TRIAL BY JURY? *RE COLINA; EX PARTE TORNEY*

GRANT WEBSTER*

I INTRODUCTION

Protection of individual rights is not a prominent theme in the *Australian Constitution*. Far from offering a bill of rights, there are a few scattered sections that offer the promise of protecting a few selected rights.[1] The judicial interpretation of these sections have not endorsed the aspirations of civil libertarians who have looked to these sections as providing some fundamental, if not comprehensive, protections.[2]

Section 80[3] of the Constitution is one of those sections. It could have been read as a guarantee of a right to trial by jury in certain circumstances, providing a circumscription on Parliament's capacity to legislate in derogation of such a right. Instead, it has been interpreted as a mere form and procedure provision. The effect of the authorities[4] is that s 80 mandates trial by jury where charges are brought on indict-

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[1] See *Australian Constitution*, sections: 51(xxxi) (acquisition of property on just terms); 80 (jury trials, under consideration here); 116 (religious freedom); and 117 (freedom of movement without discrimination between states). In *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 an implied right of communication on political matters was established, and an implied right to equality of treatment under Commonwealth laws was endorsed in *Leeth v Commonwealth* (1992) 174 CLR 455.

[2] See, for example, *Teori Tau v Commonwealth* (1969) 119 CLR 564 (acquisition on just terms not applicable in Commonwealth territories), *A-G (Vic); Ex rel Black v Commonwealth* (*'DOGS Case'*) (1981) 146 CLR 559 (Commonwealth may support religious schools); *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116 (regulations and declaration dissolving association and seizing property upheld), *Henry v Boehm* (1973) 128 CLR 482 (residency in state requirements for legal practice upheld—however, the potency of s 117 was restored and *Henry v Boehm* over-ruled in *Street v Queensland Bar Association* (1989) 168 CLR 461) and reconsideration of the *Australian Capital Television* case in *Lange v ABC* (1997) 189 CLR 520. In the *Kroger* case, the High Court rejected submissions that the Constitution contained an implied right to freedom of association and an implied right to equal treatment before the law.

[3] '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.'

[4] See, for eg, *R v Bernasconi* (1915) 19 CLR 629; *R v Archdall and Roskruge; Ex parte Carrigan and Brown* (1928) 41 CLR 128; *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556; *Sachter v A-G (Cth)* (1954) 94 CLR 86; *Spratt v Hermes* (1965) 114 CLR 226; *Zarb v Kennedy* (1968) 121 CLR 283; *Li Chia Hsing v Rankin* (1978) 141 CLR 182; *Clyne v Director of Public Prosecutions*

ment. However, Parliament is free to specify, without limitation, whether or not an offence—any offence—will be dealt with by way of indictment or by summary procedure.

Re Colina; Ex parte Torney[5] raises the issue of interpreting s 80 and also discusses the nature of contempt, the nature of legislative provisions that give power to courts to deal with contempt. There is also some consideration of a submission concerning the apprehension of judicial bias in proceedings.

The judgments in this case keep alive the glimmer of hope that what civil libertarians see as the true purpose of s 80 will one day be vindicated. Kirby J in particular not only joined the tradition of dissenters but articulated their history and gave the dissenting view a sense of direction and a rallying call. His judgment is likely to inspire those that may be sympathetic, but regard salvaging a Constitutional guarantee for s 80 as a lost cause whose repeated defeats over many years deprive the cause itself of legitimacy in the face of accumulated authority. The other judgments, on the other hand, were non-committal in their approach, leaving open the possibility that some members of the presently constituted High Court may be persuaded on this issue.

II BACKGROUND

Re Colina; Ex parte Torney came before the High Court not as an appeal but as an application for a writ of prohibition sought by Torney. It had been alleged that Torney demonstrated outside the Family Court building in Melbourne, distributing written material to members of the public, and making abusive remarks about the Family Court and its members.

