

MEMORANDUM OF ADVICE

HOMELESSNESS BILL 2012

1. INTRODUCTION

1.1 The Public Interest Advocacy Centre has sought advice as to the proposed Homelessness Bill 2012 (Cth) and the implications of the recent decision of the High Court in *Williams v Commonwealth of Australia* [2012] HCA 23 (“the *Williams* case”) case for that legislation.

1.2 The Homelessness Bill seeks to:¹

- (a) Establish a clear definition of homelessness;
- (b) Set out the Government’s views on how people who are homeless should be treated and supported;
- (c) Reaffirm the Government’s commitment to work cooperatively with State and Territory governments, the not-for-profit and the for-profit sectors to reduce homelessness; and
- (d) Recognise the importance of strategies to reduce homelessness, including early intervention and prevention, appropriate accommodation options, and ongoing service and support.

¹ Minister for Homelessness (Cth), ‘Draft Homelessness Bill released for comment’.

- 1.3 The Homelessness Bill does not seek to make any payments, agree to any grants or provide any explicit service. It merely involves a definition of homelessness, an outline of strategies to treat homelessness and recognition of the importance of such strategies. This somewhat unusual approach is based on an apprehension that the Commonwealth has no express constitutional power to comprehensively regulate housing or homelessness. It is our opinion, for the reasons that follow, that this apprehension by the Commonwealth is misplaced.

2. THE IMPLICATIONS OF THE *WILLIAMS* CASE

- 2.1 The *Williams* case involved a challenge to the validity of payments made pursuant to the National School Chaplaincy Program (“NSCP”) concerning the following Constitutional sections:

- (a) Section 61 (executive power of the Commonwealth);
- (b) Section 51(xx) (corporations power);
- (c) Section 51(xxiiA) (benefits to students);
- (d) Section 116 (prohibition on a religious test);
- (e) Section 81 (consolidated revenue); and
- (f) Section 96 (grants to states).

- 2.2 Section 61 provides:

*“The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth.”*²

² *Australian Constitution* s 61.

- 2.3 The High Court held that s 61 did not empower the Commonwealth, in the absence of statutory authority, to contract for or undertake the challenged expenditure on chaplaincy services in the Darling Heights State School.³
- 2.4 The reasoning of the High Court in the *Williams* case did not arise from an evaluation of the merits of public funding of chaplaincy services in schools nor any conclusions about the availability of constitutional mechanisms, for example, grants to States or intergovernmental-agreements, which might permit the provision of such services.
- 2.5 The executive power extends to:
- (a) Powers necessary or incidental to the execution and maintenance of a law of the commonwealth;⁴
 - (b) Powers conferred by statute;⁵
 - (c) Powers defined by reference to such of the prerogatives of the Crown as are properly attributable to the Commonwealth;⁶
 - (d) Powers defined by the capacities of the Commonwealth common to legal persons;⁷ and
 - (e) Inherent authority derived from the status of the Commonwealth as a national government.⁸
- 2.6 The Court held that funding of the NSCP is not provided under any statute of the Parliament. There was no law enacted that relied on a legislative head of power to provide for such expenditure.⁹

³ *Williams v Commonwealth of Australia* [2012] HCA 23, 3.

⁴ *R v Kidman* (1915) 20 CLR 425.

⁵ *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73.

⁶ *Farey v Burvett* (1916) 21 CLR 433.

⁷ *New South Wales v Bardolph* (1934) 52 CLR 455.

⁸ *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338.

- 2.7 It is well settled that the Executive *can* spend where power to do so is conferred by valid statute.¹⁰ The *Williams* case only poses potential and substantial ramifications for any Commonwealth spending program not supported by legislation. For programs supported by legislation, the *Williams* case would unlikely have any implication.

