

MOCKERY AND THE RIGHT TO TRIAL BY JURY

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ABSTRACT

If anyone is possessed of an ambition to fill up ‘gaps’ in the *Constitution* by restoring safeguards to the people, (they) may start by endeavouring to secure that the right of trial by jury in serious cases should be made effective, for, as it is, s 80 means little more than this ‘if an offence against Commonwealth law is triable before a Superior Court and a jury and if it is so tried, then it shall be so tried’.¹

This paper attempts to address the challenge presented by Evatt J, writing extra-judicially of the High Court’s narrow interpretation of the right to trial by jury, conferred on the Australian people in s 80 of the *Constitution*. What could have been a strong protection of what many consider to be a fundamental right has been rendered impotent by the High Court’s interpretation of the section. Ironically, the effect of the section’s current interpretation is that what could have been a protection from Federal Government abuse of process only operates when the Federal Government decides that it should operate. It is this kind of perversity that has led respected members of the High Court to describe the current interpretation of the section as one involving mockery.²

I RIGHT TO TRIAL BY JURY AS A FUNDAMENTAL RIGHT

Only a few references need be made here to demonstrate the fundamental regard in which the right to trial by jury has been held by legal scholars. Lord Atkin described the right as ‘ingrained ... in the British constitution and in the British idea of justice’.³

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¹ H Vere Evatt, ‘The Jury System in Australia’ (1936) 10 *Australian Law Journal* (Supp) 49, 64.

² Kirby J in *Cheng v The Queen* (2000) 203 CLR 248, 332 ‘Section 80 appears in the Constitution. It has been mocked and evaded in Australia for too long’, and Dixon and Evatt JJ in *R v Federal Court of Bankruptcy; ex parte Lowenstein* (1938) 59 CLR 556, 581-582:

A cynic might suggest the possibility that s 80 was drafted in mockery; that its language was carefully chosen so that the guarantee it appeared on the surface to give should be in truth illusory. No court could countenance such a suggestion and ... an intention to produce some real operative effect (should be) conceded to the section ... there is high authority for the proposition that the Constitution is not to be mocked.

³ Lords Debates 5th series, vol 87, 1054. In *Ford v Blurton* 38 TLR 805 he considered that:

Trial by jury ... is an essential principle of our law. It has been the bulwark of liberty, the shield of the poor from the oppression of the rich and powerful. Anyone who knows the

Lord John Russell held it was to trial by jury that the Government of England owed the attachment of its people to the laws.⁴ Blackstone called it the ‘grand bulwark of English liberties which cannot but subsist so long as this palladium remains sacred and inviolate.’⁵ He said:

the antiquity and excellence of this trial for the settling of civil property has already been explained at large. And it will hold much stronger in criminal cases; since in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the sovereign and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has, therefore, wisely placed this strong and twofold barrier of a presentment (grand jury/subsequently committal) and a trial by jury between the liberties of the people and the prerogative of the Crown.⁶

The United States Supreme Court noted that country’s protection of the right:

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant or biased or eccentric judge.⁷

history of our law knows that many of the liberties of the subject were originally established and are maintained by the verdicts of juries in civil cases. Many will think that at the present time the danger of attack by powerful private organizations or by the encroachments of the executive is not diminishing. It is not without importance that the right now taken away is expressly established as part of the American Constitution’. Lord Devlin in *Trial by Jury* (1966) declared ‘trial by jury is more than an instrument of justice and more than one wheel of the constitution; it is the lamp that shows that freedom lives ... the first object of any tyrant ... would be to make Parliament utterly subservient to his will, and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject’s freedom in the hands of twelve of his countrymen (164).

⁴ English Government 394. Refer also to Blackstone’s *Commentaries on the Laws of England* (1st ed, 1966 rep) Book III 379-381, Book IV 342-344. William Forsyth in his book *History of Trial by Jury* (1875) 449 claims that ‘the whole establishment of Kings, Lords and Commons and all the laws and statutes of the realm have only one great object, and that is, to bring twelve men into a jury box’.

⁵ W Blackstone, *Commentaries on the Laws of England* (1876 ed vol 4) 342-343.

⁶ *Ibid* 360, 349-350. He was concerned with the growing trend to summary offences:

And however convenient these may appear at first, yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern’. Lord Devlin observed that a tyrant would firstly make Parliament subservient to his will, and then ‘overthrow or diminish trial by jury.

He concluded jury trial was more than an instrument of justice and more than one wheel of the *Constitution*: ‘It is the lamp that shows that freedom lives’ (Lord Devlin, *Trial by Jury* (1978)).

⁷ *Duncan v Louisiana* (1968) 391 US 145, 156. Professor Joseph Story in his *Commentaries on the Constitution of the United States* (1833:1970 rep Vol III 653) wrote:

The great object of a trial by jury in criminal cases is to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people ... The sympathies of all mankind are enlisted against the revenge and fury of a single despot ... In such a course there is a double security against the prejudices of judges,

Deane J described it as a:

deep seated conviction of free men and women about the way in which justice should be administered in criminal cases. That conviction finds a solid basis in an understanding of the history and functioning of the common law as a bulwark against the tyranny of arbitrary punishment.⁸

Trial judges themselves have expressed reservations about the wisdom of running a major indictable offence trial without a jury,⁹ and the right is considered fundamental in international law.¹⁰

who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy.

Alexis De Tocqueville in *Democracy in America* noted:

The institution of the jury ... places the real direction of society in the hands of the governed, and not in the hands of the government ... He who punishes the criminal is ... the real master of society ... all the sovereigns who had chosen to govern by their own authority, and to direct society instead of obeying its direction have destroyed or enfeebled the institution of the jury: at 282-83.

Refer more recently to the Supreme Court in *Apprendi v New Jersey* (2000) 530 US 466 confirming the fundamental importance of jury trial by requiring that facts that would increase the maximum jail term for the offender must also be proven and accepted by the jury beyond reasonable doubt, and the Supreme Court in *Jones v United States* (1999) 526 US 227, 247-248, noting the founders' fears that the right could be lost not only by gross denial, but by erosion. The Sixth Amendment to the United States *Constitution* guarantees the right to trial by an impartial jury 'in all criminal prosecutions'. Article 3, section 2 cl 3 of that *Constitution* also guarantees that the trial of all crimes will be by jury, excluding impeachment.

⁸ *Kingswell v R* (1985) 159 CLR 264, 298. His Honour added it was part of the 'structure of government and distribution of judicial power adopted by, and for the benefit of, the people of the federation as a whole'. Brennan J in *Brown v The Queen* (1986) 160 CLR 171, 197 described trial by jury as 'the chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice', Murphy J in *Li Chia Hsing v Rankin* (1978) 141 CLR 182, 198 stated that 'the judicature provisions of our *Constitution* should be read in the light of the deep attachment of the people for whom the *Constitution* was made to trial by jury for criminal offences ... the jury system is the main social defence against governmental or other oppression, the main instrument for preserving the liberties of the people', see Justice Murphy, 'Trial by Jury: The Scope of Section 80 of the Constitution' in D Challenger (ed) *The Jury* (1986). Gaudron J in *Cheng v The Queen* (2000) 203 CLR 248, 277 noted that 'trial by jury is so deeply embedded in our judicial process that its importance in protecting the liberty of the individual from oppression and injustice needs no elaboration'. Kirby thought that 'the role of the jury in our legal tradition, in mitigating the operation of laws sometimes considered excessive, would have been well known to the founders of the Australian Commonwealth', 329

G Fricke presents one practical effect of introducing jury trial in Northern Ireland prosecutions. Jury trials were suspended in that country in relation to certain offences. The acquittal rate of courts trying these offences without juries subsequently declined from 57% in 1973 to 33% in 1981. In relation to other offences, the acquittal rate in jury trials increased from 38% to about 60% in Northern Territory during a similar period. Fricke uses this example to justify his view that 'judges who are regularly called upon to hear criminal prosecutions without juries become case-hardened and prosecution-minded': G Fricke, *Trial by Jury* (Research Paper No. 11, Parliament of Australia Parliamentary Library, 1996-97).

⁹ In *R v Marshall* (1986) 43 SASR 448, 496-499, a trial judge presiding alone over a murder charge expressed misgivings; see also Justice Hennan, 'Trial by Judge Alone' (1995) 4 *Journal of Judicial Administration* 240; Justice Hidden 'Trial by Judge Alone in New South Wales' (1997) 9 *Judicial Officers' Bulletin* 41; J Willis, 'Trial by Judge Alone' (1998) 7 *Journal of Judicial Administration* 144.

II BRIEF HISTORY OF RIGHT TO TRIAL BY JURY

Something needs to be said of the history of the fundamental right to trial by jury from its creation and recognition in Great Britain to its eventual adoption in Australian law prior to the drafting of s 80. To understand why s 80 may have been created, it is helpful to appreciate the context and the long history of the right to trial by jury.

