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

Notwithstanding this repeal, further problems were encountered with jury trials in the Northern Territory, in particular in applying it to the trial of Aboriginals. This lead to a report by Acting Judge Sharwood to the Minister for the Interior in 1932, as a result of which the Criminal Procedure Ordinance 1933 (No 2) was enacted. Section 2 of that Ordinance reintroduced trial by Judge alone for an indictable offence against a law of the Northern Territory other than a capital offence. Section 3 also introduced majority verdicts for the trial of indictable offences against a law of the Commonwealth triable by jury. The earlier comment of Asche as to possible unconstitutionality, particularly for Commonwealth indictable offences not sourced in section 122 of the Constitution, was simply overlooked, as a subsequent memorandum from the Attorney General's Department revealed. However no further legislative changes in this respect were made for almost two decades after 1933.

In 1940, following discussion of further difficulties in the jury trial of Aboriginals, an amendment of the Observance of Law Ordinance was proposed and drafted to require the trial on indictment of Aboriginals in all cases to be by Judge without jury. However this was not enacted.

The issue of constitutionality was tested by the High Court in Speed v The King (1948) 22 ALJ 299. Latham CJ (Dixon J concurring) held that, on a charge of larceny of Commonwealth goods in the Northern Territory, tried by Judge alone under the Criminal Procedure Ordinance,that the trial was valid, citing R v Bernasconi.

In 1961, it was decided to restore trial by jury and the Criminal Procedure Ordinance 1961 (No 33) was enacted, repealing section 2 of the Principal Ordinance.

Trial by jury in the Northern Territory was confirmed by the new Juries Ordinance 1962, an Ordinance which repealed existing jury legislation in the Territory back to and including The Jury Act 1862 of South Australia. The new Ordinance required 12 jurors for the trial of criminal offences (section 6), and if the Court ordered the trial of a civil issue by jury, by requiring four jurors for that trial (section 7). That Ordinance, with later amendments, still remains in force in the Northern Territory.

The question of the application of section 80 of the Constitution to Territory laws and offences has continued to be a live issue, as many High Court Judges have tended to move away from the earlier "disparate" approach to the place of territories in the Constitution. This movement has been particularly noticeable since the High Court decisions in Lamshed v Lake (1959) 99 CLR 131, and Spratt v Hermes (1965) 114 CLR 226. However no High Court case has since overruled the authority of R v Bernasconi, although it has been criticised and its correctness has sometimes been doubted. There is not sufficient space in this article to allow a proper analysis of all the cases of relevance in this regard. However it is sufficient to note the latest High Court case in point, Re Wakim; Ex pt. McNally & Ors (the cross-vesting case), the judgments having being handed down on 17 June 1999 ([1999] HCA 27), and which included the case of Spinks and Prentice. The latter case, in dealing with cross-vesting to and from a Territory Supreme Court, also raised the question of the relationship between the territories power in section 122 of the Consitution and Chapter III of the Constitution headed " The Judicature". Section 80 is in Chapter III.

The Northern Territory argued in this case in favour of the cross-vesting scheme, and in doing so argued that territory courts were not Chapter III federal courts, and that there was no need to overrule R v Bernasconi in that case. In the judgments of their Honours, not a great deal of attention was given to territories. However, in the joint judgment of Gummow and Hayne JJ, they indicated that most of the difficulties with the interpretation of section 122 and Chapter III can be traced to R v Bernasconi. But they added that that case had stood for many years , and no application was made to reopen it, so that matter was not determined by them. Gleeson CJ agreed with the reasoning of Gummow and Hayne JJ, while Gaudron and McHugh JJ concurred with their orders in Spinks v Prentice. Kirby J expressed a view that would confine R v Bernasconi strictly to the point it decided concerning the application of section 80.

Thus the applicability of section 80 to territories remains a matter for argument for another day.

If section 80 of the Constitution was to be applied in the future to offences against Territory laws, then on the present state of the High Court authority, it would have a number of serious consequences in the Northern Territory. Despite the broader views of some High Court Justices, section 80 is limited to offences expressed to be indictable. It does not apply to offences triable summarily, even at the election of the defendant, and even if carrying a heavy maximum term of imprisonment (Kingswell v R (1985) 159 CLR 264, Brown v R (1986) 160 CLR 171). If applied to Northern Territory offences, this would mean that section 80 could presumably apply to all Territory "crimes" (Criminal Code, section 3 (2)). Provisions in the Justices Act for the election of a summary trial for indictable offences (eg: section 121A) would be open to attack.

