Trial by Jury

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Major Issues

When federal Parliament creates criminal offences, the question arises as to whether such offences should be tried by judge and jury, or tried summarily by a magistrate. The framers of the Australian Constitution inserted section 80, which appears to confer a right to jury trial.

A difficulty results from the use of the words 'on indictment' in the opening words of section 80. This has at times resulted in a narrow construction of the section, for the High Court has said that it is only when prosecutions are brought 'on indictment' that the right to jury trial arises; where Parliament has authorised summary proceedings, and summary proceedings are brought, the right to jury trial is avoided.

It is contended that there have been three eras of interpretation of section 80:

- an initial period in which the section was regarded as laying down a fundamental law of the Commonwealth;
- a much longer period in which a narrow, 'procedural' approach was taken; and
- the last decade, which reveals a tendency to revert to the broad approach.

The broad approach, which is necessary if citizens facing substantial liability to imprisonment are to enjoy a genuine right to jury trial, was also supported by prominent judges in dissenting judgments during the second period.

The fact that the narrow approach has been taken makes it important for federal parliamentarians to be vigilant in legislating for criminal offences and the mode of trial of such offences. Where offences are made subject to substantial periods of imprisonment, the legislation should make it clear that the trials should take place on indictment. If summary trial is provided for, the accused will be deprived of an important benefit which some, at least, of the framers of the Constitution intended the accused to enjoy.

Many of the sections of the Crimes Act 1914 (Cth) do not make it clear whether the offences it creates are triable by jury or summarily. Guidelines are provided by sections 4G, 4H and 4J. Section 4G, for example, 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'. This may leave the situation in an unfortunate state of uncertainty. Other federal legislation authorises summary proceedings even though substantial terms of imprisonment may be imposed.

It is suggested that federal Parliament should enact that the trial of any federal offence providing for punishment in excess of one year's imprisonment shall be on indictment. This enactment, taken in conjunction with section 80 of the Constitution, would result in an effective guarantee of trial by jury for serious offences.

Arguably Parliamentary Committees should play a greater role in scrutinising laws to ensure that summary trial is not available for serious offences.

Stronger protection of a right to trial by jury for serious offences, even if that right could be waived by the accused, would facilitate the democratic participation of the community in the administration of justice. This in turn would strengthen public confidence in the legitimacy of the Australian criminal justice system.

Introduction

Section 80 of the Constitution provides:

> 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 as the parliament prescribes.

The section was based on a provision contained in the United States' Constitution,(1) which in turn rests on the philosophy that people charged with serious offences are entitled to have their guilt or innocence determined by the judgement of their peers. The importance of trial by jury was expressed in passionate terms by Deane J in his judgment in Kingswell in 1985:

> The guarantee of section 80 of the Constitution was not the mere expression of some casual preference for one form of criminal trial. It reflected 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. In the history of this country, the transition from military panel to civilian jury for the determination of criminal guilt represented the most important step in the progress from military control to civilian self-government....
>
> The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community as a whole will be more likely to accept a jury's verdict than it would be to accept the judgment of a judge or magistrate who might be, or be portrayed as being, over-responsive to authority or remote from the affairs and concerns of ordinary people. The random selection of a jury panel, the empanelment of a jury to try the particular case, the public anonymity of individual jurors, the ordinary confidentiality of the jury's deliberative processes, the jury's isolation ... from external influences and the insistence upon its function of determining the particular charge according to the evidence combine ... to offer some assurance that the accused will not be judged by reference to sensational or self-righteous pre-trial publicity or the passions of the mob.(2)

Deane J's eloquent support for the jury system was expressed in a dissenting judgment. But he can be a persuasive advocate,(3)and his dissent in Kingswell seems to mark a change in approach away from a narrow or 'procedural' view of section 80 of the Constitution. If we share Deane J's views about the criminal justice system, it is suggested that we should favour the taking of steps which would help to ensure that those charged with serious offences are not deprived of the benefit of trial by jury.

In expressing a preference for jury trial of serious offences, one must to a large extent rely on value judgements, since considerations of confidentiality create difficulties for effective statistical research. The research that has been conducted, however, does support the conclusion that judges who are regularly called upon to hear criminal prosecutions without juries become 'case-hardened' and prosecution-minded. For example, jury trials were suspended in Northern Ireland in 1973 in relation to some offences, known as 'scheduled' offences. The acquittal rate in trying these offences without juries (so-called 'Diplock' courts) subsequently

declined from 57 per cent in 1973 to 33 per cent in 1981. By comparison, the acquittal rate in jury trials–involving other than 'scheduled' offences–increased from 38 per cent to about 60 per cent in Northern Ireland during a similar period.(4)

The majority of federal prosecutions in Australia take place in the magistrates' court. Of the 5387 defendants dealt with in 1995–96, approximately 90 per cent (4842) were dealt with summarily, while approximately 10 per cent (545) were dealt with on indictment. The majority of the defendants in these cases pleaded guilty–80 per cent of those dealt with summarily and 64 per cent of those dealt with on indictment. Thus, of the matters which went to trial (413), 25 per cent (107) were dealt with by judge and jury.(5)

The Commonwealth Director of Public Prosecutions has formulated a number of guidelines for determining whether cases in which the mode of trial is discretionary should be dealt with on indictment or summarily. These guidelines are set out in Appendix 1.