Though some have sourced the right to trial by jury to the Magna Carta¹¹ in 1215,¹² the better view seems to be that the English jury practice was originally adopted centuries earlier by the French kings in the exercise of their prerogatives. Maitland states that the French inquisition practice ‘perished, transplanted to England where it grew and flourished, and became that trial by jury which after long centuries Frenchmen introduced into modern France as a foreign, an English, institution’.¹³ This original crude form of jury trial was then adopted in the Assize of Clarendon, an enactment of King Henry II in 1166. The Assize called for inquiry to be made, by the oath of twelve men, as to which persons were ‘publicly suspected’ of robbery, murder or theft, or harbouring those who had committed such an offence.¹⁴

As originally conceived by the French, however, if the king wished to know something, he would employ an inquisitor (investigator) to enquire of the relevant people, such as those living in the area where the dispute or contested events happened.¹⁵ These neighbours were initially witnesses to the action, and reflects the original role of what we now call ‘jury’ members in Great Britain as being witnesses rather than independent umpires.¹⁶ The idea of neighbours as witnesses to the legal action eventually evolved to the position that jurors were not necessarily witnesses, but rather independent arbiters of the truth.¹⁷

A *Development of Right in Great Britain*

It is both interesting and instructive to consider briefly the development of and experience of the right to trial by jury in Great Britain in the centuries before the establishment of British colonies in Australia and the United States. No doubt the

¹⁰ Article 14(1) of the *International Covenant on Civil and Political Rights*, to which Australia is a signatory, requires that everyone shall be entitled to a fair and impartial hearing by a competent, independent and impartial jury established by law; the Sixth Amendment to the United States *Constitution* also guarantees the right to trial by jury in criminal matters.

¹¹ Article 39 of which stated that ‘no freemen (sic) shall be taken or imprisoned except by the lawful judgment of his peers or by the law of the land’.

¹² For example, Justice Harlan speaking for the United States Supreme Court in *Thompson v Utah* (1898) 170 US 343, 349, stated that: ‘when *Magna Carta* declared that no freeman should be deprived of life etc, but by the judgment of his peers or by the law of the land, it referred to a trial by twelve jurors’. See also N Blake ‘The Case for the Jury’ in M Findlay and P Duff (eds) *The Jury Under Attack* (1988).

¹³ F Maitland, *The Constitutional History of England* (1968) 122.

¹⁴ see Professor R H Helmholz ‘The Early History of the Grand Jury and Canon Law’ (1983) 50 *University of Chicago Law Review* 613

¹⁵ Maitland, above n 13, 120-131.

¹⁶ See Justice McHugh ‘Jurors’ Deliberations, Jury Secrecy, Public Policy and the Law of Contempt’ in M Findlay and P Duff (eds) *The Jury Under Attack* (1988).

¹⁷ A development noted by Maitland, above n 13, 211.

British and American experiences were in the minds of the Founding Fathers when drafting the Australian guarantee. As Griffith CJ himself stated in *R v Snow*:

the rationale and the essential function of that guarantee are the protection of the citizen against those who customarily exercise the authority of government; legislators who might seek by their laws to abolish or undermine ‘the institution of trial by jury’ *with all that was connoted by that phrase in constitutional law and in the common law of England*’ (emphasis added).¹⁸

One need hardly comment on the influence of Griffith in the drafting of the Commonwealth *Constitution*, so these comments are considered to be especially significant in the discussion of the right to trial by jury.

The origin of what we now recognize as trial by jury seems to have originated in the practice of the French kings of using the oaths of neighbours to determine a dispute involving the king’s interests. These enquiries by neighbours were known as inquisitions. The king also had power to grant this novel process to private litigants if he wished. This process was then extended to criminal matters. The traditional process of private accusation in criminal matters was dispensed with, being seen as insufficient for the peace of the realm. ‘The king finds himself strong enough to order that the men of a district be sworn to accuse before royal officers, those who have been guilty of crime. These royal officers ... sent out to receive such accusations and hold such inquisitions’.¹⁹

Use of what we might consider to be jury trials grew rapidly in Great Britain from this adoption. By the fourteenth century, it had already become an ancient prerogative to have one’s guilt judged by twelve laymen, regardless of the seriousness of the charge. The inquisition (what we now know as the committal) would take place with what came to be known as a grand jury.²⁰ The actual trial would be decided by a ‘petit’ jury.²¹ Originally, a person could be a member of both the grand jury and the petit jury, but eventually this practice was discouraged. As the volume of cases continued to grow, it became infeasible for trials of every criminal charge to be dealt with through this process.²²

It is recorded that around the time of King Henry VII, penal statutes began to restrict the grand jury’s scope of activity, by authorizing justices to initiate prosecutions themselves, apart from the indictment process. For example, 11 HEN VII c3 allowed justices ‘by their own discretion to hear and determine all offences and contempts’ other than felonies.²³ As the number of offences increased, it became increasingly difficult to

¹⁸ (1915) 20 CLR 315, 323.

¹⁹ Maitland, above n 13, 121-122.

²⁰ Refer to A Bruce ‘The Judge and the Grand Jury’ (1932-1933) 23 *American Institute of Criminal Law and Criminology* 16; and A Lieck, ‘Abolition of the Grand Jury in England’ (1934-1935) 25 *American Institute of Criminal Law and Criminology* 623.

²¹ A French word for small, reflecting the French roots of the practice. Further information concerning these arrangements may be found in S F C Milson *Historical Foundations of the Common Law* (2nd ed, 1981) 409-413, and in J Baker, *An Introduction to English Legal History* (3rd ed, 1990) 87-90, 576-579.

²² F Frankfurter and T Corcoran, ‘Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury’ (1926) 39 *Harvard Law Review* 917, 924.

²³ It was appropriate that contempt offences could be heard by a judge without a jury because the judge had seen the facts himself, and thus did not need members of a jury to give evidence as

arrange for a jury trial for offences, as well as to find suitable people to act as jurors. Parliament, while initially resisting King Henry VII's moves, eventually gave more power to justices to hear and determine matters without resorting to juries. This was particularly the case with newly created offences, such as petty disorders, swearing, drunkenness, embezzlement, and wage-bargaining. Later it was extended to excise legislation, trade laws, and game acts.

An interesting question is whether one can identify a principle upon which the decision was made to entrust an issue to a justice rather than a jury. Frankfurter and Corcoran conclude there was no science to this:

There was no unifying consideration as to the type of criminal offense subjected to summary trial nor any uniformity in the number of magistrates before whom the various offenses were tried. Although the great majority of instances were aptly described as petty violations, some bordered closely on serious felonies and were punished with appropriate severity. The controlling factor seems less the intrinsic gravity of the offense, judged by its danger to the community, than the desire for a swift and convenient remedy.²⁴

Although most offences triable summarily were punishable by fine only, a number were punishable by a term of imprisonment. While in most of these instances, the maximum jail term was 12 months, there were exceptions. For example, one English statute punishing the burning of houses at night, made the felony punishable by transportation to a penal colony for seven years.²⁵

There is substantial literature documenting the expansion in Britain of the number of criminal cases which could be heard by a judge sitting alone.²⁶

The experience with jury trials in Great Britain has been briefly traced here, which shows the evolution and flexibility of the institution of jury trial from its original

witnesses: J Baker, *An Introduction to English Legal History* (1990) 583. Refer also to Lord Devlin, 'The Conscience of the Jury' (1991) 107 *Law Quarterly Review* 398.

²⁴ Frankfurter and Corcoran, above n 22, 927.

²⁵ 22 and 23 CAR II c7, noted in Frankfurter and Corcoran, above n 22, 927. Current examples in Commonwealth statutes where offences may be treated summarily exist although the maximum imprisonment is greater than 12 months. Section 24C of the *Crimes Act*, dealing with seditious enterprises, carries a maximum term of imprisonment of three years. Section 232A of the *Customs Act* 1901 (Cth) creates the offence of rescuing goods that have been seized, destroying goods or documents to prevent their seizure and assaulting officers in the execution of their duty. It provides that an offender should be liable upon summary conviction to imprisonment for two years. Similarly, the legislation unsuccessfully challenged in *Zarb v Kennedy* (1968) 121 CLR 383 provided for two years' imprisonment for an offence which was to be heard summarily.