The comments attributed to Torney are described in the case by Gleeson CJ and Gummow J[6] and by Callinan J.[7] Torney blamed the Family Court and its judges for the deaths of people and for instances of child abuse. He claimed judges were terrorised by women's organizations and that decisions were made on a daily basis destroying the lives of innocent children. The general complaint was of bias against men. Torney's literature asserted that if people knew the nature of orders made by judges, the likely consequence would be violent action towards the judges. Judges were said to make decisions 'based on their twisted morals' and are 'protected by ... secrecy'.[8] Statements in leaflets included references to the Family Court and its judges as belonging to an 'incompetent and immoral system of justice', as a 'gar-

(1984) 154 CLR 640; *Brown v The Queen* (1986) 160 CLR 171; and *Kingswell v The Queen* (1985) 159 CLR 264.

[5] [1999] HCA 57 (Unreported, Gleeson, CJ, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 22 October 1999).

[6] Ibid [7].

[7] Ibid [116].

[8] Ibid [7].

bage can', adopting 'unfair and biased practices', as 'a tool of destruction backed by corrupt legislation and created by evil politicians', and as a 'feminazi court'.[9]

Proceedings for contempt were commenced against Torney on 6 August 1998 before Mushin J, who adjourned the hearing so that Torney might obtain legal representation and have time to prepare his case. The matter came before Burton J for hearing on 10 September 1998.

At this hearing, Torney made three submissions. He submitted that emotional stress from his recent involvement in Family Court proceedings had left him unable to instruct his advisers adequately, and for that reason the proceedings should be adjourned. Burton J acted on this submission and adjourned the proceedings to give Torney time to prepare his defence. At the same time, Burton J rejected Torney's submissions that the charges of contempt should be dismissed because the material before the Court did not include any allegation as to Torney's state of mind, and that s 80 of the Constitution required that his trial for contempt of the Family Court be by jury.

Before the charges came on for hearing, a national conference of the Family Court was held in Melbourne on 20 October 1998. At that conference, the Family Court's Chief Justice Nicholson made a speech vigorously defending the Family Court against public attacks made by men's groups on the Family Court. Nicholson CJ subsequently gave a number of media interviews on matters raised in his speech. Gleeson CJ and Gummow J set out in their judgment an extract of Nicholson CJ's speech. It is useful to quote part of that extract which seems to provide the basis of Torney's subsequent submission to the High Court. In that speech, Nicholson CJ said:

> As I said at the 1995 conference there is a more sinister element at work. ... A feature of their rhetoric is a complete absence of concern for children other than as objects of their rights and entitlements. They frequently engage in the grossest form of harassment of their former partners and their children. Many demonstrate in strident terms outside the Court.[10]

Prior to the scheduled date for the adjourned hearing Torney applied to the High Court for a writ of prohibition. The original application was heard by Hayne J who referred the matter to a Full Court for determination.

The grounds for the application are set out most fully in Kirby J's judgment[11] and Callinan J's judgment.[12] The grounds included that s 80 of the Constitution required that the contempt proceedings be tried by a jury. Another was that because of Nicholson CJ's statements a reasonable observer might apprehend bias against Torney, not just by Burton J, but by all judges of the Family Court, a claim of 'institutional

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[9] Ibid [116] (Callinan J).
[10] Cited ibid [9].
[11] Ibid [53].
[12] Ibid [115].

bias'. It was submitted that the proceedings were an abuse of process interfering with Torney's freedom to speak about matters of legitimate public interest. Finally, it was claimed that the offence of contempt in the form alleged against Torney, scandalising the court, was obsolete; or if that form of contempt was not obsolete the use of summary procedures for such contempt was obsolete. The first part of this latter submission was abandoned during the hearing. The submission relating to abuse of process was not dealt with in the judgments. The submission that summary procedures for contempt were obsolete were not dealt with directly in the judgments, but a response can be discerned implicitly in dealing with other issues.