History and Importance of Trial by Jury in a Democratic Society

I have suggested elsewhere that the jury system can help to defuse conflict during turbulent times,(6) and I have offered as an Australian example the acquittal of the Eureka rebels, following the rebellion and massacre. British prosecutions for treason, sedition, unlawful assembly and the like provide further illustrations: cases such as those involving William Penn, Thomas Hardy and John Horne Tooke.

Those who have studied such matters and those who have had experience of the jury system have generally favoured the system as one which facilitates the democratic participation of the community in the administration of justice. Lord Devlin observed that each jury 'is a little parliament'. He added that the first object of any tyrant 'would be to make parliament utterly subservient to his will'; the next would be 'to overthrow or diminish trial by jury'. He concluded with characteristic eloquence that 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'.(7)

In Australia, judges and retired judges have made similar observations. The former ACT justice Xavier Connor QC has listed some of the features of the system:

- The twelve jurors chosen at random are likely to represent community views and values in a way that a single judge does not.
- Trial by jury is democratic in that the community participates in a vital way before people accused of serious crime can be convicted.

- Juries, because they do not give reasons for their decisions, can bring the conscience of the community to bear on issues in a trial in a way that a judge cannot do.
- The community participation in the administration of criminal justice, by way of jury service, promotes an understanding of the system and confidence in it in a way that no other system does.
- Trial by jury is and is seen to be a system better adapted than any other to preserving the liberty of the subject against oppression by the State.(8)

Like air and water, trial by jury is best appreciated by those who have had its benefits withdrawn from them. When the British parliament provided, in 1787, for a military tribunal in New South Wales, with a Judge-Advocate presiding over a panel of six military officers, the citizens soon came to appreciate the superiority of the jury system. 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. William Wentworth and others campaigned vigorously for the British system, and numerous petitions for jury trial were lodged with the authorities. Eventually, in 1847, that system was introduced into New South Wales and made applicable to the Port Phillip district.(9) By the time of federation, the citizens of all Australian colonies were quite familiar with the benefits of trial by jury in serious criminal cases.

The Convention Debates

The provisions of the Australian Constitution were formulated in the course of debates conducted at a series of conventions held during the last decade of the nineteenth century. The insertion of the expression 'on indictment' in section 80 has led to what is described as the 'narrow' approach to interpreting the section. The effect of that approach is that section 80 does not constitute a restraint on legislative power. It is, according to that approach, always open to the legislature to avoid the operation of the section by providing for the summary disposition of criminal offences, no matter how serious.

Some commentators have attributed Machiavellian deviousness to the framers of our Constitution.(10) They have suggested that the phrase 'on indictment' was inserted in section 80 for the very purpose of producing what Dixon and Evatt JJ were later to describe as a 'mockery'.(11) To accept this would be akin to suggesting that some of the framers drafted the provision on April Fools' Day, setting out to ensnare the public into the delusion that they had been accorded a protection which they did not in fact enjoy.

A Tasmanian jurist, Andrew Inglis Clark, composed the first draft of what was to become section 80 in 1891. Taking as his precedent Article III, section 2 of the Constitution of the United States of America,(12) he drew a clause providing that the trial of 'all crimes cognisable by any Court' shall be by jury. Sir Samuel Griffith altered Inglis Clark's draft to confine the guarantee to 'indictable offences cognisable by any court exercising federal jurisdiction'.

The matter came up for debate at the Melbourne sitting of the Convention in 1898. When Wise (NSW) resisted an amendment proposed by Glyn (SA), on the basis that the clause as it stood was 'a necessary safeguard to the individual liberty of the subject in every state', Isaacs (Vic) intervened:

> I do not think there is any safeguard at all such as the honourable and learned member has stated... To my mind, it is a very proper thing to do [to have a jury]. I think, in our present state of development, a man is entitled to have a jury in a case; but it is no fetter on the Federal Parliament, because, when it creates an offence, it may say it is not to be prosecuted by indictment, and immediately it does it is not within the protection of this clause of the Constitution...(13)

The commentators have perhaps been a little unfair to attribute a Machiavellian intent to Isaacs(14) and some of his colleagues. A more likely explanation is that Isaacs became petulant when his warnings were not heeded, and did not, when he became a High Court justice, forbear from saying 'I told you so'.(15) But it is clear that he and others perceived the problems.

The High Court–a Glimpse of a Broad Approach

It is suggested that there have been three eras of interpretation of section 80:

- an initial period in which a broad approach was espoused.
- a much longer period in which a narrow, 'procedural' approach was taken.
- the last decade, which reveals a tendency to revert to the broad approach.