²⁶ R Burn, *Justice of the Peace* (1776), referred to by Frankfurter and Corcoran; Blackstone, *Commentaries* (1769) 276, 281 deploring the growth of practices threatening the 'disuse' of juries, J Beattie, *Crime and the Courts in England 1660-1800* (1986) 315, Maitland, above n 13, 231. This expansion was not free of criticism, with one author lamenting that 'such powers were appropriate only for minor offences, but even so they infringed the principle that a man should only be judged by his peers, and they were regarded with deep suspicion by the superior judges': J Baker, *An Introduction to English Legal History* (1990) 584, and another lamenting that some of those chosen to act as magistrates were unfit for their work and others were actually corrupt: Sir G Cross and G D H Hall, *The English Legal System* (4th edition, 1964).

conception. There has been a history of continual refinement and modification of the incidents of trial by jury through the centuries.²⁷

B *Reception of Trial by Jury in the Colonies*

1 *The Australian Experience*

While the historical material available is understandably limited and not available in detail, it is clear that there was no immediate adoption of something like a jury system upon the arrival of the First Fleet.²⁸ An 1787 Act authorised the establishment of a court of criminal judicature in the penal settlement of New South Wales.²⁹ However, the court was to comprise a judge together with six navy or army officers. The strong military presence on the court, resembling in many ways a court-martial, reflected the nature of the settlement as a penal colony. This system might have been suitable in the early days, but as the number of free settlers and emancipists grew, the military nature of court proceedings grew increasingly incongruous.³⁰ It has been suggested that the military tribunal could be manipulated by Macarthur and others and could not be relied on to be impartial, especially when military interests were involved.³¹

Reflecting the need for some changes to the adjudication system in the fledgling settlement, the 1823 Act³² created a jury system for civil cases, with the main qualification for service on the jury being property ownership. There is a record in 1825 of the first civil case to be heard by a jury in the colony of New South Wales.³³ Changes made to the criminal system required that the officers take an oath of the same nature as (non-military) jurors in England made.

As early as 1824, there is a record of the New South Wales Supreme Court Chief Justice Forbes, strongly advocating jury trial.³⁴ Reform proposals from the New South Wales

²⁷ A point noted by the High Court in *Brownlee v The Queen* (2001) 207 CLR 278, 286 (Gleeson CJ and McHugh J), 291 (Gaudron Gummow and Hayne JJ).

²⁸ Vere Evatt, above n 1, 53.

²⁹ 27 Geo III c2.

³⁰ Early advocates of a jury system for all criminal trials in the colony included William Balmain, Captain Bligh, and Ellis Bent, who had been appointed Deputy Judge-Advocate in the colony: The Committee of Inquiry of 1812 agreed with the views of Captain Bligh that the inhabitants of the colony were anxious 'not to be so much in the power of the military' and 'to have some kind of justice that might bring them nearer to their brethren in Great Britain', Melbourne, *Early Constitutional Development in Australia* (1963) 40-42., 51.

³¹ Fricke, above n 8, 3.

³² 4 Geo IV c96.

³³ J M Bennett, 'The Establishment of Jury Trial in New South Wales' (1961) 3 *Sydney Law Review* 463.

³⁴ Sydney Gazette, 21 October, 1824: 'it would not merely be against the express language of Magna Charta (sic) to try free British subjects, without the common right of a jury, but against the whole law and constitution of England'. The judge was said to have issued a mandamus, the result of which was that a complete system of civil jury trial was set in motion at the Quarter Sessions level. The Executive Council of New South Wales would later wholeheartedly agree with the jury system, mandating it for both civil trials and criminal trials, with half of the jury in a criminal case to be commissioned officers, and the other half local residents. In 1832, a bill was passed providing for criminal cases to be heard by 12 civil inhabitants of the colony where the Governor or any Member of the Executive Council might have some personal interest in the case, and this entitlement to jury trial in criminal cases was extended to crimes and misdemeanours generally in the colony by an 1847 Act (11 VIC no20).

Executive Council in that year were prepared at the request of Lord Bathurst in England. They included the proposal that the trial of all crimes and misdemeanours should take place before juries comprised of six officers or magistrates nominated by the Governor and six inhabitants of the colony proposed by the sheriff.³⁵ The proposals were supported by Governor Darling.

However, the English authorities continued to resist calls for the general introduction of trial by jury. They were influenced by reports from John Bigge who advocated continuing the military-based system, on the basis that the officers were less likely to come into contact with the general population, and so be prejudiced by local jealousies and disputes, than would members of a jury.³⁶ James Stephen rejected juries due to the then makeup of the New South Wales population, 'there would be no chance of equal justice being done by any juries which could be empanelled'.³⁷ Criminal cases continued to be heard by a judge and a panel of seven commissioned officers (called a 'jury' but not resembling the then-established English practice of appointing citizens with no particular background). There is some evidence that during some Quarter Sessions, trial by jury was adopted as a matter of standard practice. This was, however, contrary to the express provisions of the 1823 Act.

Again in 1828, the House of Commons considered and refused an argument from some colonists for guaranteed jury trial. Importantly though, the House passed a law allowing the Crown to authorise the Governor of New South Wales to make necessary provision for further introduction and application of the right.³⁸ Newly appointed Governor Bourke was determined to take advantage of this right. He implemented legislation in 1832 which conferred a right to trial by jury in cases where the Governor or a public official might have a personal interest. In 1833, he narrowly secured support for his Bill entitling a person accused of crimes and misdemeanours to a jury trial of 12 persons.³⁹ It was agreed that a convicted person who had served their time might be eligible for jury service. Civil matters would also be heard by a jury of 12.⁴⁰

This development was as much a victory for the rights of the accused as it was for the broader political struggle occurring within the colony, which would eventually embrace representative institutions rather than autocratic governance. Competence to serve on juries also meant competence to vote for and be a member of the representative political institutions which would eventually be granted to the colony.⁴¹

There is little historical evidence of the development of the practice of holding summary trials in the colonies. However, Evatt documented that in 1922, while 857 prisoners

³⁵ Melbourne, above n 30, 124.

³⁶ Ibid, 76-77.

³⁷ Ibid, 148.

³⁸ Section 6 9 George IV c83.

³⁹ In other colonies, the process was easier: the first jury trial took place in Victoria in 1839, and the other colonies soon followed: see M Chesterman, 'Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy' (1999) 62 *Law and Contemporary Problems* 69.

⁴⁰ 2 Wil IV c3, extended by various laws including 4 Wil IV c12, the number of jurors in civil cases reduced to four in New South Wales by 8 Vic c4

⁴¹ D Neal, *The Rule of Law in a Penal Colony* (1991) 170; and 'The Political Significance of the Jury' in D Challenger (ed), *The Jury* (1986), proceedings of the Australian Institute of Criminology Seminar on the Jury. Links between juries and political stability also appear in Lord Devlin, *The Judge* (1981) 127.

were convicted upon indictment, 5,666 had been convicted in police (magistrates) courts, presumably after a summary trial. Figures from 1923 showed similar results, with 907 prisoners convicted upon indictment, and 5,571 convicted in the police courts. In other words, about 85% of the total number of persons imprisoned during the year had been convicted summarily of offences.

It is interesting to consider in what circumstances a jury trial, as opposed to a summary proceeding, would take place in each of the colonies. Again, there is scant evidence of this. It seems however that the New South Wales Government at one stage conferred limited jurisdiction on a magistrate to deal (summarily) with 'indictable' offences.⁴² This tends to support the views of Deane J in *Kingswell v R* that 'indictment' referred to the form of proceedings, and did not necessarily prescribe a form of trial, namely trial by jury, although in practice the two were often connected.⁴³ Reports of the practices in other colonies/States state that 'all criminal issues on indictment are determined by a jury of twelve' but unfortunately do not explain the basis on which proceedings are brought upon indictment or summarily.⁴⁴ There is no reference to police (magistrates) courts in the discussion of any other colony than New South Wales.⁴⁵

However, there is authority for the statement that trial on indictment otherwise than by trial by jury was unknown to the Australian colonies prior to federation. Wilson J makes this point in *Brown*, citing *R v Alice Short* as authority for the proposition.⁴⁶ That case involved the accused being charged with murder, and convicted of manslaughter. After all jurors had been sworn, one of them became ill, and could not continue. Another juror was found, and sworn in. However, the remaining 11 jurors were not re-sworn. The Supreme Court of New South Wales was in no doubt in that case that the conviction could not stand. It is rejected by them in that case that the accused could have consented to a trial (at least for murder) without a properly constituted jury. The High Court unanimously held in *Cheatle v The Queen* that 'by the time of federation, the common law institution of trial by jury had been adopted in all the Australian colonies as the method of trial of *serious* (emphasis added) criminal offences.'⁴⁷

Summarising the Australian experience, we see for historical reasons an initial denial of an accused's right to trial by jury in the newly established penal colony, but a gradual

⁴² Evatt refers to a 1924 New South Wales law which 'extended the jurisdiction of the magistrates so as to cover a certain number of indictable offences, including larceny, where the amount involved did not exceed 10 pounds'. Previously, those accused of indictable offences had a guaranteed right to trial by jury. Wilson J in *Brown v The Queen* refers to *R v Alice Short* as authority for the proposition that 'trials on indictment otherwise than by jury were unknown in the Australian colonies prior to 1900'.

⁴³ (1985) 159 CLR 264, 305-306.