III THE ISSUES BEFORE THE HIGH COURT

A *Section 80: Contempt Under the* Family Law Act

Section 35 of the *Family Law Act 1975* (Cth) provides for the Family Court—created by s 21 of that Act—to have 'the same power to punish contempt of its power and authority as is possessed by the High Court in respect of contempts of the High Court'. In turn, the High Court's power to punish contempts is provided for in Section 24 of the *Judiciary Act 1903* (Cth) which provides that the High Court shall have the same power to punish contempts of its power and authority as was possessed at the commencement of that statute by the Supreme Court of Judicature in England.

The judgments in the present case took a variety of approaches to the question as to whether contempt as punishable under s 35 of the *Family Law Act* was an offence against 'any law of the Commonwealth'. One point of divergence was the characterisation of contempt itself, with conflicting views expressed by Kirby J and Hayne J. Kirby J concluded that contempt was an offence whilst Hayne J argued that contempt was more in the nature of a civil proceeding.

Kirby J cited a comment from Deane J in *Hinch v Attorney-General (Victoria)* that proceedings which could result in a fine or imprisonment in consequence of a finding of contempt 'must realistically be seen as essentially criminal in nature'.[13] This would be so whether the proceedings were 'brought by the Attorney-General or some other official acting in the public interest or by a private individual for the indirect or coercive enforcement of a civil order'. Kirby J argued that this would apply with greater force where, such as in the present case, proceedings were brought 'in the public interest to vindicate judicial authority or maintain the integrity of the judicial process', a phrase cited from *Witham v Holloway*.[14]

Hayne J, on the other hand, stressed 'the significant differences between the powers that are invoked against an alleged contemnor and those that are set in train under

[13] (1987) 164 CLR 15, 49.
[14] (1995) 183 CLR 525, 534, cited by Kirby in *Re Colina* at [71].

the criminal law'.[15] He cited a passage from *Hinch v A-G (Vic)*: '[Proceedings for contempt] ... do not attract the criminal jurisdiction of the court ... they proceed in the civil jurisdiction and attract the rule ... that costs follow the event.'[16] He noted that contempt proceedings were instituted by the court of its own motion and that a cardinal feature was that it was an exercise of judicial power by the courts, and was not controlled by the executive.

Other judgments avoided the need to characterise contempt according to whether or not it constituted an offence. Assuming contempt was an offence, was it an offence against 'any law of the Commonwealth'? On this point, the joint judgment of Gleeson CJ and Gummow J diverges markedly from the judgment of McHugh J.

The approach of Gleeson CJ and Gummow J was that neither s 35 of the *Family Law Act* nor s 24 of the *Judiciary Act* were expressed to confer federal jurisdiction in respect of a particular species of 'matter'. Rather, they set out particular powers of the respective Court and should be read as declaratory of an attribute of the judicial power of the Commonwealth which is vested in those Courts by s 71 of the Constitution.

In the view of Gleeson CJ and Gummow J, that which renders such acts (if proved) liable to punishment has its source in Chapter III of the Constitution. It was an 'inherent' power of self protection and an incidental power to that of administering justice.

The phrase 'law of the Commonwealth' refers to laws made under the legislative powers of the Commonwealth, a proposition established by a long line of authority.[17] In particular, an obligation or liability which has its source in the Constitution itself does not arise under a law of the Commonwealth.[18] So what is alleged against Mr Torney is not any offence against 'any law of the Commonwealth'.

> The fact that there are laws made by the Parliament which are declaratory of the power implicit in Ch III of the Constitution or which make provision under s 51 (xxxix) of the Constitution incidental to the exercise of that power does not bring the case within s 80.[19]

McHugh J stated his agreement with the reasons of Gleeson CJ and Gummow J for dismissing the application subject to his disagreement with the view that an offence against s 35 of the *Family Law Act* is not an offence against a law of the Commonwealth within the meaning of s 80 of the Constitution.

