The Court held that 'the precept is not a mere formality. It is the instrument which authorises the Sheriff to act and which determines how many jurors are to be selected. Without it, the Sheriff has no authority.'[8]

Although the Court found that SAFE NT officers have lawful authority to examine lists of potential jurors to determine whether any of them appear to be disqualified, it observed that 'there is a lot of

[6] *R v Woods & Williams* [2010] NTSC 69 at [76], [114].
[7] *R v Woods & Williams* [2010] NTSC 69 at [103].
[8] *R v Woods & Williams* [2010] NTSC 69 at [82].

potential for error'. The procedure in use did not facilitate either the identification or rectification of any such errors.

Moreover, the Court found that it was objectionable for an organisation connected with the police to conduct these checks, because police are interested in the prosecution of offenders, giving rise to a possible suspicion that the Sherriff, unindifferently, may have 'employed those connected with the prosecution to strike off names of those selected without either statutory authority or enquiry'.

Finally, the Court considered a further ground of challenge to the array, on the basis that the Sheriff served juror summonses only by post, and there was no effective postal service to Alice Springs Town Camps. Although that ground was rejected on the basis that there was no evidence that the Sheriff was in fact unaware of the lack of an effective postal service to town camps, the Court counselled the Sheriff to modify this practice.

The Court and the Sheriff speedily acted to address these three identified instances of non-compliance with the *Juries Act*. However, as will be seen, there are still some wrinkles to be ironed out.

The Full Court also took the opportunity to recommend a general review of the *Juries Act*, and accordingly, the Attorney-General has referred the matter to the Northern Territory Law Reform Committee. The only amendment to the *Juries Act* currently under consideration in the form of a draft Bill is an increase in the age at which people summoned for jury duty are entitled to obtain exemption, from 65 to 70 years.

As has been seen, in *Woods and Williams* the Court rejected the contention that the jury selection process was flawed because the racial mix of the panel does not reflect the racial mix of the community from which the panel has been drawn. This conclusion, it should immediately be said, accords with similar decisions in both other Australian jurisdictions[9] and the preponderance of English authority.[10] 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.[11] It is conceded, however, that having regard to the radically different procedures involved in the selection and empanelment of United States juries, the US jurisprudence in this area is of only limited application to Australian courts.

Given the state of these English and Australian authorities, it is surprising to discover that for over half a millennium, the common law provided a specialised jury system, so called 'juries 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. A Kingston University research team lead by Penny Darbyshire which was commissioned to review the then extant research on juries for the Review of the Criminal Courts of England and Wales conducted by Lord Justice Auld in 2001, referred to the old jury *de mediate linguae*.[12]

Then, having observed that the right to these juries was abolished on the ground that no foreigner need fear for a fair trial in England, Darbyshire provocatively asks, '…given the trial data, reported cases and research findings, can we in England and Wales believe this to be true now?' By his

[9] See *R v Grant and Lovett* [1972] VR 423; and *R v Badenoch* [2001] VSC 409
[10] See *R v Ford (Royston)* [1989] 3 WLR 762; *R v Smith (Lance Percival)* [2003] 1 WLR 2229.
[11] See *Taylor v Louisiana* 419 US 522 (1975); *Duren v Missouri* 439 US 357 (1979).
[12] Darbyshire, Penny, Maughan, Andy and Stewart, Angus, *What Can the English Legal System Learn from Jury Research Published to 2001?* Kingston University, Occasional Paper Series 49, 2002 at 15.

application to quash the jury array in his trial, Graham Woods asked a similar question: can we in Australia believe it to be true that no Aboriginal need fear for a fair trial in the Northern Territory?

Here is an example of the research collated and relied on in the Kingston University study.[13]

> One comprehensive study in New York State took place over a 10 year period between 1986 and 1995. It examined a total of 35,595 criminal verdicts in 27 counties analysing the relationship between racial makeup and jury acquittal rates. The study found a close relationship between racial demography and jury behaviour. Bronx County had the highest jury acquittal rate but also the highest black and Hispanic population. Conversely, Ontario County had the lowest acquittal rate and second to lowest population of blacks and Hispanics.