⁴⁴ This is considered unusual, because the Evatt article goes into detail on the extent to which charges are dealt with summarily, rather than by jury, in New South Wales. The lack of reference to what was happening in other States may reflect a difficulty in obtaining satisfactory evidence of the practice in other States. It is considered unlikely to reflect that summary jurisdiction was not available in those other States.

⁴⁵ J Quick and R Garran, *Commentaries on the Constitution* (1901) do not shed light on this issue, but conclude that 'the distinction ... between indictable offences and offences punishable in a summary way ...(should be interpreted such that the s80 protection should) extend to all prosecutions which are substantially in the nature of an indictment'.

⁴⁶ (1898) 19 NSW 385.

⁴⁷ (1993) 177 CLR 541, 549, to like effect *Kingswell v R* (1985) 159 CLR 264, 304 (Deane J).

acceptance of its desirability. By the time of federation, the right to trial by jury was well established, at least for serious offences.⁴⁸ Alice Short was not able to waive this right in 1898 because the right was well-established in the colonies by then, having been (belatedly) adopted from England and reflecting the English interpretation of the fundamental importance of the right.⁴⁹

2 *United States Experience*

It is instructive to consider the experience of another former British colony in its recognition of the right to trial by jury prior to the recognition of that right in the United States *Constitution*.⁵⁰ It has been noted of this consideration that ‘all of the colonies, to some extent at least, re-lived the experience of the mother country, and resorted to summary jurisdiction for minor offenses with full loyalty to their conception of the Englishman’s right to trial by jury’.⁵¹

For example, the practice in New York from at least 1685 was that justices of the peace were given jurisdiction to deal with drunkenness, swearing and Sabbath-breaking, without jury involvement. In the early 1700s, this was extended to laws relating to fish and game, liquor sales, forest fires, servants, cattle, vagrancy and later grand larceny. Some offences that could be dealt with summarily could be punished by jail terms.

Denial of the right to trial by jury in some cases was one of the reasons for separation contained in the *Declaration of Independence* (1776), but reliance on summary trials continued after independence from Britain.

The New York courts’ use of the pre-existing practice in relation to jury trials has been interesting in cases involving interpretation of the New York Constitution. For example,

⁴⁸ Deane J stated in *Kingswell v R* (1985) 159 CLR 264, 306 that the founding fathers were presumably aware of the distinction between trials on indictment and summary offences when agreeing to a draft of the section. Deane J concludes that the practice at the time of federation was that offences punishable by at least one year’s imprisonment be heard by jury: at 309.

⁴⁹ Griffith CJ in *R v Snow* (1915) 20 CLR 315, 323 saw s 80 as designed to make sure that the ‘institution of trial by jury with all that was connoted by that phrase in constitutional law and in the common law of England’ should be applied. Deane J noted in *Kingswell* at 300, that when British settlements were established in other parts of the world, trial by jury was claimed as a ‘birthright and inheritance’ under the common law.

⁵⁰ Connecting the United States experience with the Australian, the High Court noted in *Cheatle v The Queen* (1993) 177 CLR 541, 556 that ‘one would expect that it was the intention of the framers of our Constitution to carry over into s 80 any settled interpretation of the words of that central command in the United States provision’. Kirby J in *Cheng* also connected the two countries’ experience: ‘The United States inherited, in virtually all jurisdictions, as did this country, the common law of England. It received the traditions and practices of English criminal procedure, including trial by jury’, 330, and ‘the concepts and history that underlie the United States jurisprudence are equally applicable here. They are relevant because the textual differences are immaterial’, 332.

⁵¹ F Frankfurter and T Corcoran, ‘Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury’ (1926) 39 *Harvard Law Review* 917, 936. Again, this seems to have occurred for reasons of expediency. Some evidence of this is found in a Pennsylvania law of 1700, defining the jurisdiction of the justices. Introducing a system of summary proceedings for minor cases, it reasoned ‘whereas many times, persons for misdemeanours, the fine of which is but small, being presented by the grand jury ... have been put to great charges by reason of the fees that have been accrued thereupon, for prevention whereof (this law has been enacted)’: 2 *Pennsylvania Statutes* c21, 19.

in cases such as *Murphy v People*⁵² and *Jackson v Wood*,⁵³ the Supreme Court relied upon the implication of the colonial practice for taking trials for petty larceny out of the jury requirements. The Court of Appeals in 1878 declared the constitutional protection of trial by jury not applicable to prosecutions for assault and battery which, under colonial law, had been dealt with summarily.⁵⁴ This leads Frankfurter and Corcoran to the conclusion that ‘in New York, the available limits of a criminal procedure which dispenses with trial by jury have not been found in the language of its *Constitution*. They have been drawn from colonial history’.⁵⁵

While there is little evidence of the distinction in Australia made between offences which could be heard summarily and those which required jury trial, the distinction was made explicit by the Court of Errors and Appeals in a New Jersey case:

the real underlying historically established test depends upon the character of the offence involved rather than upon the penalty imposed. The offence must be a petty and trivial violation of regulations established under the police power of the state in order that the offender may be summarily tried, convicted, and punished without indictment by a grand jury and without trial by a petit jury. It must, of course, be assumed that the punishment for such a petty and trivial offence must also be comparatively petty and trivial ... the theory, as I understand it, that gave rise to the distinction at common law and in subsequent statutes, is that the convenience and benefit to the public resulting from a prompt and inexpensive trial and punishment of violations of petty and trivial police power regulations are more important than the comparatively small prejudice to the individual resulting from his being deprived of the safeguard of indictment before having to answer and of trial by a jury when held to answer. This, of course, is the converse of the rule with regard to serious offences, crimes and misdemeanours, where, for the preservation of the liberties of the people, the security afforded the individual by his right to trial by jury is more important than the mere convenience of the public arising from a speedy and inexpensive summary trial.⁵⁶

In summary, the experience in both Australia and the United States has been the implementation of the British experience of trial by jury as a general principle, subject to exceptions given the petty nature of the offence.

⁵² (1824) 2 Cow (NY) 815.

⁵³ (1824) 2 Cow (NY) 819.

⁵⁴ *People ex rel Murray v Justices* (1878) 74 NY 406, to like effect *People v Craig* (1909) 195 NY 190.

⁵⁵ Frankfurter and Corcoran, above n 51, 949. A similar result eventuated in Connecticut, where the summary jurisdiction which existed in that colony was thought to have been implicitly incorporated in its constitution of 1818, though the document actually stated that trial by jury was a right of the accused in all criminal cases. The provision was read down on the basis it was never intended to take from judges the long-standing power to deal with petty offences without resorting to a jury trial (*Goddard v State* (1838) 12 Conn 448, 455). One might refer also to Pennsylvania, where again the guarantee of jury trial has been read down to not apply to summary prosecution for minor offences. As Judge Strong (later of the United States Supreme Court) noted:

it was a right the title to which is founded upon usage, and its measure is therefore to be sought in the usages which prevailed at the time when it was asserted ... Summary convictions for petty offences against statutes were always sustained, and they were never supposed to be in conflict with the common law right to a trial by jury. The ancient as well as modern British statutes at large are full of Acts of Parliament authorizing such convictions: *Byers v Commonwealth* (1862) 42 Pa St 89.

⁵⁶ *Katz v Eldredge* (1922) 97 NJL 123, 151.

There is also ample authority in the United States context for interpreting their constitutional protection to trial by jury in the light of its meaning in the common law. For example in *American Publishing Co v Fisher*,⁵⁷ the Supreme Court concluded that a unanimous verdict was required to meet the requirements of the Sixth Amendment right to trial by jury, reasoning that ‘unanimity was one of the peculiar and essential features of trial by jury at the common law’.

III RIGHT TO TRIAL BY JURY IN THE COMMONWEALTH CONSTITUTION

Section 80 of the Commonwealth *Constitution* seems to confer a guarantee of trial by jury, at least for Commonwealth offences.⁵⁸ However, previous decisions of the High Court have clearly not given it a broad operation and rendered the guarantee a frail one at best, as we shall see.

Two questions which arise upon reading the section:

- (a) the meaning of the phrase ‘trial on indictment of any offence’; and
- (b) why the clause applied only to a law of the Commonwealth, when the Founding Fathers had left the topic of crime, criminal law and criminal process to the States.

A *Meaning of Indictment of any Offence*

A logical place to start in addressing the first question is to consider the Convention Debates, accepting they are an imperfect record of the intentions of the drafters of the *Constitution*, and their persuasiveness in interpreting a clause of the *Constitution* is a matter for conjecture more than 100 years after the document was drafted.⁵⁹

Griffith’s 1891 draft of the clause confined the guarantee to ‘indictable offences’. During debate in Melbourne in 1898, Isaacs put the view that the guarantee could be evaded, through the Commonwealth redefining the word indictable so that any offence could be defined as non-indictable, thus rendering the supposed protection impotent. He noted that it was for Parliament to decide what would be an indictable offence and what would not be. If the Parliament wished to, it could say that murder was not an indictable offence, and the trial could lawfully take place without a jury.⁶⁰ Wise, O’Connor and Barton apparently were concerned with this suggestion. They asked

⁵⁷ (1897) 166 US 464, 468; see also *Patton v United States* (1930) 281 US 276, 297 (allowing limited exceptions to this principle); *Johnson v Louisiana* (1972) 406 US 356 and *Apodaca v Oregon* (1973) 406 US 404; R Rutland, *The Birth of the Bill of Rights 1776-1791* (1983).

