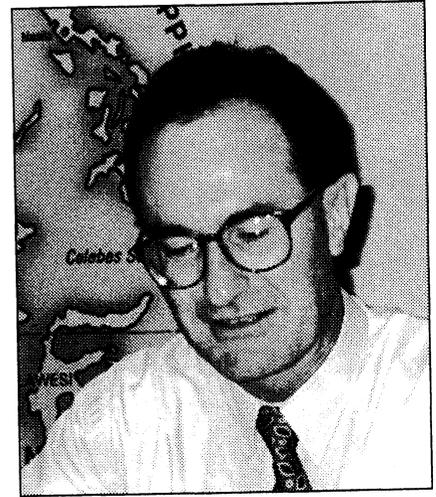


CASE NOTES

NAALAS v BRADLEY and NTA (No.2)

Federal Court No. 564 of 2002

Judgment of Weinberg J delivered 7 May 2002



Mark Hunter

ADMINISTRATIVE LAW - JUDICIAL REVIEW - COSTS

On 7 December 2001 His Honour dismissed an application ("the principal proceeding") by the North Australian Aboriginal Legal Aid Service Inc. ("NAALAS") to have the March 1998 appointment of NT Chief Magistrate Hugh Bradley declared invalid.

NAALAS then by notice of motion resisted the usual order for costs against an unsuccessful litigant, and sought an order that the respondents pay its costs in the principal proceeding on an indemnity basis. In support of its legal stance, the applicant contended:

- A. that NAALAS was "provoked" by the respondents into (on 20 April 2000) instituting and thereafter continuing the principal proceeding;
- B. that His Honour's judgment in the principal proceeding included findings:
 - (i) that the Territory had mishandled Mr Bradley's appointment and/or the fixing of his remuneration;
 - (ii) that former Chief Minister Shane Stone lied in his evidence; and
 - (iii) that Mr Bradley improperly continued to receive and retain a ten percent (10%) loading on his salary, based upon a short term contract when no such appointment was in fact made.
- C. that the success by NAALAS in resisting the respondents' challenges to its application (on the grounds of standing and justiciability) entitled NAALAS to costs on these issues or a general reduction of its liability to pay the respondents' costs;
- D. that the principal proceeding was "public interest litigation" and therefore no costs orders should be made; and
- E. that NAALAS should not be required to pay Mr Bradley's costs because:
 - (i) there was no justifiable basis for his separate representation in the principal proceeding;
 - (ii) he had been completely indemnified by the Territory in relation to costs.

ORDERS

1. Applicant to pay seventy percent (70%) of the respondents' costs in the principal proceeding, including costs reserved and this motion for costs.
2. Costs to be taxed in default of agreement.

In the course of his judgment, Weinberg J made (inter alia) the following findings and observations in relation to the (above) propositions advanced by NAALAS:

- Re A.** (i) In his letter to the Law Society Northern Territory dated 27 March 2000, Mr Bradley did not lie about the terms of his appointment; nor was his letter misleading

or less than frank, although his use of language may have been "infelicitous".¹

(ii) Even if the conclusion could be reached that Mr Bradley had lied to the Law Society, Mr Michael Jones (on behalf of NAALAS) did not in his evidence assert that any such lies provoked or contributed significantly to the decision by NAALAS to commence the principal proceeding.²

(iii) Mr Jones "was set upon" the course of challenging Mr Bradley's appointment almost from the moment that he first received instructions to ask Mr Bradley (on 28 March 2000) to disqualify himself from hearing a particular client's criminal matter.

(iv) Mr Jones did not act "...with an appropriate degree of objectivity and detachment" in advising NAALAS to commence the principal proceeding.

Re B. (i) "However ineptly Mr Bradley's appointment was handled, nothing said or done by the Northern Territory or its officers amounted to conduct of a type that should disentitle it from receiving its costs".

(ii) His Honour had (only) found that Mr Stone had a "faulty recollection".

(iii) Mr Bradley "must have been aware" that in being paid \$193,602 p.a., instead of \$156,674 p.a. (then the normal salary of the Chief Magistrate), he was somehow being compensated for a short term appointment. Once it became clear that he was not to be appointed on a fixed term contract, he was not entitled to that compensation.³ However this finding does not, in isolation, disentitle Mr Bradley to his costs in the principal proceeding.

