A Constitutional History Of Trial By Jury In The Northern Territory - Part One

*By Graham Nicholson**

The use of trial by jury has had a long English history, dating back to the Magna Carta and perhaps even earlier. However it did not apply to the early British settlers of Australia, for reasons largely connected with the penal nature of the early settlement. As the free population in the colony of New South Wales grew, however, the demand for jury trials also grew. The Imperial New South Wales Act of 1823, establishing a Supreme Court, provided for civil jury trials on the application of a party. Criminal trials were usually heard before a judge and seven military officers, although after 1832 free settlers in NSW were often tried before a jury of 12 civilian residents. The system of a Grand Jury was also used in NSW for a short period but was allowed to lapse. Trial by jury properly so-called never existed in Australia as a right, either in criminal or civil cases, until colonial legislation so provided in the 19th Century (R v Valentine (1871) SCR (NSW) 113 per Stephen CJ: 122).

None of this earlier history was of particular relevance to the Northern Territory until after its annexation to the Province of South Australia in 1863. That Province's legislature had provided for jury trials as early as 1837 (see Act No 2 of 1836/7, an Act for fixing the Qualifications of Jurors, and Act No 1 of 1837, an Act for Regulating the Constitution of Juries). By an Ordinance to Regulate Trials by Jury in South Australia No 12 of 1843, trial by jury, both civil and criminal, so far as not otherwise specially provided for, was to be the same as in England. Grand Juries were tried in South Australia but abolished by the Act No 10 of 1852. The Jury Act 1862 (No 1) was the first comprehensive legislation on the subject in the Province.

This legislative regime was extended to the Northern Territory upon its annexation to South Australia by Letters Patent in 1863, with the Supreme Court of that Province extending its jurisdiction to include the Northern Territory. Special arrangements as to juries in the Northern Territory were made by The Northern Territory Justice Act, 1875 (No 15). That that South Australian legislation as to juries applied in the Northern Territory was confirmed by The Northern Territory Justice Act, 1884 (No 311) (see now the Sources of Law Act of the Northern Territory).

Jury trials did not occur in the Northern Territory until after its annexation in 1863. It is reported that the stipendiary magistrate Dr Goldsmith, in August 1864, held an inquest with an appointed jury into the death of an Aboriginal person after attacks on the early northern settlement under Finniss ("A Picnic with the Natives" by Gordon Reid, MUP, 1990: 32). The writer is not aware of when the first trial of an offence before a jury in the Northern Territory occurred. The difficulties of enforcing the trial and punishment of serious crimes in the new Territory, and in particular by or against Aboriginals, in such a remote northern locality soon became apparent. The Northern Territory Justice Act of 1875 excluded the trial in the Northern Territory of offences punishable by death, requiring trials to occur in South Australia proper, and adding to these difficulties. That Act otherwise provided that a jury was to be established by not less than six men in the Territory, rather than 12 men as in South Australia as required by The Jury Act 1862. The requirement for the trial out of the Northern Territory of felonies punishable by death was later removed by The Northern Territory Justice Act 1884, such that all indictable offences could thereafter be tried in the Northern Territory before a Judge and jury,. Otherwise The Jury Act 1862 continued to apply in the Northern Territory.

Upon the commencement of federation on 1 January 1901, section 80 of the new Commonwealth Constitution introduced an entrenched constitutional guarantee, in that the section required that the trial on indictment of an offence against any law of the Commonwealth must be by jury, the trial to be held in the State where the offence was committed. The Northern Territory was from that time a part of the new State of South Australia up until its surrender to the Commonwealth as a Commonwealth territory from 1 January 1911. However most indictable offences in force in the Northern Territory up to that latter date were State offences, and hence section 80 had little effect. There was nothing legally to prevent South Australia creating statutory offences triable summarily. South Australian law continued to apply in the Northern Territory up to 1911.

The acceptance of the Northern Territory by the Commonwealth as a Commonwealth territory in 1911, carrying with it the laws of South Australia as then in force in the Northern Territory, but with effect thereafter as laws of the Northern Territory (see Northern Territory Acceptance Act 1910 (Cth), section 7), and subject to any Territory Ordinances made thereafter (Northern Territory (Administration) Act 1910 (Cth) section 5), raised the question of whether section 80 now mandated jury trials for Territory indictable offences. The question was whether laws of the Northern Territory were "laws of the Commonwealth". This was later resolved by the High Court in the context of the Territory of Papua in R v Bernasconi (1915) 19 CLR 692, holding that section 80 did not apply to the trial of an offence created by a law made by or under an Act of the Commonwealth Parliament for a Commonwealth territory under section 122 of the Constitution. The "disparate" approach to the constitutional place of territories in the Constitution was adopted by the High Court, that is, that a "law of the Commonwealth " did not include a law of a Commonwealth territory made under the Territories power in section 122.