⁵⁸ ‘The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State, the trial shall be held at such place or places at the Parliament prescribes’. The section appears to be based on equivalent provisions in the United States *Constitution*, Article 2 s 2 cl 3 of which requires that the trial of all crimes be by jury, held in the state where the offence was committed, but when not committed within any State, by such places as the Congress directs.

⁵⁹ In *Cole v Whitfield* (1988) 165 CLR 360, 390 the High Court, discussing the use of the Convention Debates, stated that:

Reference to ... history ... may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of the language used, (and) the subject to which that language was directed.

⁶⁰ *Convention Debates* (Melbourne 1898) 1894.

whether public sentiment would ever tolerate the punishment of imprisonment for an offence which was not triable on indictment. This has been taken as a suggestion that Wise, at least, attributed to the public an understanding of indictment as being a necessary precursor to imprisonment.⁶¹

Interestingly, Barton moved an amendment to change ‘trial of all indictable offences’ to ‘trial on indictment of any offence’. His reasoning was that:

There will be numerous Commonwealth enactments which would prescribe, and properly prescribe, punishment and summary punishment; and if we do not alter the clause in this way they will have to be tried by jury, which would be a cumbrous thing, and would hamper the administration of justice of *minor cases* entirely (emphasis added).⁶²

Quick and Garran state the object of this amendment ‘was to allow summary punishment of minor offences and contempts, even though they might be indictable’.⁶³ The majority of the High Court in *Cheng*⁶⁴ relied on the acceptance of this amendment as evidence that it was intended to provide Parliament with complete discretion over the availability of jury trials.

However, it is argued here the above conclusion is not necessarily correct. It seems that Barton believed that a jury trial should not be available to those accused of minor crimes, in case the courts would be clogged. This is an unremarkable concern which finds support in the history of the English system. However, it seems from his singling out of ‘minor offences’ in making the above comment that it was implicit in his mind that a right to jury trial would be automatic for those accused of serious crimes (however defined). And further, that Barton had no quibble with such a position. The author is not the only one with this view of the comments of Barton.⁶⁵

La Nauze asks the obvious question – when the potential for the section to be meaningless was so clear, why was it let through? His answer is that:

⁶¹ A Simpson and M Wood, ‘A Puny Thing Indeed – *Cheng v The Queen* and the Constitutional Right to Trial by Jury’ (2001) 29 *Federal Law Review* 95, 108

⁶² *Official Record of the Debates of the Australasian Federal Convention* (Melbourne 4 March 1898) 1895.

⁶³ Quick and Garran, above n 45, 807.

⁶⁴ *Cheng v The Queen* (2000) 203 CLR 248.

⁶⁵ Simpson and Wood, above n 61, 109, noting that Barton reinforced this qualification several times while explaining his proposal:

The original draft meant that, however small might be the offence created by any Commonwealth enactment, supposing an offence that should be punishable summarily, it would, nevertheless, have to be tried by jury ... The better way, however, is as we suggest, that where there is a power of punishing a minor offence summarily, it may be so punished summarily. But where an indictment has been brought the trial must be by jury’: *Official Record of the Debates of the Australasian Federal Convention* (Melbourne 1898 Vol 5) 194. Further evidence is found at 1895: ‘There will be numerous Commonwealth enactments which would prescribe, and properly prescribe, punishment and summary punishment; and if we do not alter the clause in this way they will have to be tried by jury, which would be a cumbrous thing, and would hamper the administration of justice of *minor cases* entirely (emphasis added).

A further mischief Barton perhaps saw was a situation where s 80 compelled a jury trial for some minor offence, by reason only of its historical classification as an indictable offence at common law, for example criminal contempt. Historically, this crime was an indictable offence, but a practice had long developed of allowing it to be dealt with summarily.

presumably, they were perfectly confident, for the reasons implied by Sir Owen Dixon, that trial by jury would not be in danger in the types of cases in which it was sanctioned by centuries of tradition. Most of these cases, in any event, would in the first instance be within the jurisdiction of State courts; neither States nor Commonwealth would seek to abolish or evade the use of juries where it was necessary to justice as conceived by the electors.⁶⁶

IV POSSIBLE INTERPRETATIONS OF 'TRIAL ON INDICTMENT OF ANY OFFENCE'

A *Literal Approach*

The High Court has until now accepted a literal reading of the words of the section. As Higgins J put it in *Archdall*, 'if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment'.⁶⁷ This approach, which has been unquestioningly accepted by most High Court judges hearing s 80 matters,⁶⁸ is considered by the writer to be fundamentally wrong. Others have questioned its precedent value, given that the judgment contains no reasoning.⁶⁹ It has been called by some commentators a decision of 'dubious pedigree'.⁷⁰

It is argued that the chief error made in this reasoning is the meaning of 'trial on indictment'. The orthodox view is that these words mean 'trial initiated by a procedure which involves trial by jury'. However, if read in this way, the section is tautological.

⁶⁶ J La Nauze, *Making of the Australian Constitution* (1972) 228. This fits with the Founding Fathers general (Diceyan-influenced) antipathy towards explicit rights protection. It was unnecessary due to their faith in the Parliamentary process. Cockburn at the Convention Debates, for example, wondered whether any of the colonies had ever attempted to deprive a person of life, limb or property without due process, and was concerned comments such as 'pretty things these States of Australia; they have to be prevented by provisions in the Constitution from doing the grossest injustice' would be made by observers if an express Bill of Rights were included: *Convention Debates* (Melbourne 1898 vol 1) 688.

⁶⁷ *R v Archdall and Roskrugge; Ex Parte Brown* (1928) 41 CLR 128, 138-139. McHugh J reiterated this view in *Cheng v The Queen* (2000) 203 CLR 248, 291: 'The literal meaning of s 80 is very clear: trial by jury is required only where the trial is on indictment'.

⁶⁸ *R v Federal Court of Bankruptcy; Ex Parte Lowenstein* (1938) 59 CLR 556 (Dixon and Evatt JJ dissenting), *Zarb v Kennedy* (1968) 121 CLR 283, *Li Chia Hsing v Rankin* (1978) 141 CLR 182 (Murphy J dissenting), *Kingswell v R* (1985) 159 CLR 264 (Brennan and Deane JJ dissenting), *Brown v The Queen* (1986) 160 CLR 171 (Brennan and Deane JJ dissenting on this point), *Cheng v The Queen* (2000) 203 CLR 248 (Gaudron and Kirby JJ dissenting on this point), *Brownlee v The Queen* (2001) 207 CLR 278 (Kirby J dissenting on this point).

⁶⁹ Simpson and Wood, above n 61, 103-104 point out that by today's standards, the court's refusal in *Archdall* to provide reasons taints its precedent authority, citing Gleeson CJ 'Judicial Legitimacy', an address to the Australian Bar Association Conference, New York, 2 July 2000 for the observation 'decisions of the High Court are not subject to the usual form of judicial accountability, that is to say, the appeals process. The only form of accountability which applies is the requirement to give reasons'. Others have expressed reservations with the courts' reliance on *Archdall* include G Williams, *Human Rights Under the Australian Constitution* (1999) 107 and M Coper, *Encounters With the Australian Constitution* (1987), 326:

Despite the absence of any supporting reasoning, this (*Archdall*) peremptory decision sealed the fate of section 80. As has happened at various times in the development of Australian constitutional law, the issue quickly assumed the aura of being settled, even though it had not been the subject of full discussion, and it maintained that aura through constant repetition ... of the bare assertion that it was settled.

⁷⁰ J Willis, 'Paying Lip Service to the Jury' in Dennis Challenger (ed), *The Jury* (1986) 37, noted that 'for reasons best known to itself, (the High Court has) refused to give s 80 any real effect'.

Literally, it reads that ‘a trial by jury shall be by jury’. This is clearly a ridiculous outcome, and one reason why a literal approach should not be taken to the section.

Dixon and Evatt JJ were similarly unimpressed with the orthodox view:

It is a queer intention to ascribe to a Constitution; for it supposes that the concern of the framers of the provision was not to ensure that no one should be held guilty of a serious offence against the laws of the Commonwealth except by the verdict of a jury, but to prevent a procedural solecism, namely the use of an indictment in cases where the legislature might think fit to authorize the court itself to pass upon the guilt or innocence of the prisoner. There is high authority for the proposition the *Constitution* is not to be mocked.⁷¹

They found the orthodox view ‘treats (the) constitutional provision as producing no substantial effect (which) seems rather to defeat than to ascertain its intention’.⁷²

McHugh J in *Cheng v The Queen*,⁷³ though eventually accepting the orthodox narrow view regarding the scope of the section, admitted that so interpreted, ‘the section serves little purpose’.⁷⁴

One might wonder about the wisdom of continuing to interpret a provision in such a fundamental document as the Australian *Constitution* in a way that even some of its adherents admit render the section impotent.⁷⁵ This is even more so, when one realizes that potentially, the section could be used to strongly protect rights which many great judges and legal scholars agree are fundamental in a democratic society.

