

# Commonwealth Executive Power and Accountability Following *Williams (No. 2)*

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## I Introduction

The importance of the High Court's decision in the first School Chaplains case<sup>1</sup> to our understanding of Commonwealth executive power, parliamentary accountability and federalism has been demonstrated in previous editions of *Papers on Parliament*.<sup>2</sup> This paper further considers these issues by examining the significant implications of the second School Chaplains case.<sup>3</sup>

In *Williams (No. 1)* the High Court, relying to a large extent on principles underlying parliamentary accountability and federalism, held that the Commonwealth executive did not have the power to enter into a funding agreement with a private company that provided chaplaincy services in a Queensland government school. The Court thereby effectively invalidated the National School Chaplaincy Program (NSCP) and cast doubt over the constitutional validity of a significant proportion of Commonwealth expenditure.<sup>4</sup>

Following *Williams (No. 1)* it appears that the Commonwealth will only have authority to expend public money that has been legally appropriated when the expenditure is:

1. authorised by the Constitution;
2. made in the execution or maintenance of a statute or expressly authorised by a statute;
3. supported by a common law prerogative power;
4. made in the ordinary administration of the functions of government; or
5. (possibly) supported by the nationhood power.

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<sup>1</sup> *Williams v Commonwealth* (2012) 248 CLR 156 ('*Williams (No. 1)*').

<sup>2</sup> See Cheryl Saunders, 'The scope of executive power', *Papers on Parliament*, no. 59, April 2013, pp. 15–34 and Glenn Ryall, '*Williams v Commonwealth*—a turning point for parliamentary accountability and federalism in Australia?', *Papers on Parliament*, no. 60, March 2014, pp. 131–48.

<sup>3</sup> *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416 ('*Williams (No. 2)*').

<sup>4</sup> Ryall, *op. cit.*, p. 131.

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Any expenditure of validly appropriated public money that does not fall into any of these categories is invalid.<sup>5</sup> Thus, in most cases the Commonwealth requires some form of legislative authority in order to expend public money.

While these general principles can be discerned from the case, *Williams (No. 1)* is also ‘fundamental in nature, and like all such cases that involve major changes and development in our understanding of the Constitution, it will take many decades of future cases for it to be refined into a comprehensible and logical set of principles and rules’.<sup>6</sup> On 19 June 2014, the High Court handed down its decision in *Williams (No. 2)*—the first of the potential line of cases to provide this greater clarity.<sup>7</sup>

As the Commonwealth Attorney-General has stated, the decision in *Williams (No. 2)* was quite limited;<sup>8</sup> however, the decision is important to the extent that it:

- (again) invalidated the NSCP and all payments made under it;
- detailed the High Court’s apparent frustration at the Commonwealth’s continuing refusal to accept limitations on its executive power;
- resulted in all payments made under the chaplaincy program becoming debts owing to the Commonwealth which the Commonwealth subsequently decided to waive; and
- did not consider broader questions in relation to the validity of the legislative response to *Williams (No. 1)* (with the result that there remains uncertainty surrounding the constitutionality of many Commonwealth spending schemes).

This remaining constitutional uncertainty means that ‘governments should be cautious about their spending and do their best to ensure that government programs involving payments or grants to third parties are adequately supported’.<sup>9</sup> In this context, it is also important to emphasise the benefits of establishing spending schemes in primary legislation.

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<sup>5</sup> Anne Twomey, ‘Post-*Williams* expenditure—when can the Commonwealth and states spend public money without parliamentary authorisation?’, *University of Queensland Law Journal*, vol. 33, no. 1, 2014, pp. 9–10.

<sup>6</sup> *ibid.*, p. 9.

<sup>7</sup> More recently, arguments based upon the *Williams* principles have also been advanced in a challenge to the offshore detention regime which is currently before the High Court. See Transcript of Proceedings, *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2015] HCATrans 160 (24 June 2015).

<sup>8</sup> Senate debates, 19 June 2014, p. 3412 (George Brandis), 23 June 2014, p. 3555 (George Brandis).

