



THE UNIVERSITY OF
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3 May 2010

Committee Secretary
Senate Legal and Constitutional Committee

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

NATIONAL SECURITY LEGISLATION AMENDMENT BILL 2010: SUPPLEMENTARY SUBMISSION

Please find attached a supplementary submission to that lodged by the Gilbert + Tobin Centre of Public Law on 30 April in relation to the National Security Legislation Amendment Bill 2010 ('the Bill'). The submission should be labelled 'Gilbert + Tobin Centre of Public Law – Annexure 2'.

I make this supplementary submission in my capacity as Director of the Gilbert + Tobin Centre of Public Law and am solely responsible for its content.

If you have any questions relating to this submission, or if I can be of any further assistance, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in blue ink that reads 'Andrew Lynch'.

Dr Andrew Lynch

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The National Security Law Amendment Bill and the Referrals Power

In his Second Reading speech to the National Security Law Amendment Bill, the Attorney-General said that the Bill's failure to make any substantial amendment of the core provisions of Divs 101 and 102 of the Code is because the States must first amend the referring legislation by which they enlivened the topic of 'terrorist acts' for Commonwealth legislative power.¹ Specifically, he said:

I should take this opportunity also to point out that some of the measures that were included in the discussion paper that was circulated are not in this bill. These include proposed amendments to the definition of terrorist act and the proposed new terrorism-based hoax offence. These amendments will require the states to amend their legislation which referred power to the Commonwealth. The government will continue to work closely with the states to progress these measures.

The Intergovernmental Agreement

Clause 3 of the Commonwealth and States and Territories Agreement on Terrorism and Multi-Jurisdictional Crime, 5 April 2002 provides that the Prime Minister and State and Territory leaders agreed:

*3. To take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation, including roll back provisions to ensure that the new Commonwealth law does not override State law where that is not intended and to come into effect by 31 October 2002. The Commonwealth will have power to amend the new Commonwealth legislation in accordance with provisions similar to those which apply under Corporations arrangements. **Any amendment based on the referred power will require consultation with and agreement of States and Territories, and this requirement to be contained in the legislation.***

The IGA's recognition of 'consultation and agreement' before a Commonwealth amendment falls rather short of what the Attorney-General states is necessary in his Second Reading speech. In any case, the IGA does not determine the scope of the Commonwealth's power – that is the function of the referrals themselves (to the extent the Commonwealth does not independently possess the necessary legislative capacity – a point returned to below).

The Referrals and the Code

As an examination of the referrals by the States to the Commonwealth makes apparent, it is not necessary that the States amend their legislation before the Commonwealth can make changes to its own.

Section 100.2(1) of the Code provides that:

- (1) A State is a **referring State** if the Parliament of the State has referred the matters covered by subsections (2) and (3) to the Parliament of the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution:

Sub-section 2 of that provision is the 'initial reference' and covers the enactment by the Commonwealth of the text contained in the Schedules of the States' respective referring Acts:

¹ It is not explained why Item 2 of Sch 2 (which inserts 'substantial' before 'risk' in s 102.1(1A)(c)) is not subject to this requirement.

- (2) This subsection covers the matters to which the referred provisions relate to the extent of making laws with respect to those matters by including the referred provisions in this Code.

Sub-section 3 is the 'amendment reference' by which the States refer such power to the Commonwealth as is necessary to make 'express amendments' to the text originally referred:

- (3) This subsection covers the matter of terrorist acts, and of actions relating to terrorist acts, to the extent of making laws with respect to that matter by making express amendment of this Part or Chapter 2.

Under s 100.1, 'express amendment' is defined to mean 'the direct amendment of the provisions (whether by the insertion, omission, repeal, substitution or relocation of words or matter).'

These Code provisions substantially replicate those in the State referrals themselves, but the latter are more explicit. For example, s 4 of the *Terrorism (Commonwealth Powers) Act 2003 (Vic)* provides for both the initial and amendment references:

- (1) The following matters are referred to the Parliament of the Commonwealth –
 - (a) the matters to which the referred provisions relate, but only to the extent of the making of laws with respect to those matters by including the referred provisions in the Commonwealth Criminal Code in the terms, or substantially in the terms, of the text set out in Schedule 1; and
 - (b) the matter of terrorist acts, and actions relating to terrorist acts, but only to the extent of the making of laws with respect to that matter by making express amendments of the terrorism legislation or the criminal responsibility legislation.