B *Reading the Section in its Historical Context and Consistently*

A better way of viewing the requirement for a trial on indictment to be heard by a jury may be to ascribe to ‘trial on indictment’ a different meaning. One meaning could be that the English understood a trial on indictment to be a two-stage process, which in that country came to involve a grand jury deciding the prima facie case question, and then a petit jury assessing guilt. Perhaps if the ‘indictment’ is used to describe the two-stage process, rather than the requirement for a jury, some interpretation difficulties would disappear from the section. The next question would be then on which occasions this two-stage process was used. The answer might be, only in relation to serious charges, however defined. This was certainly the English experience – once generally accepted, trial by jury was initially used for all criminal proceedings, only to be subsequently progressively limited as minor matters were transferred to the magistrates for

⁷¹ *R v Federal Court of Bankruptcy; Ex Parte Lowenstein* (1938) 59 CLR 556, 581-582; Deane J agreed in *Kingswell* at 307.

⁷² *Ibid* 584. Even McHugh J, who accepts the majority orthodox view, admitted in *Cheng* that the result is that the section serves little purpose, 289.

⁷³ (2000) 203 CLR 248, 289.

⁷⁴ Kirby J lamented that the effect of the orthodox view of s 80 was that the section ‘might just as well not have been included in the *Constitution*’, 307.

⁷⁵ As Barwick CJ lamented, but declined to address, ‘what might have been thought to be a great constitutional guarantee has been discovered to be a mere procedural provision’: *Spratt v Hermes* (1965) 114 CLR 226, 244.

consideration without a jury.⁷⁶ Let us consider whether there is any historical support for this interpretation.

The historical evidence in relation to England is not precise in determining the meaning of the phrase ‘trial on indictment’ or the word ‘indictment’. Writing of English criminal history, Beattie writes ‘the main record of those courts was the indictment, the formal charge against the prisoner that was normally drawn up by a clerk of the court, and read in summary form when the prisoner was arraigned ... The indictment contained the name of the accused and his occupation and residence, and it stated the date, place and nature of the crime ... By the seventeenth century, the clerks were listing on the back of the bill the names of witnesses sworn in court. On the reverse side is also to be found the verdict of the grand jury, which either sent the accused to trial or discharged him on the grounds there was no case to be answered’.⁷⁷

A reading of *The Constitutional History of England* gives another sense in which the word ‘indict’ is used. Maitland⁷⁸ uses the phrase ‘the trial of a man for crime by a petty jury after a grand jury has indicted him’. This indicates the nature of an indictment as a two stage process. Maitland then goes on to consider the English practice from the Norman conquest, where initially criminal matters were heard by appeal or private accusation, which led to trial by battle. He notes that gradually under Henry II and his heirs, parties to a dispute could purchase from the king the privilege of having questions tried by an inquest of neighbours (similar to the originally French practice of inquisitions). This was known as the indictment. If the inquest found there was a case to answer, the matter would proceed to trial. This originally involved trial by ordeal but then itself evolved into trial by neighbours.

The conclusion reached on the English historical material available is that originally sourced in France, trial on indictment was closely associated with a jury trial. However, it was not associated in the modern way, whereby there is initially a committal before a magistrate alone, followed by a jury trial. The traditional way was that the committal would be by jury, followed by trial by ordeal, combat etc. Later, these alternate ways themselves also gave way to jury trial. Juries were thus initially involved in both stages of the process. So the word ‘indictment’ and the phrase ‘trial by indictment’ certainly contemplated the use of juries; but also contemplated a two-stage process of determining guilt. It may be an error to equate ‘trial by indictment’ with ‘trial by jury’.

V ARGUMENT FOR BROAD READING OF S 80 BASED ON HISTORY

Both the Australian and American courts have considered the meaning of the right to trial by jury by referring to the historical practice in England. There is clear authority

⁷⁶ Reference has already been made to this English trend. Beattie wrote of the trend still occurring hundreds of years after it had commenced:

In the nineteenth century numerous minor property offences and assaults were transferred to the jurisdiction of magistrates acting summarily. This had begun in the eighteenth century and had gone far enough to worry libertarians like Blackstone who deplored the growth of practices that threatened ‘the disuse of juries.

However, as at 1800, all felonies and many misdemeanours continued to be tried before juries: J Beattie, *Crime and the Courts in England 1660-1800* (1968) 315.

⁷⁷ Ibid 19, Professor Helmholz, ‘The Early History of the Grand Jury and the Canon Law’ (1983) 50 *University of Chicago Law Review* 613.

⁷⁸ Maitland, above n 13, 126.

for reading s 80 in light of the common law existing at the time. In considering the question of unanimous jury verdicts, the High Court in *Cheatle* concluded:

in 1900, it was an essential feature of the institution (jury trials) that an accused person could not be convicted otherwise than by the agreement ... of all the jurors. It is well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law's history.⁷⁹

An earlier reference to the Convention Debates on s 80 indicates the belief of the one who proposed an amendment to it that the right to jury trial would continue to exist for those accused of serious crimes, as it had at common law.⁸⁰

If the High Court is impressed with the history of the right in confirming that the right is an absolute one, as it did in *Cheatle*, is it not logical to consistently conclude that the history of the right is that it is particularly fundamental in serious criminal cases (however defined). If the Supreme Court of New South Wales was convinced in 1898 that Alice Short could not have elected to have her murder charge heard by a judge sitting alone, is this not evidence that prior to federation, an accused had an absolute right to trial by jury in serious criminal cases, and this position needs to be reflected in how we interpret and apply s 80?⁸¹

A *History and 'Functionality' or 'Essentiality'*

Professor Scott wrote of the evolving meaning of trial by jury in the following terms:

only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature. The question of the constitutionality of any particular modification of the law as to trial by jury resolves itself into a question of what requirements are fundamental and what are inessential, a question which is necessarily, in the last analysis, one of degree. The question, it is submitted, should be approached in a spirit of open-mindedness, of readiness to accept

⁷⁹ *Cheatle v The Queen* (1993) 177 CLR 541, 552; one may also recall the comments of Griffith CJ in *Snow* (1915) 20 CLR 315, 323 that the requirement of s 80 involved an adoption of the institution of trial by jury with all that was connoted by that phrase in constitutional law and the common law of England.

⁸⁰ Barton at the 1898 Convention, in moving an amendment, commented that if the Court had to hear all cases involving Commonwealth offences by jury, this would 'hamper the administration of justice of minor cases entirely'. This is submitted to imply that the section was not intended to take away the then common law right to a jury trial in 'serious' cases: *Official Record of the Debates of the Australasian Federal Convention* (Melbourne 4 March 1898), 1894. (After quoting these remarks, McHugh J in *Cheng* concludes that the words of the section show 'the freedom of the Parliament to choose which offences should be classified as indictable and which should be classified as summary, so that the Parliament could control which offences against the law of the Commonwealth should be tried by jury', 295). The author cannot agree, with respect, that this is a reasonable summation of the available historical literature from the *Convention Debates*. The comments by Barton are taken, to the contrary, to mean the continuation of the common law right to trial by jury. If the founding fathers had doubted whether it would continue, they would have guaranteed it in the wording of s 80.

⁸¹ This view is inconsistent with the comment of McHugh J in *Cheng v The Queen* (2000) 203 CLR 249, 295 that: 'whether one looks at text, history or purpose, the answer is the same: the approach to the construction of s 80 accepted by the majority in *Kingswell* and by this court in earlier cases is correct. Section 80 is not a great guarantee of trial by jury for serious matters'.

any changes which do not impair the fundamentals of trial by jury. It is a question of substance, not form.⁸²

The High Court in *Cheatle v The Queen*⁸³ indicated its interpretation of the right to trial by jury would be influenced by what it saw as the ‘essential’ characteristics of that right, influenced by history. In deciding in that case that the section required that the verdict be unanimous, the unanimous judgment took solace in the fact that ‘in 1900, it was an essential feature of the institution that an accused person could not be convicted otherwise than by the agreement or consensus of all the jurors’.⁸⁴ The court concluded that neither the exclusion of females nor the existence of some property qualification was an essential feature of the jury system in the Australian colonies as at 1900.