The first approach is reflected in the decision in R v Snow.(16) In that case, Snow had been charged with attempting to trade with the enemy in the early stages of the First World War. The Trading with the Enemy Act 1914 (Cth) was passed on 23 October 1914, and Snow was charged with offences on specified days both before and after that date. At the end of the Crown case, his counsel submitted that, so far as [illegible] days preceding that date were concerned, the legislation was not retrospectiv[illegible] that, so far as the days subsequent to that date were concerned, there was no

evidence of any offence fit to be submitted to the jury. The trial judge agreed with those submissions and directed the jury to return a verdict of not guilty, which they did.

The Crown sought special leave to appeal to the High Court. By a majority of four to two, the High Court refused such leave. After referring to the common law position, that there could be no appeal from a verdict of acquittal, Griffith CJ asked whether the Constitution had altered the common law position on trial by jury. He answered that it had not:

> So far from finding any such clear indication in the Australian Constitution, I find a clear indication of a contrary intention. Section 80 lays down as a fundamental law of the Commonwealth that the trial on indictment of any offence against any of the laws of the Commonwealth shall be by jury... The history of the law of trial by jury as a British institution ... is, in my judgment, sufficient to show that this provision ought prima facie to be construed as an adoption of the institution of 'trial by jury' with all that was connoted by that phrase in constitutional law and in the common law of England.(17)

The Chief Justice then adverted to the contention that section 80 'relates merely to procedure'. He rejected that argument.

Isaacs J, who described Snow's offence as 'one of unparalleled gravity in the history of Australia'–adding that 'the crime for which Carl Lody was shot was mild in comparison'!–delivered a dissenting judgment. So did Higgins J. But Griffith CJ's views were supported by three other justices. In the course of their joint judgment, Gavan Duffy and Rich JJ asked:

> Is it to be supposed that the British Parliament, when providing by section 80 of the Constitution that 'the trial on indictment of any offence against any law of the Commonwealth shall be by jury' were leaving to this Court in its appellate jurisdiction the right to control at its pleasure the verdict of the jury?

Their answer was: 'If so, that section is indeed a 'mockery, a delusion and a snare'. (18)

The Narrow Approach

During the decade or so following Snow's case, the composition of the High Court changed significantly. Griffith CJ and Barton J were replaced by Knox CJ and Starke J. The ascendancy of Isaacs J–who had done little to conceal his hostility towards Griffith CJ–was marked by the decision in the Engineers' case,(19) in which a number of Griffith CJ's earlier decisions were overruled.

In 1928, Isaacs J had a further opportunity to reiterate the views he had expressed on section 80 during the Convention debates, views which he had also foreshadowed in a High Court case decided in the same year as R v Snow.(20) Isaacs J restated these views in R R v Archdall and Roskruge; ex parte Corrigan and Brown.(21) That case marked a distinct change in the High Court's approach to section 80.

In the Archdall case, two union leaders were charged with offences under section 30K of the Crimes Act 1914 (Cth), in that they had hindered the provision of a lighthouse service provided by the Commonwealth. Section 30K provided that the maximum penalty for the offence it created was one year's imprisonment.

The charges were heard summarily by a police magistrate, who convicted and fined the defendants. They took proceedings in the High Court to quash the convictions. Their counsel relied on section 4 of the Acts Interpretation Act 1904 (Cth)–since repealed–which provided that 'offences against any Act which are punishable by imprisonment for a period exceeding six months shall, unless the contrary intention appears in the Act, be indictable offences.'

Since section 30K provided for 12 months' imprisonment, it was argued that the offence was indictable, and should not have been heard summarily ('the first argument'). Alternatively, counsel argued that if the Crimes Act 1914 (Cth) did permit offences under section 30K to be dealt with summarily, it was in conflict with section 80 of the Constitution ('the second argument').

The case was not a good vehicle for testing an important constitutional issue. One suspects that there was not much judicial sympathy for the union leaders, who had declared the relevant ship 'black', and who had each suffered no more than a fine of £100, together with an order for costs. It could hardly be described as a serious offence, warranting trial by jury and the time of the highest court in the land.

The High Court rejected the first argument, holding that the scheme of the legislative provisions in the Crimes Act 1914 (Cth) revealed a 'contrary intention' for the purposes of section 4 of the Acts Interpretation Act 1904 (Cth).