It must be said that McHugh J's stated general agreement with Gleeson CJ and Gummow J is rather obscure. The point of disagreement is fundamental. Because

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[15] *Re Colina: Ex parte Torney* (1999) HCA 57 [109].
[16] (1987) 164 CLR 15, 89; cited in *Re Colina* (1999) HCA 57 [109].
[17] The authorities cited are: *R v Bernasconi* (1915) 19 CLR 629; *Jerger v Pearce* (1920) 27 CLR 526; *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421; *Sankey v Whitlam* (1978) 142 CLR 1; and *Western Australia v Commonwealth* (1995) 183 CLR 373.
[18] *Sankey v Whitlam* (1978) 142 CLR 1, 29-30, 72-4, 91-3, 104-5.
[19] *Re Colina: Ex parte Torney* (1999) HCA 57 [25].

Gleeson CJ and Gummow J found that the alleged offence is not one against a law of the Commonwealth, they did not need to consider (and did not consider) whether trial by jury was mandated by s 80 in this or any circumstance. McHugh J, on the basis that the alleged offence is against a law of the Commonwealth, dismisses the application on the authority-sanctioned basis that because there was no indictment, trial by jury was not required.

McHugh J doubted the validity of s 35 of the *Family Law Act*. Its validity, he said, depended on its proper construction. If it did no more than pick up and apply as Commonwealth law the precise content of the rules of contempt which were recognised by the Supreme Court of Judicature in England as at the commencement of the *Judiciary Act*, and not any judicial development of them after that date, then s 35 may be valid.

However, McHugh J notes, if s 35 purports to define the content of a law of Parliament by reference to the doctrines of judge made common law then arguably it cannot do so. He cites passages from *Western Australia v The Commonwealth (Native Title Act Case)*[20] to support this proposition. Since the constitutionality of s 35 had not been challenged, McHugh J was bound to decide the case on the assumption that s 35 was valid. However, his judgment is peppered with the phrase 'assuming it is valid' or similar qualification.

McHugh J never quite offers much by way of reason for the proposition that s 35 of the *Family Law Act*, 'assuming it is valid', is a law of the Commonwealth for the purposes of s 80 of the Constitution. The strongest reasoning is the argument that Parliament must have been legislating more than the necessity power inherent in Chapter III of the Constitution. But he states that it would be a law of the Commonwealth even if it was merely declaratory.

One can sense a degree of frustration in McHugh J's judgment in attempting to find a formula for expressing why that which appears obvious is in fact the case, that is, that a legislative provision passed by the Australian Parliament is 'a law of the Commonwealth'. One can sympathise. It certainly seems artificial, contrived and unconvincing to deny that a law, even a law that is 'merely declaratory', once enshrined in legislation, is a law of the Commonwealth. How does a law change its nature once it is 'declared' in legislation? It is submitted that there is a change because it has now been recognised and adopted by Parliament as its own. Its text, and therefore a large part of its content, is frozen and somewhat fixed. We read a statute differently from the way we read common law judgments establishing a rule. Its status and authority are different. It has been noted that common law rules enjoy their status not because of the circumstances of their origin, but because of their continued reception, whereas statute law is exceedingly less likely to be so treated because of its origins.[21]

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[20] (1995) 183 CLR 373, 484-5.

[21] See B Simpson, 'The Common Law and Legal Theory' in William Twining (ed), *Legal Theory and Common Law* (1986) 14.

Callinan J's approach to the entire issue of the requirements of s 80 is far more peremptory. The controversies over characterisation of contempt and whether or not a breach of a law of the Commonwealth is involved are avoided in his judgment. His approach is to show, firstly, that the summary procedure for contempt proceedings is both long-established and well-established. Callinan J then acknowledges that a practice evolved over the years cannot stand in the way of a constitutional guarantee, and a practice fallen into obsolescence can be revived especially if as a Constitutional imperative it must be.

However, in Callinan J's view, the authority of *Lowenstein* and *Kingswell* stand in the way of such a proposition and would need to be re-opened. His treatment of these authorities is similarly peremptory before reaching a curiously precise conclusion that 's 80 of the Constitution does not require that the charge of the contempt of the Family Court by scandalising it be tried by jury'.[22] This conclusion is reached by the consideration of the intention of the framers of the Constitution, the long history of summary proceedings for contempt and the High Court's 'recent considered judgment' in *Kingswell.*

B *When, if Ever, is Trial by Jury Mandated by s 80?*

It is perhaps not an excessive claim to say that the major point of interest in *Re Colina; Ex parte Torney* is Kirby J's passionate advancement of the argument that s 80 is a guarantee of trial by jury. Kirby J is acutely aware of the forces operating against the ultimate vindication of such an argument. Indeed, in his judgment, Kirby J takes care to set out with full force the reasons, apart from the state of authority on the matter, for adhering to what has been the majority view on s 80.