This reasoning was continued by members of the Court in *Brownlee v The Queen*.⁸⁵ Gleeson CJ and McHugh J referred with apparent approval to the functional approach applied in the United States for determining the validity of legislation regulating juries,⁸⁶ in compiling their own list of ‘essential features’.⁸⁷ Gleeson CJ and McHugh J considered whether it was, or should today be, an essential requirement of jury trial that the jury be sequestered during its deliberations. They acknowledged that the incidents of jury trials changed dramatically over the centuries, and would continue to do so. Given this, it could not be said that all of the characteristics of jury trial at any given time were considered essential. On the facts, the requirement that the jury be kept isolated during deliberations was not an essential one.⁸⁸ The contemplation in State legislation of its departure did not offend s 80 of the *Constitution*.

Though Kirby J took a different view as to the importance of the history of the s 80 provision, he agreed the enquiry should be as to the essential characteristics of trial by jury, and agreed that sequestration of the jury while deliberating was not one of them.⁸⁹

⁸² A W Scott, ‘Trial by Jury and the Reform of Civil Procedure’ (1918) 31 *Harvard Law Review* 669, approved of by Brandeis J in *Ex Parte Peterson* (1920) 253 US 300, 310.

⁸³ (1993) 177 CLR 541.

⁸⁴ It added that it was:

Well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law’s history. In the context of the history of the criminal trial by jury, one would assume that s 80’s directive that the trial to which it refers must be by jury was intended to encompass that element of unanimity: *Cheatle v The Queen* (1993) 177 CLR 541, 552.

⁸⁵ (2001) 207 CLR 278; see for discussion J McConvill and M Joy, ‘Approaching Constitutional Trial by Jury: *Brownlee v The Queen* (2001) 6 *Deakin Law Review* 217.

⁸⁶ Their Honours referred to *Williams v Florida* (1970) 399 US 78, where the United States Supreme Court stated that the essential feature of a jury lay in the interposition between the accused and his accuser of the commonsense judgment of lay persons, and in the community participation and shared responsibility resulting from that group’s determination of guilt or innocence.

⁸⁷ The list included independence, representativeness and randomness of selection, the need to maintain the prosecution’s obligation to prove the case beyond a reasonable doubt, and the protection of the integrity of the jury’s verdict, 289; Gaudron Gummow and Hayne JJ to like effect, 298. Refer also to *Ng v The Queen* (2003) 197 ALR 10. The concept of essential aspects of jury trials is discussed further in J Stellios, ‘*Brownlee v The Queen*: Method in the Madness’ (2001) 29(2) *Federal Law Review* 319 and ‘The High Court’s Recent Encounters with Section 80 Jury Trials’ (2005) 29 *Criminal Law Journal* 139. Refer also to M Findlay, ‘The Role of the Jury in a Fair Trial’ in M Findlay and P Duff (eds), *The Jury Under Attack* (1988).

⁸⁸ Gaudron Gummow and Hayne JJ reached the same conclusion, adopting similar reasoning, *Brownlee v The Queen* (2001) 207 CLR 278, 301.

⁸⁹ *Brownlee v The Queen* (2001) 207 CLR 278, 330.

His Honour referred with approval to United States precedents on a similar issue which considered ‘the function that the particular feature perform(ed) and its relation to the purposes of the jury trial’. Function here was not limited to the function of the jury as at the time of federation, but could embrace subsequent developments in relation to jury usage.⁹⁰

The logical extension to these arguments by the various judges in *Brownlee* is this – how essential is it to the proper functioning of the jury process that it be used whenever the court is hearing a ‘serious’ charge?

The author submits that it is essential, and their own reasoning should have led the court to the conclusion that the orthodox view as to the scope of s 80 was incorrect. How can it be seriously argued, for example, that the right to a unanimous verdict was ‘essential’, but the requirement to use a jury at all for some kinds of case was not? As the High Court (unanimously) itself said in *Cheatle*, a decision confirmed in subsequent cases *Cheng* and *Brownlee*, ‘by the time of federation, the common law institution of trial by jury had been adopted in all the Australian colonies as the method of trial of serious criminal offences’,⁹¹ and ‘by 1900, trial by jury was firmly established by legislation in each of the federating colonies as the universal method of trial of serious crime’.⁹²

With respect, how can it be seriously suggested in the 21st century that the requirement for a jury trial in serious crime was not an essential requirement regarding juries at the time of federation? Yet the orthodox view requires that we accept unanimity as an essential feature of jury trial as at the start of federation, but not the right to have a jury trial itself, at least for serious offences.

VI TRIAL BY JURY AS A SUBSTANTIVE RIGHT

Recall here the dissenting judgment of Dixon and Evatt JJ in *Lowenstein* where their Honours concluded that an intention to produce some real operative effect should be conceded to the section, and that its supposed protection should not be rendered illusory by an interpretation that allows the very body against whom the right would be exercised to determine whether the right should or should not apply.⁹³

Gaudron J in *Cheng v The Queen*⁹⁴ took the view that s 80 conferred a substantive right on individuals. Kirby J agreed that the section should not be seen as a ‘withered guarantee of no substantive use to those facing trials for federal offences’.⁹⁵ As such, it had to be interpreted according to the settled principle that constitutional guarantees are

⁹⁰ Citing *Williams* (1970) 399 US 78, 99-100: per Kirby J in *Brownlee* 329.

⁹¹ *Brownlee v The Queen* (2001) 207 CLR 278, 549.

⁹² *Brownlee v The Queen* (2001) 207 CLR 278, 551.

⁹³ *R v Federal Court of Bankruptcy; ex parte Lowenstein* (1938) 59 CLR 556, 581-582.

⁹⁴ (2000) 203 CLR 248, 277-278.

⁹⁵ *Cheng v The Queen* (2000) 203 CLR 248, 307. Even Callinan J in *Cheng* expressed ‘disquiet about a proposition that might leave it entirely for the legislature to define what is, and what is not to be an offence charged on indictment, and its elements’, 344, but felt justified in adhering to the orthodox narrow view because there had not been any occasion of abuse of the orthodox view (dismissed as ‘no answer at all’ by Kirby J at 324).

to be construed liberally and not pedantically confined. The existing interpretation of the provision rendered the protection largely ineffective.⁹⁶

The right to trial by jury is considered to be one of the most important rights that a citizen in a democracy possesses. Many references were made earlier in the article to comments from esteemed judges and legal scholars reflecting upon the great tradition and importance of this right, both to do justice in respect of a citizen accused of a crime, but to reinforce the public's involvement in and respect for legal processes.⁹⁷

Given the fundamental importance of this right, the author believes it justifies the court reconsidering the orthodox narrow view of s 80, which renders the potentially great protection what might be considered a frail shield. It may be that the founding fathers did not conceive s 80 as a section which would act as a strong protection of rights.⁹⁸ This may be because they did not think that this was necessary, influenced as they were by Diceyan thinking regarding Parliament's law-making power, causing them to decline to include an express bill of rights.⁹⁹

However, the author agrees with the proposition accepted by all members of the High Court in *Cheng* and *Brownlee* – the intention of the founding fathers, and the history leading up to federation, is not the only guide to how the section can and should be interpreted today. It is not inconceivable that s 80 in the 21st century has more of a role in protecting the rights of accused persons than the founding fathers intended when they drafted the *Constitution*. This is not considered to be unfaithful to the intention of the founding fathers.¹⁰⁰

VII ARGUMENT FOR BROAD READING OF S 80 BASED ON MODERN NEEDS AND 2004 MEANING

Some judges have rejected an interpretation of s 80 that would confine it to the meaning

⁹⁶ McConvill and Joy, above n 85, 344, 359, claim that an important consideration for the Australian people is the extent to which their *Constitution* protects and upholds basic human rights and freedoms, including trial by jury. They concluded that, as a result, 'it becomes the duty of the High Court to interpret and apply the Australian *Constitution* in such a way so as not to impugn these rights and freedoms unless coherent and principled judicial reasoning necessitates this. In *Brownlee*, it is submitted, the court failed to adhere to this duty'.

⁹⁷ Graham Fricke has commented on the benefit jury trials bring in terms of reducing conflict and calming tensions, citing the Eureka Stockade and subsequent trials as a prime example: 'The Eureka Trials' (1997) 71 *Australian Law Journal* 59.

⁹⁸ Some writers have also expressed reservations about s 80 being seen in terms of 'rights-protection': see J Stellios, 'The Constitutional Jury – A Bulwark of Liberty?' (2005) 27 *Sydney Law Review* 113; however Chesterman, above n 39, states that in a general context of not having a Bill of Rights in the Constitution, the fact the founding fathers saw fit to include s 80 is a 'striking testament to the importance attributed to the criminal jury trial by Australian politicians and lawyers one hundred years ago'.

⁹⁹ Cockburn at the Convention Debates, for example, wondered whether any of the colonies had ever attempted to deprive a person of life, limb or property without due process, and was concerned comments such as 'pretty things these States of Australia; they have to be prevented by provisions in the Constitution from doing the grossest injustice' would be made by observers, *Convention Debates* (Melbourne, 1898, vol 1) 688.