<sup>9</sup> Twomey, *op. cit.*, p. 27.

## **II Chaplaincy program invalidated (again)**

### ***A The legislative response to Williams (No. 1)***

The immediate legislative response to *Williams (No. 1)* was the *Financial Framework Legislation Amendment Act (No. 3) 2012* (Cth) (the FFLA Act). The FFLA Act itself purports to retrospectively provide legislative support for over 400 non-statutory funding schemes whose validity was thrown into doubt following *Williams (No. 1)*. Furthermore, future additions to the list of spending schemes can be made by the executive by the making of a disallowable instrument (the power to do so was provided for in new section 32B of the *Financial Management and Accountability Act 1997* (Cth) (the FMA Act)).<sup>10</sup> The list of items purporting to authorise executive spending schemes are contained in Schedules 1AA and 1AB of what is now known as the Financial Framework (Supplementary Powers) Regulations 1997 (Cth) (the FF(SP) Regulations).

The FFLA Act has been subject to significant criticism,<sup>11</sup> including concerns expressed by the former Chief Justice of New South Wales, James Spigelman. Specifically, the former Chief Justice noted that ‘the Commonwealth proceeded to virtually replicate its view of the Executive power in the form of a statute’ and expressed concern that this may amount to a breach of the rule of law. At a general level, Spigelman expressed concerns about the Commonwealth ignoring the limitations on its executive power in the Constitution—particularly after *Pape*.<sup>12</sup> This issue is discussed in further detail below.

### ***B The challenge to the legislative response***

In *Williams (No. 2)*, Mr Ron Williams (the parent of children who attended a Queensland government school in which services were provided under the NSCP) challenged the legislative response to *Williams (No. 1)*. Specifically, Mr Williams challenged the purported authorisation of funding of the chaplaincy program in the FFLA Act on the basis that:

- (a) there was no Commonwealth head of legislative power to support the authorisation of expenditure on the chaplaincy program (the narrow submission); and

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<sup>10</sup> Ryall, *op. cit.*, p. 143. This provision is now section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (Cth) (the FF(SP) Act).

<sup>11</sup> *ibid.*, pp. 143–7.

<sup>12</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; James Spigelman, ‘Constitutional recognition of local government’, Speech delivered at the Local Government Association of Queensland 116th Annual Conference, Brisbane, 24 October 2012, pp. 12–13.

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(b) section 32B impermissibly delegated to the executive authorisation of expenditure because the relevant programs were all identified by regulations which could be made and amended by the executive (the broad submission).<sup>13</sup>

The High Court rejected arguments that the chaplaincy program was supported by a Commonwealth head of legislative power and therefore upheld the plaintiff's narrow submission—that is, it found there was no head of legislative power to support the expenditure of funds on the chaplaincy program. The Court, however, left undecided the question of whether section 32B was invalid because of an impermissible delegation of the power to authorise expenditure to the executive. It was not necessary for the Court to decide this point because even if section 32B were valid it still did not support the chaplaincy program. As Anne Twomey notes, for present purposes, the Court 'read down s 32B as not applying to support expenditure on those programs that do not fall within a Commonwealth head of power'.<sup>14</sup> The Court thus clearly affirmed the requirement for a constitutional head of power to support spending programs.

### *C No head of legislative power*

As noted above, ultimately, the central question in *Williams (No. 2)* was whether the chaplaincy program was supported by a Commonwealth head of legislative power. Both the Commonwealth and Scripture Union Queensland (SUQ) argued that section 32B and the item in the regulations specifically providing authority for the chaplaincy program were supported by:

- the 'benefits to students' limb of section 51(xxiiiA) of the Constitution; and/or
- the express incidental power (section 51(xxxix)) taken together with sections 61 or 81 of the Constitution.