Turning to the second argument, the High Court was quite perfunctory:

> The suggestion that the Parliament, by reason of section 80 of the Constitution, could not validly make the offence punishable summarily has no foundation and its rejection needs no exposition.(22)

In dismissing the second argument, Higgins J formulated the celebrated aphorism: 'if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment.'(23)

As Deane J was to point out later in Kingswell's case,(24) the judgments in the Archdall case contain no reasoning at all in favour of the narrow view, let alone any cogent reasoning. But they reflect a conclusion that prevailed for a period in excess of 50 years.(25) The 'guarantee' provided by section 80 could be avoided if the Parliament authorised summary proceedings for any offence, no matter how serious, and summary proceedings were taken. As Barwick CJ put it, 'What might have been thought to be a great constitutional guarantee has been discovered to be a mere procedural provision.'(26)

But powerful and reasoned dissents surfaced from time to time. In Lowenstein's case, Dixon and Evatt JJ highlighted the fatuity of the notion that the framers solemnly inserted in a constitution a provision of merely procedural significance. After referring to Higgins J's statement in the Archdall case, they observed:

> 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 indictment in cases where the legislature might think fit to authorise the court itself to pass upon the guilt or innocence of the prisoner. There is high authority for the proposition that 'the Constitution is not to be mocked.' A cynic might, perhaps, suggest the possibility that section 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, if this explanation is rejected and an intention to produce some real operative effect is conceded to the section, then to say that its application can always be avoided by authorising the substitution of some other form of charge for an indictment seems but to mock at the provision...(27)

In the Li Chia Hsing case, Murphy J endorsed these views of Dixon and Evatt JJ, and added that in his opinion section 80 'contains a guarantee of a fundamental right to trial by jury in criminal cases (at least in serious ones).'(28)

To these dissenting views, one may add the sustained attack on the narrow, procedural approach which Deane J delivered in Kingswell's case. As Xavier Connor has observed:

> If, by means of some judicial time machine, Dixon, Evatt, Murphy and Deane had ever sat together in a case involving section 80, they would not only have constituted a powerful High Court quartet, they would also have constituted the majority in that particular case.(29)

A number of things should be said about the narrow approach. In the first place, as Deane J has pointed out, it was not the product of distinguished or cogent reasoning. The contrary arguments were simply rejected in a cavalier fashion until the point was reached when it was said that the matter was no longer open to argument. The dissenting judgments contained much more in the way of reasoned and logical argument.

But-assuming they were not being Machiavellian-greater blame for the narrow approach is attributable to the framers of the Constitution. As Latham CJ observed in the Lowenstein case, section 80 'could easily have been better expressed if it was intended that it should have the effect of preventing or limiting the possibility of the Commonwealth Parliament providing for the summary trial of all, or any particular offences.'(30) For example, the framers could have limited the guarantee to 'serious offences' and defined such offences as those punishable by imprisonment for a period in excess of, say, one year.

The next observation is that the matter has not really been tested by a case in which someone facing a long term of imprisonment has been denied the right to trial by jury. There has been, as Dawson J has pointed out, 'nothing in the Australian experience so far which would put the limits of this [narrow] view to any severe test.'(31) That is to say, it is difficult to find 'any instance in a law of the Commonwealth of obvious or deliberate disregard for the distinction [between serious and less serious offences] in order to avoid trial by jury.'(32)

A most troubling instance, however, is the case of Zarb v Kennedy.(33) During the war in Vietnam, when the community was divided about Australia's involveme the conflict, Zarb was charged with failure to comply with a notice under the N Service Act 1951-1968 (Cth) calling him up for military service. The legislation,

although it provided for two years' imprisonment, authorised summary proceedings for such charges. Zarb claimed to have held an honest belief that he was an exempt person, based on an erroneous notice purporting to exempt him, which a clerk of courts had sent to him, and the advice of counsel to the effect that he was exempt. The magistrate rejected Zarb's claim, and on Zarb's refusal to undertake to render service, sentenced him to two years' imprisonment.

The High Court, led by Barwick CJ, rejected the constitutional argument based on section 80, which the Chief Justice said had been 'long settled' and 'ought not now to be reopened.'

The appellant was obviously not regarded with sympathy by the justices, some of whom had rendered distinguished military service in their youth. Windeyer J commented that 'A man who under the Act is obliged to serve cannot, with impunity, refuse to do so, leaving the duty to others who are law-abiding and dutiful.'(34)

The issues raised in this case, during a turbulent period of Australian history, may have been better resolved by a jury. The entitlement of a young man facing two years' imprisonment to invoke the judgment of his peers-rather than that of a conservative, unelected judicial officer-should not have been dismissed without serious consideration of the argument. Even if the view is taken that a jury would have been bound to convict, that would have been a more satisfactory process, and a verdict reached using this process would have generated more widespread acceptance.

The jury system has not escaped criticism. Jury trials can be expensive and time-consuming, and some have suggested that they are inappropriate in complex fraud cases. Some accused persons may prefer to have their matters dealt with by a judge alone, and there is much to be said for the right to waive trial by jury. What is contended is that persons facing long terms of imprisonment should have the option of trial by jury, even if that option is open to waiver.

A Change of Approach

Kingswell's case involved a prosecution for conspiring to import narcotic drugs.(35) The applicant, who had been sentenced in the New South Wales Court of Criminal Appeal to eighteen years' imprisonment, had been charged on indictment and had been tried by a judge and jury.

The Customs Act 1901 (Cth) provided for a wide variety of penalties for this offence, ranging from two years' imprisonment to life imprisonment. The determinatio
some of the factual elements affecting the maximum penalty-such as the qua

the drugs and the existence of prior convictions–had been committed to the trial judge.