¹⁰⁰ As the unanimous court held in *Cole v Whitfield* (1988) 165 CLR 360, 385:

Reference to the history of (sections of the Constitution) may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the *contemporary meaning* of language used (emphasis added).

intended (even if such could be ascertained) by the founding fathers (presumably objectively) when the clause was finally approved. Kirby J in *Cheng* found that the framers of the *Constitution* ‘did not intend, nor did they enjoy the power to require, that their subjective expectations, wishes or hopes should control all succeeding generations of Australians who live under the protection of the *Constitution*’.¹⁰¹

Kirby J in *Brownlee v The Queen* referred to the dilemma for those who adhere to the 1900 criterion in construing our *Constitution*:

Either they must indulge in false history, laying emphasis on exceptional straws in the wind to ascribe extraordinary prescience to the framers. Or they must embrace counter-factual fictions about what those framers would have intended. Or they are forced to adopt a hybrid criterion that in respect of the sex and property qualifications of jurors mentioned in *Cheatle*, gives a passing nod to the intention of the framers in 1900 but hurries back to the attributed features of the trial by jury as a contemporary institution according to the generally accepted standards of a modern democratic society.¹⁰²

He did not agree that the views of the founding fathers as to the meaning of s 80 was determinative or even significant in determining the meaning of the section today.¹⁰³

VIII WHY THE GUARANTEE IS RESTRICTED ONLY TO OFFENCES AGAINST COMMONWEALTH LAW, WHEN CRIME IS AN AREA OVER WHICH THE STATES WERE INTENDED TO HAVE MOST POWER

Once the above argument is accepted, the answer to this question seems obvious. The founding fathers intended that the status quo in the colonies that existed at the time of federation would continue post-federation. We have already seen evidence that by the time of the late 1800s, it was an established right of an accused in the colonies, at least in serious cases, to have the matter heard by a jury. The founding fathers knew that the States would be regulating criminal law. They assumed that the right of the accused to trial by jury in serious cases would continue in the States, as it had in the colonies, and they wanted to apply the same right to any serious offences that might later be created by the new Federal Government.

They wanted to be sure, however, that not all cases would need to be heard by a jury, taking on board the experience in other countries with trials for petty offences sometimes being (inefficiently) dealt with by a jury. To ensure this flexibility, they required that only certain trials, those on indictment, required a jury trial. However, it is

¹⁰¹ *Cheng v The Queen* (2000) 203 CLR 248, 321. Kirby J, 34, reiterated this view in *Brownlee v The Queen* (2001) 207 CLR 278, 314 ‘the text of the *Constitution* must be given meaning as its words are perceived by succeeding generations of Australians’. It is ‘impossible seriously to suggest that the conduct of trial by jury in 1900 remains the universal criterion for the understanding of those words as they appear in the *Constitution* today ... because, by definition, the world of the framers was not that of today’s Australians, it is misleading, and prone to result in serious error, to accept as the applicable principle of constitutional interpretation the intention of those who framed it.

¹⁰² (2001) 207 CLR 248, 325

¹⁰³ Cf J Goldsworthy, ‘Interpreting the Constitution in its Second Century’ (2000) 24 *Melbourne University Law Review* 677, 710. Professor Goldsworthy believes that an attempt to ascertain the original, intended meaning of the Constitution must, at the very least, be the starting point in giving meaning to its provisions.

submitted this was not intended to, and should not, mean that the Commonwealth Parliament could absolutely decide whether trials should proceed upon indictment or summarily. If this were the intention, surely the founding fathers would not have included the provision at all. The idea was that the Commonwealth would have discretion to provide that minor federal offences be dealt with summarily, but that for serious offences, the trial would be by way of jury, as had been the experience in the Australian colonies up until the time of federation.

Further support for this view appears in the judgment of Gaudron J in the *Kable* case.¹⁰⁴ Her Honour in that case emphatically rejected any suggestion that the Commonwealth *Constitution* was intended to permit different grades or qualities of justice. If this is so, it can be argued that given in the colonies the right to trial by jury was regarded as automatic for all serious offences, the *Constitution* should not be presumed to have intended to create a different regime for criminal offences created by the new Commonwealth Parliament.

The High Court in *Kable* was particularly concerned with legislation which would undermine public confidence in the judiciary by conferring inappropriate powers on it. It is at least arguable that allowing a Chapter III Commonwealth court to determine the guilt or otherwise of an accused for a serious offence,¹⁰⁵ without jury involvement, would undermine public confidence in the system of administration of justice. De Tocqueville understood the political importance of a jury's involvement in law enforcement generally:

Political laws owe their chief support to the enforcement of the penal laws; if this support be wanting, the law sooner or later loses its force. He who is invested with decisions of political matters, is in truth the master of society. But the institution of the jury places the people, or at least a class of the people, in the judgment seat. This institution in fact, therefore, places the direction of society in the hands of the people, or of the class from which the juries are taken.¹⁰⁶

IX TO WHICH TRIALS SHOULD THE PROTECTION APPLY?

Accepting the criticism that where one draws the line between an offence that is serious and thereby warranting a jury trial can seem somewhat arbitrary,¹⁰⁷ there is a respectable body of opinion to suggest that any offence punishable by more than one year's imprisonment should be considered an indictable offence, and require a jury trial

¹⁰⁴ *Kable v Director of Public Prosecutions* (NSW)(1996) 189 CLR 51, 103.

¹⁰⁵ The relationship between s 80 and Chapter III courts in the Commonwealth *Constitution* is considered by J Stellios, 'The Constitutional Jury – 'A Bulwark of Liberty?'' (2005) 27(1) *Sydney Law Review* 113.

¹⁰⁶ A De Tocqueville, *Democracy in America* (1969) 729; an earlier version was cited by J Macarthur, in *New South Wales: Its Present State and Future Prospects* (1837) 111, reflecting its relevance in the Australian context.

¹⁰⁷ McHugh J in *Cheng v The Queen* (2000) 203 CLR 248, 297-298. The author does not accept that this difficulty precludes the courts reaching a conclusion on which offences are 'serious' enough to warrant a jury trial, given the fundamental nature of the right being discussed. It is accepted that this distinction does not appear in the Constitution, but the High Court has previously found that certain principles implicitly underlie the Constitution and affect its interpretation: see for example *Nationwide News v Wills* (1992) 177 CLR 1 – it seems less of a leap to interpret an existing express provision in the *Constitution* in such a way than to imply rights of which nothing at all is expressed in the *Constitution*.

to determine the matter. Indeed, that is at least the starting presumption contained in the Commonwealth's *Crimes Act* 1914.¹⁰⁸ This was also the conclusion reached by Deane J in *Kingswell*,¹⁰⁹ taking into account the general practice in the Australian colonies at the time of federation and the general practice in England at the time. The author respectfully agrees with such a suggestion. The section should be interpreted to require that a trial for the offence of any provision the maximum punishment of which is at least one year's imprisonment should be heard by a jury.¹¹⁰

X CONCLUSION

This article argues for a broad reading to be given to s 80, entitling a person accused of a 'serious crime' against Commonwealth law to a jury trial. This has been justified on the basis of:

- The long history of jury trials in the common law system and their great importance in our system of criminal procedure.
- The adoption of jury trials for most trials in the Australian colonies prior to federation.
- That one of the essential aspects of a jury trial is its use in serious cases.
- The High Court has used the 'essential aspects of a jury trial as at 1900' to justify the continuing requirement of some aspects of jury trials, though not (yet) on the fundamental issue of whether or not jury trial is available at all.
- That the right is a fundamental one that should not be taken away at the whim of the Parliament.
- That the limited rights conferred by the *Constitution* should be read expansively in modern times, in accordance with modern requirements, while still paying regard to the intentions of the framers of the *Constitution*.

A broad reading of s 80 is justified also when one considers why the protection in s 80 applies only to Commonwealth offences, when the founding fathers well knew that criminal law would largely be a State issue. It reflects their understanding that the status quo in the States would remain, that jury trial be used for all serious offences. Section 80 sought to expand the status quo then existing in the States to the newly created Commonwealth.

Section 80 has been mocked for too long. It is time to give it substantive effect.

¹⁰⁸ Section 4G provides that federal offences punishable by imprisonment for a period exceeding 12 months are indictable offences, but it adds the words 'unless the contrary intention appears'.

¹⁰⁹ (1985) 159 CLR 264, 319, as have some commentators – G Fricke, above n 8, 2; cf Dixon and Evatt JJ in *R v Federal Court of Bankruptcy; ex parte Lowenstein* (1938) 59 CLR 556, 583 would have required any crime for which a possible punishment was imprisonment to be heard by a jury, as would have Brennan J (*Kingswell v R* (1985) 159 CLR 264, 294).

¹¹⁰ This is similar to the conclusion reached in the *Report of the Advisory Committee to the Constitutional Commission – Individual and Democratic Rights* (1987) 45.