SUQ also argued that the item was supported by the corporations power (section 51(xx)).<sup>15</sup>

#### *1 Benefits to students power*

Section 51(xxiiiA) of the Constitution provides the Commonwealth Parliament with the power to make laws with respect to:

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<sup>13</sup> Anne Twomey, 'Déjà Vu—the Commonwealth's response to the Williams Case', *Constitutional Critique* (Constitutional Reform Unit, Sydney Law School), 3 July 2014, [http://blogs.usyd.edu.au/cru/2014/07/deja\\_vu\\_the\\_commonwealths\\_resp\\_1.html](http://blogs.usyd.edu.au/cru/2014/07/deja_vu_the_commonwealths_resp_1.html).

<sup>14</sup> *ibid.*

<sup>15</sup> Australian Government Solicitor, 'Further challenge to the Commonwealth's power to contract and spend money on school chaplains', *Litigations Notes*, no. 24, 6 November 2014, p. 3.

the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances [emphasis added].

The Court held that the word 'benefits' in section 51(xxiiiA) 'is used more precisely than as a general reference to (any and every kind of) advantage or good'.<sup>16</sup> Therefore, for something to come within the meaning of 'benefits to students' the relief should amount to 'material aid provided against the human wants which the student has by reason of being a student'.<sup>17</sup> While the chaplaincy program had 'desirable ends' ('strengthening values, providing pastoral care and enhancing engagement with the broader community'), the Court held that 'seeking to achieve them in the course of the school day does not give the payments which are made the quality of being benefits to students'.<sup>18</sup> The provision of chaplaincy services at a school therefore cannot be characterised as falling within the meaning of 'benefits to students' in section 51(xxiiiA).

## 2 *Express incidental power*

Section 51(xxxix) of the Constitution provides the Commonwealth Parliament with the power to make laws with respect to:

matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

The Commonwealth argued that the authorisation scheme established in the FFLA Act was incidental to section 61 of the Constitution (relating to executive power).<sup>19</sup> The Court also rejected this argument on the basis that:

... to hold that s 32B of the FMA Act is a law with respect to a matter incidental to the execution of the executive power of the Commonwealth (to spend and contract) presupposes what both *Pape* and *Williams (No 1)* deny: that the executive power of the Commonwealth extends to any and

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<sup>16</sup> *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 458 [43].

<sup>17</sup> *ibid.*, 460 [46].

<sup>18</sup> *ibid.*, 460 [47].

<sup>19</sup> Australian Government Solicitor, *op. cit.*, p. 4.

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every form of expenditure of public moneys and the making of any agreement providing for the expenditure of those moneys.<sup>20</sup>

The swift rejection of this argument appears to indicate the High Court's frustration at the Commonwealth's continuing refusal to accept limitations on its executive power. This is discussed in further detail below.

### 3 Corporations power

Section 51(xx) of the Constitution provides the Commonwealth Parliament with the power to make laws with respect to:

foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

SUQ argued that section 32B, in combination with the relevant item in the regulations that purported to provide legislative authorisation for the chaplaincy program, was supported by section 51(xx).<sup>21</sup> The Court noted that SUQ's argument in this respect 'may be dealt with shortly'.<sup>22</sup> The Court held that a law which gives the Commonwealth the authority to make an agreement or payment of the kind in question is not a law with respect to trading or financial corporations because:

The law makes no provision regulating or permitting any act by or on behalf of any corporation. The corporation's capacity to make the agreement and receive and apply the payments is not provided by the impugned provisions. Unlike the law considered in *New South Wales v The Commonwealth (Work Choices Case)*<sup>23</sup>, the law is not one authorising or regulating the activities, functions, relationships or business of constitutional corporations generally or any particular constitutional corporation; it is not one regulating the conduct of those through whom a constitutional corporation acts or those whose conduct is capable of affecting its activities, functions, relationships or business.<sup>24</sup>

As Simon Evans notes, this makes it clear that the 'Commonwealth can no longer assume that contract is available as a regulatory tool whenever the entity it seeks to

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<sup>20</sup> *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 470 [87].

<sup>21</sup> Australian Government Solicitor, *op. cit.*, p. 4.