Darbyshire 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 jury 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.

> **JURIES ACT** (NT)
>
> **65 Abolition of certain juries**
> Special juries and juries de medietate linguae are abolished.

In any event, we don't have juries *de mediatate linguae* any more here in the Northern Territory, or for that matter in other Australian jurisdictions, although they survived across the Tasman until as recently as 1961, out of deference to the special needs and circumstances of the indigenous people of New Zealand.[14]

Lord Justice Auld referred to and adopted many of the findings and recommendations of the Kingston University study in his report, which in turn has been frequently cited by various Australian law reform bodies which have examined the jury system in recent years.

Auld did not shrink from recognising the white elephant, stating that:[15]

> 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.

Here is Auld's proposal to deal with the problem of the white elephant.[16]

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[13] Darbyshire, supra at 14.
[14] Vidmar, N. "A Historical and Comparative Perspective on the Common Law Jury" in Vidmar, N (ed.) *World Jury Systems* (2000, OUP), 25.
[15] Auld LJ, *Review of the Criminal Courts of England and Wales* (2001), 158.
[16] Auld LJ, supra, 159.

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.

This proposal is radical, controversial, and, to date, has not been adopted. In fact, there was nothing new about it, however new-fangled and post-modern it might appear at first blush. The very same proposal 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*. Auld's recommendation follows the advice of the Darbyshire study referred to above, in which details are provided of the results of research to the effect that any less than three members of a ethnic minority group on a jury of twelve would be unlikely to make a significant difference to the verdict outcome. I, for one, am not so sure about that. To my mind, 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. I'll return to this later.

Darbyshire makes the important point that if this proposal were to be adopted, then it should be applied not just to protect the interests of accused persons who are members of a racial or ethnic minority, but also to protect the interests of victims who belong to a racial or ethnic minority group.

In Australia, we are unlikely to get white elephant remediation programs along *de mediate linguae* jury lines as proposed by Lord Justice Auld. But, I would suggest, we do have a problem, and it is incumbent on us to find solutions for it.

The Woods & Williams jury array: background facts

- Two NT jury districts: Darwin & Alice Springs
- The Alice Springs district annual jury list is compiled from the electoral roll for the Alice Springs municipality
- 21% of the Alice Springs population is Aboriginal
- 45% of the Central Australian population is Aboriginal
- 83% of the NT prison population is Aboriginal
- 25% of the randomly selected panel were disqualified

This is extracted from the agreed statement of facts and matters which formed part of the reference to the Full Court in *Woods and Williams*. Section 19 of the *Juries Act* provides that there are two jury districts in the Northern Territory, namely Darwin and Alice Springs. The Act further provides that the annual Alice Springs jury list is to be compiled from the Electoral Roll for the municipality of Alice Springs.

When the list of 350 people on the Alice Springs jury list randomly selected by the Sheriff's computer for the Woods and Williams trial was sent to SAFE NT to 'cull' disqualified persons, as previously described, 25% of them were found to have disqualifying criminal records. The court described this as a 'rather alarming statistic'.[17]

[17] *R v Woods and Williams* [2010] NTSC 69 at [94]

By comparison, 0.3% of jurors in a sample Victorian panel of 12,000 had been disqualified or exempted,[18] and in New South Wales, it is reported that the equivalent rate was 0.5% of persons aged 21 years in 2005.[19]

It can readily be inferred from these facts that a disproportionate number of Aboriginal people would have been disqualified from being available for empanelment from the original number of 350 randomly selected persons on the Electoral Roll.

Relying in particular on these circumstances, it was contended on behalf of Woods and Williams that the practical operation and effect of the *Juries Act* 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. Had this contention been accepted by the Court, then a real question would have arisen as to whether or not the *Juries Act* would have been struck down for inconsistency with section 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, however, rejected this contention, both on the basis that there was insufficient evidence to support it, and by reference to, in particular, the English line of authorities that I mentioned earlier.