The majority of the High Court rejected the argument that this way of determining the penalties for the offence offended section 80. Brennan and Deane JJ, however, dissented. Brennan J considered that the complex legislation created several distinct offences. He construed section 80 as 'prohibiting the Parliament from withdrawing issues of fact on which liability to a criminal penalty depended from a jury's determination when any offence against a law of the Commonwealth is tried on indictment.'(36) In Deane J's vigorous dissent, he concluded that section 80 applied to 'serious' federal offences, which depended on whether they were punishable by a maximum term of imprisonment of more than one year.(37)

Within four months of Kingswell's case, the High Court handed down its decision in Brown v R.(38) In that case, the appellant had been charged in South Australia with an offence against section 233B(1)(ca) of the Customs Act 1901 (Cth), which prohibited possession of a drug reasonably suspected of having been imported into Australia. The charging document was called an 'information', but it was common ground that the trial was on indictment.(39) Brown sought to elect under section 7(1) of the Juries Act 1927 (SA) to be tried by judge alone. The trial judge ruled that section 80 precluded such an election and the matter proceeded before a judge and jury. When Brown was convicted, he appealed. The case thus raised the question of whether the right to trial by jury under section 80 could be waived.

The majority of the High Court held that section 80 could not be waived. In doing so they revealed a quite different approach from the previous narrow construction of the section. According to Brennan J:

> Trial by jury is not only the historical mode of trial for criminal cases prosecuted on indictment; it is the chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice... Section 80 of the Constitution entrenches the jury as an essential constituent of any court exercising jurisdiction to try a person charged on indictment with a federal offence. That section is not concerned with a mere matter of procedure but with the constitution or organisation of any court exercising that jurisdiction.(40)

Deane J reiterated some of the views he had expressed in Kingswell, and concluded that section 80 commanded trial by jury, rather than conferring a privilege tha be waived.

Dawson J considered that it was overstating the position to say–as had Barwick CJ in Spratt v Hermes–that section 80 has been reduced to a procedural provision, 'or that it does not yet lay down, in the words of Griffith CJ in R v Snow, "a fundamental law of the Commonwealth"'.(41) Following his observation to the effect that section 80 had not been exploited by the Commonwealth,(42) Dawson J added that it did not matter whether this was due to 'the presence of section 80 itself' or the fact that 'our criminal procedures and the occasions appropriate for their use are so deeply ingrained that government may abuse them only at their peril'.(43)

Whether or not one takes the view that the denial of a right of waiver 'is to imprison a man in his privileges and call it the Constitution',(44) the decision in Brown's case reflects a broader and more substantive approach to section 80. Even the minority, who considered that the right to jury trial could be waived, shared that approach.(45)

The most recent analysis of section 80 occurred in Cheatle v R.(46) The Cheatles had been charged in South Australia with conspiracy to defraud the Commonwealth. Section 57 (1) of the Juries Act 1927 (SA) provided for a majority verdict by ten or eleven jurors. The Cheatles were convicted based on a majority verdict. They appealed and argued that unanimity was an indispensable feature of trial by jury, according to long-established notions which continued to apply up to the time the Constitution was enacted. The High Court unanimously accepted the appellants' argument. Once again, the decision reveals a broader approach to section 80.

Both Brown and Cheatle, however, were cases which were brought on indictment. They therefore do not directly conflict with the Archdall line of authority. Moreover, legal precedents can only be authoritative within the limits generated by their underlying factual material. Pronouncements made in cases where the offences were plainly not serious cannot be binding on courts which have to determine whether offences carrying substantial periods of incarceration must be dealt with by juries.

An Examination of Commonwealth Legislation

Section 4G of the Crimes Act 1914 (Cth) provides:

> Offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences, unless the contrary intention appears.

Section 4H provides, by contrast, that Commonwealth offences not punishable by imprisonment or punishable by imprisonment for a period not exceeding 12 months are summary offences, unless the contrary intention appears.

Section 4J deals with the hybrid category of indictable offences that may be tried summarily. With some exceptions, it provides that indictable federal offences punishable by imprisonment for a period not exceeding 10 years may (unless the contrary intention appears) be heard summarily 'with the consent of the prosecutor and the defendant'.

The Commonwealth Parliament lacks the power to legislate generally on the subject of the criminal law. It nonetheless has enacted a good deal of legislation creating criminal offences, particularly in relation to the importation of drugs and in relation to social security fraud. The major substantive offences in the Crimes Act 1914 (Cth) are contained in:

- Part II (treason and other offences against the government)
- Part IIA (protection of the Constitution and of public and other services)
- Part III (offences relating to the administration of justice)
- Part III A (child sex tourism)
- Part IV (piracy)
- Part V (forgery)
- Part VI (offences by and against public officers)
- Part VI A (offences relating to computers)
- Part VII (espionage and official secrets)
- Part VII A (offences relating to postal services)
- Part VII B (offences relating to telecommunications services).