In this part of his judgment, Kirby J notes that the history of successive drafts of s 80 and the Constitutional Convention debates support the argument for Parliament having flexibility in defining which offences would be tried on indictment. The framers were aware of the range of offences that were tried summarily, and a summary procedure for contempt would not have shocked them. In fact, contempt was specifically discussed in relation to the drafting of s 80 at the constitutional conventions. Kirby J notes that dissenting opinions on s 80 display no unanimity as to applicable principles. He also notes that Deane J's approach in Kingswell has been criticized for inserting criteria not supported by the text. Given the holding in *Brown v The Queen*[23] that once s 80 applies its requirements may not be waived, invigorating s 80 may import an unnecessary element of inflexibility into the trial of offences in the nature of contempt. Finally, there is the argument that s 80 should not be interpreted so as to impute to Parliament a propensity to abuse the flexibility it possesses.

Even before setting out the above arguments in favour of the majority view of s 80, Kirby J has given a strong indication of his approach. He acknowledges the con-

[22] *Re Colina: Ex parte Torney* (1999) HCA 57 [136].
[23] (1986) 160 CLR 171, 201 (Deane J), 197 (Brennan J).

struction of the term 'on indictment' advanced by both the first respondent and the Attorney-General for the Commonwealth (who intervened) in the following terms: '[t]his is that it was wholly left to the Federal Parliament to specify those "trials" and any "offences" which must proceed "on indictment".'[24]

According to this view, there is no implication in the mandatory language of the section ('shall') nor in its purpose as a constitutional guarantee of rights, nor in its place in Chapter III, nor any other aspect of the matter that would require that the trial of some offences must be on indictment and thus by a jury and not by judge alone.[25]

There follows an outline history of judicial consideration of s 80 with some pointed and openly partisan commentary. On *R v Bernasconi*[26] Kirby J writes: '[t]hat regrettable decision has blighted more than s 80 of the Constitution in the intervening years.'[27] Commentary in a similar tone is made on Isaac J's opinions in both *Bernasconi* and *R v Archdall and Roskruge; Ex parte Carrigan and Brown*.[28] And so through subsequent authorities referring to s 80.

One upshot of this history is that despite claims—or pleas?—that the interpretation of s 80 should be regarded as settled, the dissenting voices have not gone away. In the wake of Kirby J's judgment in this case, they are unlikely to, even if ultimate success continues to elude them.

Kirby J's reasons for asserting that s 80 should be construed as a guarantee of trial by jury in certain cases—and he favours Deane J's formulation that it should apply to serious cases, that is, where a defendant faces imprisonment for more than 12 months—can be set out as follows.

Firstly, Kirby J rejects as fundamentally erroneous an approach to construction of the Constitution 'as if the task of the Court were to give effect to the opinions, expectations, beliefs and hopes of the founders of the Commonwealth.'[29] Once the Constitution was adopted, the text was set free from the 'intentions' of its draftsmen. The Court is bound to read s 80 as a permanent obligation, expressed in Chapter III and thus governing an important question of the composition of a court in the circumstances specified.

Secondly, in the context of the express provision for the Parliament to prescribe other matters as stated in s 80, that is, as to place, it would not lightly be assumed that Parliament or the Executive would enjoy such an untrammeled discretion to determine, without interference from the Constitution, when a trial should be on indictment and when it should not.

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[24] *Re Colina: Ex parte Torney* (1999) HCA [84].
[25] Ibid.
[26] (1915) 19 CLR 629.
[27] *Re Colina: Ex parte Torney* (1999) HCA , [85].
[28] (1928) 41 CLR 128.
[29] *Re Colina: Ex parte Torney* (1999) HCA , [96].