The Court summarised its conclusion as follows:

> 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.[20]

With respect, however, the contention advanced on behalf of Woods and Williams was not that the jury of twelve should be racially balanced or proportionate. Instead, what they sought to contend 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].[21]

However, the 'enormous practical difficulties' adverted to by the Full Court in Woods and Williams presented the accused with a formidable, and ultimately insuperable, obstacle. One practical measure to address these difficulties would be the amelioration of the current disqualification provisions, which are substantially stricter than those in force in some other Australian jurisdictions, and which were criticised by the Full Court as being unclear and possibly anomalous.[22] When the

[18] See *Katsuno v The Queen* (1999) 199 CLR 40 at 52 [14]
[19] New South Wales Law Reform Commission, *Report 117 Jury Selection* (September 2007), 37
[20] *R v Woods and Williams* [2010] NTSC 69 at [59].
[21] See *Katsuno v The Queen (1999)* 199 CLR 40, 65 per McHugh J; *Cheatle v The Queen* (1993) 177 CLR 541, 560 per Curiam.
[22] *Woods & Williams* supra, [95] – [96]

Juries Act (NT) is reviewed, it is to be hoped that close attention will be given to introducing such measures.

So, following all this fuss, or, as some might characterise it, this frolic, has the white elephant now acquired a slightly darker shade? Extraordinarily, the next four juries before which I appeared in Alice Springs after September 2010 all apparently had at least one or two Aboriginal members. When the trial of Graham Woods and Julian Williams got underway in March 2011, two jurors who appeared to be Aboriginal were selected. Having said that, the empanelment process almost came to grief immediately.

Only a quarter of the 300 people summoned turned up on the day. That, it should be said, is apparently in itself not particularly unusual. Another quarter had already been exempted or deferred. Of the 77 who attended, 30 were successful in obtaining excusals from the trial Judge, and the two accused between them exercised their statutory 24 peremptory challenges. With a few jurors also being stood aside by the Crown, and 3 reserves also empanelled, by the time the jury was selected, there were just 6 marbles left in the barrel. In these circumstances, it can be fairly said that the jury selection process was not so much one of randomness as one of attrition.

The Kingston University study also bemoaned the use of excuses to avoid jury service, and the even more widespread practice of simply ignoring jury summonses.[23]

> Many courts, if they feel they have sufficient jurors among the respondents, will do nothing. Astonishingly, the [Central Summoning] Bureau staff find they need to call four times as many persons as a court needs for jury service in England and Wales generally, and up to six times as many in London because of the combination of "no-shows", statutory exclusion and excusals.

There is no ready solution to this problem.

The fact that the court came within a whisker of not being able to array sufficient jurors to successfully empanel a jury for this murder trial is not generally known. By contrast, the trial Judge was faced with another problem arising out of the empanelment which, literally, attracted front page headlines.

> HIS HONOUR: Now, ladies and gentlemen, we struck a problem with this trial yesterday as a result of an article that was published in the Centralian Advocate in yesterday's edition. The article said, in part, and I quote:
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> > Reeves J received a note from one jury member before the trial started, stating that they were related to the accused but had never met the two men and their family ties would not affect the juror's decision. After a brief deliberation, he allowed the juror to remain.
>
> Of course, that is quite inaccurate…

Needless to say, the allegation that the Judge had approved the selection of a juror who was related to the accused was utterly false, and an embarrassed retraction and apology soon followed. Nevertheless, this incident highlights how in a big trial in a small town like Alice, the issue of who is on the jury is intrinsically sensitive.

[23] Darbyshire, supra, 12.

A further wrinkle emerged when, a couple of days into the trial, it was discovered by the Court that one of the jurors (as it happened, one of the members who appeared to be Aboriginal) was disqualified, having been sentenced to a term of imprisonment (albeit fully suspended) imposed within (albeit by only a few months) the last 7 years. Ironically, this situation would not have arisen had the previous irregular practices been permitted to continue, as this person would have been identified and taken off the list before the precept was even issued summoning prospective jurors. It transpired that this was not the first trial to have encountered this problem following the change to the pre-existing practice.