Turning to the details of this legislation, three categories of offences may be identified:

- The first category of offences provide that any person who engages in a particular activity, usually with a particular intention, 'shall be guilty of an indictable offence'. These offences go on to provide for a maximum penalty. For example, section 24C, dealing with engaging in seditious enterprises: 'Penalty: Imprisonment for 3 years'.
- The second category of offences follow a similar form, but use the phrase 'shall be guilty of an offence', omitting the word 'indictable'. For example, section 29A (false pretences) where the maximum penalty prescribed is five years' imprisonment.
- The third category of offences involves prohibitions which do not use the word 'offence' at all, but which provide for a certain penalty. For example, section 85G:

> (1) A person shall not forge a postage stamp.
> Penalty: Imprisonment for 10 years.

The sections of the Crimes Act 1914 (Cth) that fall within each of these three categories are set out in Appendix 3.

The three different approaches are curious. In some sections falling within the first category, which plainly create indictable offences, the legislation provides for a maximum of 2 years' imprisonment (for example, sections 27 (2) and 83). In other sections falling within the second category, where the word 'offence' (without any adjectival qualification) is used, the section provides for imprisonment for 10 years (for example, section 29).

There is little difficulty about the first category. The offences these sections create are clearly indictable offences which attract the operation of section 80 of the Constitution. If summary proceedings were brought in respect of such offences, the defendants could insist on trial by jury.(47)

Presumably in the case of sections in the second category which provide for imprisonment for periods exceeding twelve months, the combined effect of section 4G and each of those sections is to make the offences indictable. It may be arguable, however, that the difference in the language used in the first and second categories is significant and reflects a 'contrary intention' within section 4G. The argument would rely on the first part of the decision in Archdall's case, dealing with the question of statutory construction, where the appellants' argument (the first argument) was rejected.(48) The court discerned a 'contrary intention' from the pattern of provisions in the Crimes Act 1914 (Cth), in particular section 12. In that case, however, the predecessor to section 4G was contained in a different Act (the Acts Interpretation Act 1904 (Cth)).

Even though this argument is tenuous, it is unfortunate that the matter should be attended by any uncertainty. Some of the offences falling within the second category are quite serious offences, punishable by up to ten years' imprisonment.

There seems to be little doubt that sections falling within the third category create indictable offences whenever they provide for punishment in excess of 12 months imprisonment. Section 50CD expressly contemplates jury trial in child sex tourism cases.(49)

There is one variation from the norm in the pattern of sections falling within the first category. Sections 24C and 24D create the offences of engaging in seditious enterprises and publishing seditious words. They state that an offender 'shall be guilty of an indictable offence', and go on to provide for a penalty of 3 years' imprisonment. But section 24E (1) provides that an offence under section 24C or section 24D shall be punishable either on indictment or summarily (in the latter case with the consent of the Attorney-General). Section 24E(2) gives the defendant who has been prosecuted summarily the right to elect 'immediately after pleading' to be tried on indictment.

Turning to other legislation, there are instances of offences carrying substantial liability to imprisonment which nonetheless may be tried summarily. Section 232A of the Customs Act 1901 (Cth), for example, creates the offences of rescuing goods which 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 shall be liable upon summary conviction to a fine not exceeding $500 or to imprisonment for any period not exceeding two years. Plainly this section evinces a 'contrary intention' for the purposes of section 4G of the Crimes Act.

Change by Referendum

It would require boldness and perhaps lack of realism to recommend the expensive resort to section 128 of the Constitution to amend and clarify section 80. Of the 42 proposals to change the Constitution that to date have been submitted to referendum, only eight have surmounted the difficult hurdles presented by section 128.

Indeed, as recently as 1988, an attempt to clarify and widen the operation of section 80 failed miserably. The overall national percentage of voters in favour of this proposal (in the Constitutional Amendment (Rights and Freedoms) Bill 1988) was only 30.33. The highest percentage in favour in any Australian State was that in Victoria: 32.76.

Two explanations for this abysmal result can be offered. First, the proposal did not enjoy bipartisan support,(50) which seems to be a sine qua non for successful referendums. Second, the proposal was complex and it lumped together issues of trial by jury, acquisition of property and freedom of religion. The latter aspect aroused the suspicion of church interests who were concerned about funding of education, and the proposal proved to be quite contentious during the campaign. The proposal:

> ... was the surprise in the package. Far from being a source of good public relations for the government, the attempt to extend the sphere of constitutionally guaranteed rights proved to be highly controversial.(51)

With some diffidence, then, I suggest that if bipartisan support could be obtained, a more modest proposal could be taken to referendum. The following italicised words could be inserted into section 80:

> The trial on indictment of any offence against any law of the Commonwealth punishable by more than twelve months' imprisonment shall be by jury...

It is a pity that some such formula was not adopted by the framers of the Constitution.