The Court has both a discretion and an obligation to correct previous constructions of Constitutional provisions that were wrong and has done so on numerous occasions. The Court should not attribute to s 80 a meaning which mocks its existence or rests on the assumption that it was 'misconceived at birth'.[30] That some might prefer to opt for a summary trial was no answer in *Brown v The Queen*[31] nor should it be in relation to the construction of s 80.

In answer to the criticism that the introduction of a criterion of liability to imprisonment or to imprisonment for a term of more than one year involves introduction into s 80 of conditions not expressed in the text, Kirby J argues that there is 'a simple answer'. The Court must often explain and elaborate the application of disputed provisions. As he explains,

> [e]very legal system must draw 'nice distinctions' and, as a consequence, accept 'borderline cases'. So long as these are defined by reference to an 'intelligible principle' they escape justifiable criticism.
>
> The criterion proposed by Deane J in *Kingswell* ... takes into proper account the history of summary trials in Australia and England at the time s 80 was adopted, and since that time, and the purpose that must be attributed to s 80.[32]

Finally, Kirby J argues that in matters of fundamental constitutional rights a greater vigilance will be adopted by the Court than elsewhere. (It would seem that this statement is intended to be normative rather than descriptive.) 'Governments, including the Executive Government of the Commonwealth, will sometimes have strong reasons, not all of them financial, for supporting proposals to limit jury trials in certain circumstances.'[33]

In contrast to Kirby J's detailed and somewhat passionate argument concerning this aspect of s 80, other members of the Court gave it scant consideration. Hayne J was entirely silent on the matter. McHugh J, who in fact rested his reasons on the established state of authority, said no more than 'However, because Mr Torney has not been charged on indictment, s 80 has no application in this case', citing *R v Archdall and Roskruge* and *Brown v The Queen*.[34]

Callinan J's general position is particularly difficult to discern. Without a great deal of discussion, he saw fit to present three lengthy quotations from, in turn, Starke J as one of the majority in *Lowenstein*, the joint judgment of Gibbs CJ, Wilson and Dawson JJ in *Kingswell* and the judgment of Brennan J, dissenting, in *Kingswell*. He then refers briefly to comments by Barton and Isaacs at the Melbourne Convention of 1898.

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[30] Ibid [100].
[31] (1986) 160 CLR 171.
[32] *Re Colina: Ex parte Torney* (1999) HCA 57 [103] (citations omitted).
[33] Ibid [104].
[34] Ibid [50].

Callinan J's conclusion on the matter on the one hand seems content to rest on these authorities while tantalisingly expressing concerns about the interpretation of s 80. As indicated previously, his conclusion is curiously precise:

> The intention of the framers so clearly expressed, the long history of summary proceedings for contempt and the recent considered judgment of this Court in *Kingswell* bring me to the conclusion that s 80 of the Constitution does not require that the charge of contempt of the Family Court by scandalising it be tried by jury, notwithstanding that I share some of the concerns expressed by Dixon and Evatt JJ in *Lowenstein* and by Brennan J in *Kingswell* in the passage I have quoted.[35]

And what, one would like to ask, of the concerns expressed by Deane J in *Kingswell*? And would these concerns translate into supporting a role for s 80 that placed some limit on Parliament's discretion to define which offences would be brought on indictment?

The joint judgment of Gleeson CJ and Gummow J is similarly non-committal on the question of a possible re-opening of this issue. Their judgment provides a summary statement of the state of authority, with a footnote listing most of the authorities considering s 80.[36] Their judgment then notes that that interpretation has not been universally accepted. The judgment on this matter then concludes:

> Counsel for Mr Torney invited the Court to reconsider this issue but, even if the Court were otherwise minded to do so, the present would not be an appropriate case. The reason is that the argument based on s 80 must in any event fail on another ground. What is alleged against Mr Torney is not an 'offence against [a] law of the Commonwealth.[37]

C *Institutional Bias?*

It would have been startling, and probably headline news, had the justices of the High Court found that Barton J was so subject to an apprehension of bias because of the comments of Nicholson CJ that he could not hear a charge of contempt of the Family Court (and nor could any other Family Court judge).