The solution to this problem which was adopted by the trial Judge, with the consent of all parties, was to discharge the disqualified juror, and promote one of the reserve jurors. However, there remains some doubt as to the validity of that practical and expedient solution. In *Petroulias v The Queen,*[24] a similar situation had arisen, and by majority, the New South Wales Court of Criminal Appeal held that the trial was fundamentally flawed from the outset, and should not have been permitted to continue.[25]

The *Jury Act* (NSW) materially differs from the *Juries Act* (NT), which enabled Reeves J to distinguish *Petroulias*. Nevertheless, out of an abundance of caution, it may be wise for the Northern Territory legislature to do as the NSW legislature did in the wake of *Petroulias*, and amend the *Juries Act* (NT) to confirm the validity of juries empanelled in these irregular circumstances.

The fact that one of the two Aboriginal jurors turned out to be disqualified and was accordingly discharged could only have fortified Graham Woods' suspicion that the system was stacked against him.

As the trial approached its conclusion, there was one more hiccup, this one also directly related to the problem of the white elephant.

It was prompted by the following seemingly standard and innocuous passage in the closing address of senior counsel for Julian Williams, in which he reminded the jury not to allow their sympathies to distract them from the task of assessing the evidence.

> This case is ripe for sympathy and ripe for prejudice. It's about violence, and I'll be surprised if all 12 of you weren't against violence. It's about a murder; a death; death of a person. The case has racial overtones, and the case is taking place in this town when there's a debate going on that we all know about. You might have sympathy for [the deceased] and his family, and so you should, but it shouldn't colour your analysis of the evidence.

The next morning the trial Judge received the following note:

[24] (2007) 237 FLR 126

[25] The passage from French CJ in *Cesan* cited earlier contains a footnote referring to *Petroulias* in a manner which suggests approval of the majority decision.

Your Honour, I found [counsel's] opening comments about racial overtones possibly colouring the jury's analysis of the evidence offensive and insulting. We have sat and listened impartially to all evidence for 12 days and at no time in any breaks have the racial backgrounds been discussed prejudicially amongst jurors... There is at least one indigenous member of the jury who may also have found the comments insulting.

Kind regards, a juror

Ouch!

Fortunately for Julian Williams, the ensuing application by his counsel for the jury to be discharged was refused, because in due course the jury acquitted him. Which just goes to show that this particular jury was indeed up to the challenge of putting their sympathies to one side.

It also goes, if not to show, at least to suggest, that the presence of even a single indigenous juror may indeed affect what is said, what is thought, what is done, and what is decided behind the closed doors of the jury room.

This vignette also gives us a glimpse of how a jury can operate as a little multicultural republic, a theme which emerged from a recent study published by the English Home Office, of juror's perceptions, understanding, confidence and satisfaction in the jury system. Jurors, this study found, value the experience of being part of a diverse group.

As the authors of this study report:[26]

> The diversity of the jury was widely celebrated. In contrast, however, where diversity was less evident, jurors' confidence was undermined.
>
> 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.

The key conclusions of the Home Office study can be summarised as follows:[27]

- There is a belief in the 'democratic' element associated with jury trials
- There is a belief in being 'tried by your peers' and that 'twelve heads are better than one'
- The nature of the make-up of the jury was pivotal in 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.

[26] 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), p 47.
[27] Hancock, supra, p 46 - 47

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 the process would look unfair to an ordinary person, or, to use more judicial terminology, that it gives 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'.[28] These words come from the High Court in *Webb*, a case also involving an Aboriginal accused charged with killing a non-Aboriginal man. As Deane J stated in *Webb*, 'clearly, the case was one in which special vigilance was necessary to safeguard the appearance of impartial justice.'[29]

Also consistent with the findings of the Home Office study was the claim asserted in Woods and Williams – not, I hasten to add, found to have been proven on the evidence before the Full Court – but nevertheless a claim which our experiences strongly suggest is factual, that the white elephant does indeed exist: that Aboriginal people are under-represented as participants in Alice Springs jury service. A partial remedy to this problem is suggested by the Home Office report: go beyond the electoral roll to capture potential jurors.