In sub-s (3) it is stated that the 'operation of each paragraph of subsection (1) is not affected by the other paragraph' – in other words that the 'initial' and 'amendment' references are to be understood independently of each other. In *Thomas v Mowbray* Hayne J accepted the Commonwealth's argument that the amendment reference would allow the insertion of any new matter falling within the description of a law with respect to 'terrorist acts, and actions relating to terrorist acts' so long as 'that is done by express amendment to the law that was enacted in the form of the scheduled text'.²

Section 3 of the Referring Act defines as follows:

express amendment of the terrorism legislation or the criminal responsibility legislation means the direct amendment of the text of the legislation (whether by the insertion, omission, repeal, substitution or relocation of words or matter) by Commonwealth Acts, but does not include the enactment by a Commonwealth Act of a provision that has or will have substantive effect otherwise than as part of the text of the legislation.

Clearly, the Commonwealth has very broad powers of amendment with the only expressed restriction being against use of the referral to support legislative initiatives otherwise than as 'part of the text of the legislation'. Despite being distinctively novel in comparison to the Divs contained in the initial referral, Hayne J found the addition of Division 104 was valid as an 'express amendment' since it was an insertion to that text rather than located in a separate enactment.

Kirby J reached a contrary conclusion and insisted that the amendment reference could not be used by the Commonwealth to depart from 'the referred provisions... in the terms, or substantially in the terms, of the text' of the initial referral. He viewed the insertion of Div 104

² *Thomas* (2007) 233 CLR 307, [454].

as a radical addition which could not be said to amend the initial text but would require a fresh referral.³

Only these two Justices addressed the referrals power in *Thomas*.

The legislative purpose behind recognizing a restriction as to only the location, rather than content, of the ‘express amendment’ appears to be to ensure adherence to the requirement of s 100.8 of the Code. Section 100.8(2) of the Code provides that:

An express amendment to which this section applies is not to be made unless the amendment is approved by:

- (a) a majority of the group consisting of the States, the Australian Capital Territory and the Northern Territory; and
- (b) at least 4 States.

For a variety of reasons, section 100.8(2) was declared to be invalid by three Justices in *Thomas v Mowbray* (with the rest not deciding). That view is very probably correct, but even if it is not, it should be noted that contrary to the Attorney-General’s statement in the Second Reading speech, the provision does *not* require any legislative attention by the States to their referring Acts but merely executive assent (and even then, not of all States). Indeed, such a requirement would substantially defeat the utility of State referrals by reducing the co-operative endeavour to an agreement to pass and update mirroring legislation.

In conclusion:

- The amendment reference is expressed very widely both in terms of the subject ‘terrorism matters’ and the nature of the amendment which may be performed;
- The referring legislation stipulates that the scope of the amendment reference is to be read independently of the initial text reference;
- In *Thomas*, Hayne J accepted that the introduction of Div 104 to the Code could be supported by the amendment reference;
- Prior to the enactment of *Anti-Terrorism Act (No 2) 2005* the States were not required to (and nor did they) amend their referral legislation so as to allow the Commonwealth to insert Div 104;
- Section 100.8 establishes a mechanism for State approval of ‘express amendments’ which, if even valid, does not involve legislative action by the States.

Beyond the referral

In *Terrorism (Commonwealth Powers) Act 2003 (Vic)* s 4(4) and other State referrals, it is recognised that the Commonwealth may make amendments to the initial text using those legislative powers it holds aside from the State references.

The result in *Thomas* regarding the breadth of the Commonwealth’s defence power under s 5(vi) of the Constitution must seriously undermine the continued relevance of s 51(xxxvii) and the associated State referrals as the substantial basis for Part 5.3 of the Code. With a 6:1 majority finding that s 51(vi) supports the creation of a scheme of interim control orders as a preventative tool against internal threats of terrorism, it would seem most likely that this power would also sustain the earlier Divisions which criminalise terrorist acts.

³ *Thomas* (2007) 233 CLR 307, [204]-[205].

Conclusion

The Commonwealth possesses sufficient power under the ‘amendment references’ of the States to carry out those changes originally proposed in the Discussion paper – and any others it may also care to devise. Any valid requirement for State approval does not require legislative enactment at the State level, but merely executive assent.

The High Court has confirmed that the Commonwealth possesses substantial powers to legislate with respect to terrorism using s 51(vi) and there is every reason to suspect that the proposed amendments which the Attorney-General has deferred would fall within the scope of this power, rendering resort to the referrals power unnecessary in any case.