Further, jury trials under section 80 require the unanimous decision of all the jurors (Cheatle v R (1993) 177 CLR 541). Provisions in Northern Territory law for majority verdicts (eg; Criminal Code, section 368, see Tipiloura v The Queen (1992) 106 FLR 71) would be open to attack.

However provisions for reducing the size of a jury to less than 12 persons as a result of the incapacity, etc, of some of the jurors (eg: Criminal Code, section 373) would be compatible with section

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80 as long as there was unanimity among the remaining jurors (see Brownlie v R (1997) 142 ALR 590).

For the present, if section 80 presents any difficulties in Commonwealth territories, it can be assumed that this only arises in the case of indictable offences created by Commonwealth legislation of Australia-wide application made in reliance (in whole or part) on a head of power other than section 122 of the Constitution. Of the recent High Court Justices to consider section 122, Gaudron J in particular has suggested in several cases that there may be some Commonwealth legislation applying in Commonwealth territories but not by force of that section. Relevant in this regard is the manner and extent to which the majority of the High Court were prepared to extend the requirement in section 51 (31) of the Constitution of just terms on any acquisition of property to an acquisition in a territory by Commonwealth legislation in Newcrest v Commonwealth (1997) 190 CLR 513. This may lend some support for at least a limited application of section 80 in territories. It remains possible that the 1922 warnings of Crown Law Officer E.T. Asche may yet prove to be soundly based, not just in the case of those limited category of Commonwealth offences, but also in the case of all indictable offences in Commonwealth territories. The latter position would require the overruling of R v Bernasconi. An opportunity to this effect was recently provided in Re the Governor of Goulburn Correctional Centre; Ex Pt Eastman (1999) HCA 44 (2 Sept 1999), but although Bernasconi was mentioned by most of the Justices

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As to the respondent's deliberate attempt to mislead the court and giving of false evidence, his Honour said that he had reached the conclusion beyond reasonable doubt. The finding of contempt was also made applying that standard of proof.

The respondent was given ample opportunity to file any material in this Court in reply to this application, but did not do so. An application made at the commencement of the hearing of the application for an adjournment to enable material to be filed was refused.

The respondent had admitted to practice as a practitioner of this Court on 3 February 1987. He had been first admitted to practice as a barrister of the Supreme Court of England and Wales on 23 July 1981 and fulfilled the then requirements for admission to practice in this Court upon that basis. In his affidavit in support of the application he asserted that he was a fit and proper person to be so admitted, and the Legal Practitioners Admission Board reported that in its opinion there were no grounds upon which the Court might be satisfied that he was not of good fame and character.

The question for the Court now is whether he is a fit and proper person to remain on the roll of solicitors and practise as such (see the authorities cited by Isaacs J. in *Incorporated Law Institute of New South Wales v Foreman* (1994) 34 NSWLR 408 said:

"It is still true today, as it was in 1909, that high standards are expected of legal practitioners, particularly in their dealings with clients and the courts. This is so that members of the public, litigants, other practitioners and the courts themselves can have confidence in the integrity of those who enjoy special privileges as legal practitioners. This court is the guardian of the maintenance of those standards. It is still the case that the court accredits to the public legal practitioners who are put forward as people who can be trusted, whose word can be accepted as truthful; who will not involve themselves in shabby, deceptive and dishonourable deceit."

We consider that those passages are particularly apt to the present application.

It was our firm opinion that His Honour's findings demonstrate that:

- the respondent is not to be trusted by the public with the absolute confidence which must be reposed in persons fulfilling the duties of solicitors (*The Southern Law Society v Westbrook* (1910) 10 CLR 609 per O'Connor J at 619);

- the respondent would be unable to command the confidence and respect of the court, fellow practitioners and clients;

-the court would be completely unable to place any reliance upon what the respondent might say and do as a practitioner of the court. The courts should be entitled to accept without question assertions made by a solicitor, and if a solicitor is found to have deliberately lied to the court, then he has failed, in a fundamental respect, to adhere to the required standards. Once a finding that a solicitor has deceived a court has been made that provides compelling evidence of his unfitness to practice (per Clarke JA, O'Reilly v Law Society of New South Wales (1988) 24 NSWLR 204 at 230).

It is difficult to envisage a worse case of breach of oath taken by applicants for admission to practice that they will well and honestly conduct themselves in the practice of a legal practitioner of this court.