Certainly, experience elsewhere shows that changes to the method of capture result in changes to the composition of jury arrays, and in turn changes to jury verdicts. This US example is from the Darbyshire Report referred to above.[30]

> Interestingly, as Van Dyke pointed out, in Baltimore in 1969 when jury commissioners switched from selecting jurors from property lists to randomly selecting them from the voter registration list, the composition of juries changed from 70 per cent white to 43.7 per cent black by 1973. The conviction rate also dropped from 83.6 per cent in 1969 to an average of 70 per cent in the next few years.

In the United States, authorities have gone to extraordinary lengths to achieve representative cross-sectional juries, scouring a wide range of databases including even dog licence registration lists to add to their jury lists. I do not suggest that such measures be used in Australia. Firstly, we do not labour in this country under the burden of having to achieve a representative cross-section. Secondly, electoral enrolment in Australia is, unlike the US and the UK, compulsory, so it presumably provides a more comprehensive database of eligible jurors here than in those jurisdictions.

Nevertheless, it is widely accepted that rates of enrolment of Aboriginal people on the electoral roll are disproportionately low, and accordingly, there may be merit in giving consideration to the sort of measure recommended here by Darbyshire, aimed at widening the net to catch more jurors.[31]

[28] *Webb v The Queen* (1993 – 1994) 181 CLR 41, 42
[29] *Webb v The Queen*, supra at 78.
[30] Darbyshire, supra, 13.
[31] Darbyshire, supra, 63.

Recommendation

Selecting jury panels from the electoral roll excludes certain groups, notably those who choose not to register or whose residential status is more transient. This excluded group includes a disproportionate number of non-whites. The *Juries Act* 1974 should be amended to require that the roll be merged with other lists, such as those compiled by the DVLC, the DSS and Inland Revenue and/or telephone directories, mobile 'phone subscriber lists and mailing lists.

And 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 finds, offers an opportunity to address this problem:[32]

- 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
- Potentially significant, as these groups are regarded as experiencing a greater degree of alienation from the criminal justice system and other state institutions

Aboriginal people are citizens. Jury participation is an incident of citizenship. We have long had programs to encourage Aboriginal people to get onto the Electoral Roll. Similarly, we should take active steps, including those I have suggested, to remove the practical and regulatory barriers to the performance by Aboriginal citizens of jury service.

[32] Hancock, supra, p. 66.

Rod Moss, 'The Justice Parable'

Here is another painting by Rod Moss. It graphically illustrates here how our criminal justice system is experienced by many Aboriginal litigants in Central Australia: alien, incomprehensible, possibly dangerous, and, yes, ridiculous. There is no jury in this picture, suggestive perhaps that without the collective wisdom, experience and common sense of a group of ordinary citizens to guide us, our stumbling path to justice really is a case of the blind leading the blind.

There's another sense, too, in which we're blindly stumbling in the dark: we just don't know who exactly our jurors are, let alone what they actually think and say in their closed room. That is why the jury array challenge brought by Graham Woods fell at the evidentiary hurdle.

Woods was eventually tried by a multi-racial jury, which acquitted him of murder, and convicted him of manslaughter. Had he been tried by an all-white jury, and convicted of murder, we could never know exactly how and why that result was arrived at. Would an informed, fair-minded, disinterested observer have had some serious doubts about the fairness of that hypothetical trial? Perhaps, perhaps not. But one thing is certain. That informed observer would perforce be only partly informed, and partially (albeit impartially) sighted.

There is a deep irony here. A fundamental feature of our jury system is its inscrutability, its invisibility. Thus, any efforts to 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 improving and strengthening that system. Justice may be blind, but she is not so blind that she cannot see that.