Proposals for Legislative Change

If the proposal for constitutional amendment is not acceptable, there is still scope for improvement by legislative change. Xavier Connor has suggested that the Commonwealth Parliament could rectify the situation by enacting that the trial of any offence against any law of the Commonwealth providing for punishment in excess of one year's imprisonment shall be on indictment.(52) Such a provision, combined with section 80 of the Constitution, would ensure the entitlement of persons charged with serious offences to trial by jury.

The simple removal of the phrase 'unless the contrary intention appears' from section 4G of the Crimes Act 1914 (Cth) also would effect a considerable improvement. It would avoid arguments of the sort raised in the Archdall case (the first argument).(53) It would ensure that persons such as Zarb(54)–or anyone charged with, for example, rescuing goods from custody, under s. 232A of the Customs Act 1901(Cth)–receive an entitlement to trial by jury when they face a substantial term of imprisonment. It would eliminate any doubts about persons facing ten years' imprisonment being entitled to jury trial.

Such an amendment would still leave it open to magistrates' courts to deal with the large volume of summary offences which they need to process in the interests of efficiency and economy, for offences punishable by up to twelve months' imprisonment. It would also leave intact the scheme by which indictable offen

be tried summarily with the consent of the parties, under section 4J of the Crimes Act 1914 (Cth)–subject, of course, to any successful challenge to section 4J based on Brown's case.

But the alternative formulation proposed by Xavier Connor ('shall be on indictment' instead of 'are indictable offences') would have the advantage of clarity, for it would mesh in with the language of section 80.

Endnotes

1. See Appendix 2.
2. Kingswell v R (1985) 159 CLR 264 at 298–302 per Deane J.
3. His dissenting views in Duke v R (1989) 83 ALR 650 and Carr v R (1988) 165 CLR 314 have since become accepted: see McKinney v R (1991) 171 CLR 468.
4. Findlay and P. Duff (eds), The Jury under Attack, Sydney, Butterworths, 1988: 178.
5. Commonwealth Director of Public Prosecutions Annual Report 1995–96, chapter 8.
6. In an article 'The Eureka Trials', Australian Law Journal 71 (1997): 59.
7. Devlin, Trial by Jury, London, Stevens & Son, 1978: 164.
8. Connor, 'Trial by Jury–Can it survive?' Law Institute Journal 61 (1987): 818.
9. See D. Neal, The Rule of Law in a Penal Colony, Oakleigh, Vic., Cambridge University Press, 1991.
10. For example, C. Pannam, 'Trial by Jury and Section 80 of the Australian Constitution', (1968) 6 Sydney LR 1 at 6; cf. H. Charlesworth, 'Individual Rights and the Australian High Court', (1986) 4 Law in Context 53 at 54.
11. See text below at n. 28.
12. See Appendix 2.
13. Convention Debates, Melbourne, 1898, vol. 1: 352. (Higgins had said that Wise's comments would have been 'mere clap trap' in the mouth of anyone else; O'Connor said that the Parliament could be trusted not to increase the list of summary offences; Isaacs reiterated his warning when Barton successfully moved to amend the clause by substituting 'on indictment of any offence' for 'of all indictable offences'–to preserve summary jurisdiction for contempt proceedings: Convention Debates, Melbourne, 1898, vol. 2: 1895.)
14. Above, n. 11.
15. The same process of self-fulfilling prophecy occurred in relation to section 92 guaranteeing freedom of interstate trade and commerce: Isaacs warned the delegates that the provision was too vague and would cause problems.
16. CLR 315.
17. ibid. at 323 (emphasis added).

18. ibid. at 365.
19. Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129.
20. R v Bernasconi (1915) 19 CLR 629 at 637.
21. CLR 128.
22. ibid. at 136.
23. ibid. at 139–140.
24. CLR at 312.
25. R v Federal Court of Bankruptcy; ex p. Lowenstein (1938) 59 CLR 556; Spratt v Hermes (1965) 114 CLR 226; Zarb v Kennedy (1968) 121 CLR 283; Li Chia Hsing v Rankin (1978) 141 CLR 182.
26. Spratt v Hermes (1965) 114 CLR 226 at 244.
27. CLR 556 at 581–2.
28. 141 CLR 182 at 198. Cf Beckwith v R (1976) 135 CLR 569 at 585; Yager v R (1977) 139 CLR 28 at 52; Hammond v Commonwealth (1982) 152 CLR 188 at 201.
29. Neal, op.cit.: 819.
30. 59 CLR 556 CLR at 570.
31. Brown's case, 160 CLR at 215.
32. ibid.
33. 121 CLR 283.
34. ibid. at 305. It is not intended to suggest that juries are invariably correct or that they have no defects; rather that they are more likely to infuse current community values into their verdicts, and are more likely to be perceived by the accused and society as fair. Research into this issue is rare; see M. Findlay and P. Duff, op. cit., chapter 2 and pp. 103, 178, 184.
35. 159 CLR 264.
36. ibid., at 294.
37. See above, n. 3.
38. 160 CLR 171.
39. ibid. at 194.
40. ibid. at 197.
41. ibid. at 215.
42. See above, nn. 32 and 33.
43. CLR at 215–6.
44. To use the colourful language of Frankfurter J in Adams v US (1942) 317 US 269 at 280.
45. For example, see 160 CLR at 179 per Gibbs CJ.
46. 177 CLR 541.