Nothing so unlikely happened, of course. On the issue of alleged bias, both McHugh and Hayne JJ agreed with the joint judgment of Gleeson CJ and Gummow J. Kirby J found that because he had found for Torney on the issue of trial by jury, thus entitling him to immediate relief, there was no need to consider the other grounds of Torney's application. Only Callinan J made some separate comments from the joint judgment on this matter.

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[35] Ibid [136].
[36] Ibid [24]. See also authorities mentioned above n 4.
[37] Ibid [25].

Gleeson CJ and Gummow J said that the argument for bias had the flaw that it assumed a relationship between the Chief Justice and a member of his or her court which is contrary to fundamental principles of judicial independence. They noted that one aspect of this independence was that it included independence from one another. Corresponding to Nicholson CJ's duty not to seek to influence Burton J in the discharge of his judicial duties, there was a duty on Burton J to act independently, and in accordance with his judicial oath. Callinan J noted that judges frequently give dissenting judgments from those brought down by their Chief Justice.[38]

This aspect of the application does not appear to have been accorded any detailed consideration. Absent something more substantial than a Chief Justice, even in scathing terms, speaking publicly in response to attacks on the work of his or her court, this part of the application never appeared likely to be persuasive. The issue of whether the contempt proceedings were an abuse of process, as noted earlier, were not dealt with in the judgments. It was made perfectly obvious, in context, that summary procedures for contempt were, contrary to Torney's other submission, far from obsolete. Callinan J's judgment, at least, makes this perfectly clear.

IV CONCLUSION: SECTION 80 AND AUSTRALIAN POLITICAL CULTURE

On none of the issues dealt with in the judgments in *Re Colina* is there an authoritative determination. Each issue—characterisation of contempt, whether a legislative provision in an Act of Parliament can be other than 'a law of the Commonwealth', the validity of s 35 of the *Family Law Act* and similar provisions, and the interpretation of s 80—is left open in a way that invites further litigation to decide, or at least further elaborate, on them.

In relation to s 80 one senses that the project to enshrine constitutional rights is destined to remain an important and influential minority position among both the judiciary and the wider Australian community. This state of affairs has much to do, ultimately, with Australian political culture which holds individual rights to be important, but not an overriding concern. Thus, in *Kingswell*, while there may have been some respectable civil libertarian concerns about the nature of the provisions under consideration in the case, that concern in an essentially pragmatic political culture would not override the perception that the provisions were a measured, appropriate and necessary response by the legislature to issues relating to the importation of drugs.

This culture influenced the making of the Constitution with the few scattered and limited 'Constitutional guarantees' that were placed in the document and goes far towards an explanation of why calls for a bill of rights are made intermittently and never inspire a popular following.

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[38] Ibid [142].

The minority, civil libertarian, view is available as a tradition to draw on to control excesses. These can no doubt arise, where Parliament, in response to populist concerns, may seek to sacrifice civil liberties in order to address such concerns. One could argue interminably about the extent to which Australian Parliaments, state and federal, had done so in particular cases. Related to such arguments are arguments about whether such issues ought to be determined by the political culture—presumably according to the popular will (ie, democratically)—or judicially—presumably according to principle, and as a check on popular excesses against those demonised by the polity at various times.

The tensions between these positions, it is submitted, are incapable of resolution, and the tension itself is a vital part of the dynamics that provide a balance which generally lead to pragmatically acceptable outcomes, if not optimal civil libertarian outcomes.

The majority view of s 80 is likely to continue to prevail largely because Parliament is unlikely to hand the High Court a case where overturning the majority view is mandated by the circumstances of the case. It is far from impossible that such a case will arise. What is highly likely is that the High Court will be asked to consider the issue again. This would be so even without Kirby J's advocacy in the present case. It is also highly likely that other judges will follow Kirby J's call. However, ultimate success appears, on present indications, to remain out of reach.