Re C and D. Only some aspects of the principal proceeding bear the characteristics of public interest litigation, but the success by NAALAS in the NT Court of Appeal on 16 November 2000 entitles it to a reduction in its liability to pay the respondents' costs.

Re E. Neither of the arguments advanced by NAALAS is sustainable.

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CASE NOTES (cont)

APPEARANCES

Applicant - Moses/Geoff James (Solicitor).

First Respondent - Reeves QC/Cridlands.

Second Respondent - Pauling QC,S-G/Solicitor for the Northern Territory.

COMMENTARY

¹ The Oxford Dictionary defines felicitous as "well chosen".

² In his judgment Weinberg J analyses the evidence of Mr Michael Jones in relation to a much publicised but legally inconsequential home visit which he said he unexpectedly received on the evening of 4 April 2000 from the (then) president of the Law Society Northern Territory.

The remuneration and conditions of Mr Bradley's appointment are contained in a document which Weinberg J called the "Special Determination".

His Honour noted that the acceptance by Mr Bradley of a component of the Special Determination, designed to compensate him for a short term appointment, is currently an issue to be agitated by NAALAS in its appeal to the Full Court from His Honour's judgment in the principal proceeding.

³ Senior Counsel for Mr Bradley informed the Court that since judgment was handed down in the principal proceeding on 7 December last year, his client has not elected to repay any part of his salary to the Territory.

Equality before the law launched in Darwin

Gay and Lesbian Law Reform in the Northern Territory has been given a boost with the launch of a submission to the government by the Darwin Community Legal Service recently.

The impetus for the submission was the Annual Pride Week Forum in September 2001 organised by the Aids Council of the Northern Territory.

Forum participants expressed strong views about the continuing operation of laws in the NT which treat gay lesbian and bisexual people less favourably than other members of the community.

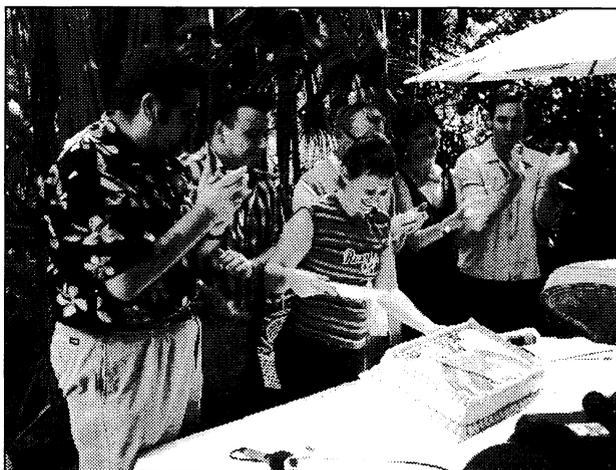
The issues specifically covered in the DCLS submission include: the age of consent to sexual intercourse, the definition of spouse for the purposes of the Domestic Violence Act, and an exemption to discriminate where work involves the care of children, or where an employer is a religious body.

progress reform

The submission calls on the Northern Territory Government to progress reform on behalf of gay, lesbian and bisexual citizens, and to undertake a comprehensive review of NT laws with a view to equalising their effect on Territorians, regardless of sexuality.

The Council of the Law Society of the NT supported the submission with the exception of the recommendation relating to excluding a provocation defence under the Criminal Code.

In writing to DCLS, President Ian Morris said: "While the Law Society supports the tenor of the remarks of Kirby J in *Green v R*, it is the view of the Society that the decision as to



Above: It's a piece of cake – DCLS staff and supporters launch the submission at Twilight on Lindsay.

whether a defence is made out is a matter for the jury as arbiters of the 'ordinary person'.

"Further if one distasteful defence was to be excluded, then a number of others would also need to be excluded on the same grounds."

In support, Mr Morris said the submission met three aspects of the Society's mission statement.

The DCLS submission can be found on the website: www.dcls.org.au/gayandlesbianlawreform.htm. ①