47. Some offences in this category are punishable by less than 10 years' imprisonment (e.g. sections , 83). On the face of it, they fall within section 4J, so as to be triable summarily, with the nt of the prosecutor and the defendant. It is, however, arguable that section 4J is nstitutional, following Brown's case.
48. See above, nn. 22 and 23.
49. There is, however, no section in this part which expressly provides for venue in such cases. mably the matter is covered by the provisions of the Judiciary Act.
50. See B. Galligan and J. Nethercote (eds), The Constitutional Commission and the 1988 endum, Canberra, Centre for Research on Federal Financial Relations and Royal Australian ute of Public Administration (ACT Division), 1989: chapter 10.
51. ibid. at 112.
52. Neal, op. cit.: 819.
53. See above, n. 22 and following.
54. See above, n. 34.

Appendix 1

Excerpt from Commonwealth Director of Public Prosecutions' Prosecution Policy of the Commonwealth, Guidelines for the making of decisions in the prosecution process:

Mode of trial

5.9 Where an indictable offence can be determined by a court of summary jurisdiction the prosecution plays a major role in the decision as to the mode of trial; indeed, under some Acts the request or the consent of the prosecution is a pre-condition to summary disposition.

5.10 In determining whether or not a case is appropriate for trial on indictment regard should be had to:

> (a) the nature of the case, and whether the circumstances make the alleged offence one of a serious character;
>
> (b) any implied legislative preference for a particular mode of trial;
>
> (c) the adequacy of sentencing options if the case were determined summarily;
>
> (d) any delay, cost or adverse effect upon witnesses likely to be occasioned by proceedings on indictment;
>
> (e) in situations where a particular type of criminal activity is widespread, the desirability of a speedy resolution of some prosecutions by proceeding summarily in order to deter similar breaches;
>
> (f) the greater publicity , and accordingly the greater deterrent effect, of a conviction obtained on indictment;
>
> as well as such of the criteria relevant to the decision whether to prosecute as appear to be significant.

5.11 The prosecution's attitude on the question of mode of trial should be made and communicated to the defendant and the court at the earliest possible stage.

Appendix 2

Article III, section 2 of the Constitution of the United States of America:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed.

Appendix 3

Sections of the Crimes Act 1914 (Cth) that fall within the first category:

> 24, 24AA, 24AB, 24C, 24D, 25, 26, 27, 29D(all in partII), 32, 33, 35, 36A, 37, 41, 42, 46(all in part III), 65(1), 66, 67, 69(all in part V), 72(part VI), 78, 79(2) and (5), 83, 83A(all in part VII).

Sections falling within the second category:

> 28, 29, 29A, 29B, 29C, 30 (all in part II), 30B, 30C, 30D, 30F, 30FC, 30K (all in part IIA), 34, 36, 38, 39, 40, 43, 44, 45, 47, 47A, 47B, 47C, 48, 49, 50 (all in part III), 68 (part V), 70, 71, 73, 73A, 74, 75 (all in part VI), 76B, 76C, 76D, 76E (all in part VIA), 79(3) (4) and (6), 81 (all in part VII).

Sections falling within the third category:

> 50BA, 50BB, 50BC, 50BD, 50DA, 50DB (all in part IIIA), 53 (part IV), 76 (part VI), 85G, 85H, 85J, 85K, 85L, 85M, 85N, 85P, 85Q, 85R, 85S, 85T, 85U, 85V, 85W, 85Y (all in part VIIA), 85ZD, 85ZE, 85ZF, 85ZG, 85ZH, 85ZJ, 85ZK, 85ZKA, 85ZKB (all in part VIIB).

Glossary of Terms

'Criminal proceedings'
: are prosecutions for crimes (or offences) brought by the State (or the Crown) for the purpose of punishment; they are to be distinguished from civil proceedings which are brought by individuals for the purpose of compensation.

'Indictable offences'
: are serious offences that are or may be tried before a judge and jury. This was the only mode of trial at common law.(1)

'Indictment'
: is a written accusation of a crime, or the formal initiating document setting out the charge or charges. (In Victoria, such a document is called a 'Presentment').

'Summary offences'
: are offences that are heard by a magistrate (or sometimes by a judge) without a jury. They are heard in a summary fashion, in that they are not preceded by committal proceedings (as are indictable offences).

'Indictable offences triable summarily'
: are serious offences normally heard by a judge and jury, but which may, with the consent of the parties, be heard by a magistrate.

1. (Brown v R, (1986) 160 CLR 171 at 211 per Dawson J. His Honour added that summary proceedings required authorisation by statute except in the case of contempt.

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