The Jury Act of 1862 continued to apply in South Australia up to 1 January 1911 (see, eg. R v Gillen [1914] SASR 196) and hence continued to apply in the Northern Territory up to, and after, that date. This was confirmed by the Jury Ordinance 1912 (No.7), made under the North-

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ern Territory (Administration) Act, but subject to the terms of that Ordinance. The latter Ordinance limited the composition of juries to male adult persons of European race or extraction who had resided in the Territory for not less than 3 months (section 5). This was altered by the Jury Ordinance 1919 (No 3) to limit it to British subjects who had resided in the Territory for not less than 12 months. Further limitations were added by the Jury Ordinance (No 2) 1919 (No 7). Jury qualifications were extended to a "half caste", that is, a person who was a British subject with one parent of European race or extraction, and who was a returned soldier, by the Jury Ordinance 1936 (No 17).

The race and gender restrictions as to the composition of juries in the Northern Territory were not lifted until the Juries Ordinance 1962 (No 30), well before any Commonwealth legislation on sex and race discrimination.

In 1921 there were some disturbances and disorder in Darwin. In a letter by the Northern Territory Administrator to the Commonwealth Government authorities dated 4 August 1921, it was stated-

"The perjury by witnesses and the corruption (not necessarily pecuniary) of juries (6) in Darwin is common knowledge and is the subject of open and general comment. It is well understood that no Unionist (unless just at present he happens to be a taxpayer) will be convicted of any offence by a Darwin jury, while it is equally certain that on a trumped-up charge against any non-Unionist a verdict of "guilty" will surely be returned. A leading solicitor informed me that it is impossible to pick twelve honest men from the jury panel, and on application to the Police for information on the subject elicited no better reply. To such low estate has the administration of justice fallen in the capital of the Northern Territory."

As a result, it was decided to suspend the system of trial by jury in the Territory except in the case of capital offences. This was achieved by section 6 of the Observance of Law Ordinance 1921 (section 6), providing for trial of indictable offences (other than those carrying the death penalty) by Judge alone.

The question of whether section 80 of the Constitution might still apply to Northern Territory indictable offences was raised in the case of R v Brown before the Supreme court of North Australia (the Northern Territory having been divided into 2 jurisdictions in 1926). This resulted in representations being made to the Commonwealth Minister Abbott, which in turn were referred to the Government Resident in Darwin. This lead to the Crown Law Officer for the Northern Territory, one E.T. Asche, reporting by way of a well-reasoned memo to the Government Resident dated 10 September 1929. While the memo expressed the view that the matter seemed to be covered by R v Bernasconi, Asche pointed out that there could still be a problem under section 80 with Commonwealth indictable offences not sourced from section 122 of the Constitution and in force in the Territory (eg Crimes Act 1914-1928). He also felt that it was against the spirit of the law to dispense with trial by jury for indictable offences, particularly as qualified jurors were available in Darwin. He advised in favour of trial by jury. Asche followed this up with a cable to the Commonwealth Solicitor-General Garran, suggesting that section 6 of the Observance of Law Ordinance may be unconstitutional, that it might be challenged in the High Court in a forthcoming trial and advising an early repeal of section 6.

Subsequently, the Minister for Home Affairs recommended to the Commonwealth Cabinet the restoration of trial by jury, and this was accepted by the Commonwealth Cabinet. The Observance of Law Ordinance (No 2) 1930 (No 8) was passed, repealing section 6 of the Observance of Law Ordinance 1921 and thereby restoring full trial by jury in the Territory. A similar Ordinance was enacted for the Territory of Central Australia (No 6 of 1930). The two Territories were again combined as one in 1931.

To be continued next edition of Balance

End Note:
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Copyright Amendment (Digital Agenda) Bill 1999

The Federal Government has introduced copyright legislation designed to update Australia's copyright law to meet the challenges posed by new communications technology, particularly the Internet.

The Copyright Amendment (Digital Agenda) Bill 1999 will replace and extend the existing technology-specific broadcasting right and cable diffusion right. It will also encompass the making available of copyright material online.

The reforms will include the extension of existing statuatory license which apply to educational institutions such as schools and universities.

The Bill introduces new enforcement measures to enable copyright owners to protect their rights in the online environment.

It will allow retransmitters of broadcasrs, such as pay TV operators, to retransmit free-to air broadcasts, subject to making payments to the owners of copyright in the underlying works.

The reforms proposed in the Bill are consistent with new World Intellectual Property Organisation treaties which are designed to improve copyright protection in the online environment.

The legislation will be reviewed within three years of its commencement.