The Financial Framework Legislation Amendment Act 2012

- 2.8 The *Financial Framework Legislation Amendment Act 2012* addresses the implications of the *Williams* case. In so far as it is an act to amend the law relating to finance, it provides the legislative foundation for agreements and expenditure potentially invalidated by the High Court's decision in the *Williams* case.
- 2.9 According to the Explanatory Memorandum to the Financial Framework Legislation Amendment Bill:

*“The Act amends the FMA Act to empower the Commonwealth, where authority does not otherwise exist, to make, vary or administer arrangements under which public money is or may become payable, or to make grants of financial assistance, including payments or grants for the purposes of particular programs, where those arrangements or grants, or a class including those arrangements or grants or relevant programs, are specified in regulations. The proposed amendments would also apply in relation to arrangements etc that are in force immediately before those amendments came into operation.”*¹¹

- 2.10 Schedule 2 of the Act specifically refers to housing and homelessness payments:¹²
- (a) Housing Assistance and Homelessness Prevention;
 - (b) Affordable Housing;
 - (c) Targeted Community Care;

⁹ *Williams v Commonwealth of Australia* [2012] HCA 23, 88.

¹⁰ *Pape* (2009) 238 CLR 1.

¹¹ Explanatory Memorandum, Financial Framework Legislation Amendment Bill 2012 (Cth).

¹² *Financial Framework Legislation Amendment Act 2012* (Cth), Schedule 2.

(d) Indigenous Housing and Infrastructure; and

(e) Australian Housing and Urban Research Institute.

2.11 In light of the passage of the above amendments through Parliament, the ramifications of the *Williams* case are minimised.

2.12 So far as the executive power of the Commonwealth is concerned, agreements to provide payment to and service for homelessness initiatives would be validated under legislative authority. At any rate, with or without the amendments above, the significance of the *Williams* case on the draft Homelessness Bill is negligible as the proposed Homelessness Bill does not authorise any spending.

3. USE OF THE EXTERNAL AFFAIRS POWER TO REGULATE THE ISSUES ASSOCIATED WITH HOMELESSNESS

3.1 The Commonwealth does enjoy constitutional power with respect to “external affairs”.¹³ The external affairs power can authorise the implementation of international obligations.¹⁴

3.2 Australia is signatory to the International Covenant on Economic, Social and Cultural Rights. One obligation created by this treaty is the right of everyone to an adequate standard of living.¹⁵ This includes the right to adequate housing and shelter.¹⁶ Amongst other international treaties, the Homelessness Bill makes reference to this Covenant, but does not attempt to use the external affairs power to legislate in the area of homelessness. It is our opinion that the external affairs power can be used to legislate in the area of homelessness.

¹³ *Australian Constitution* s 51 xxix.

¹⁴ *Commonwealth v Tasmania* (1983) 158 CLR 1.

¹⁵ Homelessness Bill (2012) s 11.

¹⁶ *Ibid* s 11(1).

4. GRANTS TO STATES

- 4.1 With regard to the provision of rights, obligations and additional finances in relation to the issue of homelessness, it is true to say that no explicit Commonwealth power exists in the constitution. That is not however to say that the Commonwealth could not rely on any or any combination of the external affairs power or grants to enact legislation which is aimed at implementing real solutions to the issue of homelessness. As we have noted, the current form of the Homelessness Bill merely contains a number of statements about homelessness rather than enacting rights and obligations aimed at the issue of homelessness in Australia.
- 4.2 For instance, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.¹⁷ These grants can impose any terms and conditions, regardless of whether or not the Commonwealth has the power to make laws relevant to them.¹⁸ The Commonwealth could tie obligations on the States into further expenditure of monies in this important area. In doing so, the Commonwealth would surpass the barriers provided by the lack of an explicit legislative power yet still effectively regulate the homelessness legal framework, should the states accept the required grants.
- 4.3 We are of the opinion that the *Williams* case does little to affect the head of power from which homelessness support and services could be drawn. The limited implications which may have been present are remedied by the recent passing of the *Financial Framework Amendment Act*.
- 4.4 We so advise.

ARTHUR MOSES SC

PROF. PATRICK KEYZER

17 July 2012

¹⁷ *Australian Constitution* s 96.

¹⁸ *Victoria v Commonwealth (Federal Aids Roads case)* (1926) 38 CLR 399.