<sup>22</sup> *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 460 [49].

<sup>23</sup> (2006) 229 CLR 1.

<sup>24</sup> *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 461 [50].

regulate is a constitutional corporation’ and therefore the Commonwealth will need to reconsider how it implements its policy objectives in this regard.<sup>25</sup>

### **III The Commonwealth’s continuing refusal to accept limitations on its executive power**

While the decision in *Williams (No. 2)* was quite limited, in addition to making it clear that neither the benefits to students power, the express incidental power nor the corporations power could support the expenditure of funds on the chaplaincy program, the decision also demonstrated the High Court’s apparent frustration at the Commonwealth’s continuing refusal to accept limitations on its executive power. In this regard the Court rejected an assumption underlying the Commonwealth’s argument that the executive power of the Commonwealth Government can be equated with the executive power in Britain.

The Commonwealth’s disregard for the limitations on its executive power appears to have continued with the Commonwealth purporting to rely on the executive nationhood power (coupled with the express incidental power in section 51(xxxix)) to provide legislative authority for spending schemes relating to matters such as mathematics and computing curriculum resources. Of course, as will be demonstrated below, this is particularly problematic given that this argument (in relation to the NSCP) was expressly rejected in *Williams (No. 1)*.

#### ***A The High Court’s apparent frustration with the Commonwealth***

The Court characterised the Commonwealth’s arguments in relation to ‘the ambit of the Executive’s power to spend’ as being advanced ‘under the cloak of an application to reopen the decision in *Williams (No 1)*’:

The Commonwealth parties put four main reasons for what they described as “a compelling case” to reopen the decision in *Williams (No 1)*.

First, they submitted that “the principle identified in [*Williams (No 1)*] was not carefully worked out in a significant succession of cases” and “constituted a radical departure from what had previously been assumed by all parties to be the orthodox legal position”. Second, they submitted that the course taken in the hearing in *Williams (No 1)* resulted in the Court not receiving “sufficient argument ... on what became the ultimate issue” ... Third, they submitted that “the reasons of the four Justices constituting the majority in [*Williams (No 1)*] do not contain a single answer” to when

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<sup>25</sup> Simon Evans, ‘*Williams v Commonwealth (No 2)*: the National School Chaplaincy Program struck

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and why Commonwealth spending requires authorising legislation ... And fourth, they submitted that the decision in *Williams (No 1)* “led to considerable inconvenience with no significant corresponding benefits”.<sup>26</sup>

In refusing the Commonwealth’s application to reopen *Williams (No. 1)*, the Court noted that the decision in *Williams (No. 1)* depended upon premises already established in *Pape*.<sup>27</sup> In relation to the Commonwealth’s submission that the decision in *Williams (No. 1)* ‘led to considerable inconvenience with no significant corresponding benefits’ the Court noted that:

What was meant in this context by the references to “inconvenience” and “corresponding benefits” would require a deal of elaboration in order to reveal how they bear upon the resolution of an important question of constitutional law. Examination of the proposition reveals no greater content than that the Commonwealth parties wish that the decision in *Williams [No 1]* had been different and seek a further opportunity to persuade the Court to their view.<sup>28</sup>

The Court went on to note that the Commonwealth’s submission in relation to the scope of the executive’s power to spend and contract ‘was, in substance, no more than a repetition of ... the “broad basis” submissions which the Commonwealth parties advanced in *Williams [No 1]* and which six Justices rejected’.<sup>29</sup> The submissions were, in effect, simply ‘another way of putting the Commonwealth’s oft-repeated<sup>30</sup> submission that the Executive has unlimited power to spend appropriated moneys for the purposes identified by the appropriation’.<sup>31</sup>

Overall, the Court noted that the Commonwealth’s arguments in *Williams (No. 2)* about its own executive power ‘have been advanced ... more than once in litigation in this Court’ and that they ‘have not hitherto been accepted by the Court’.<sup>32</sup> The Court pointedly concluded that ‘[t]heir repetition does not demonstrate their validity’.<sup>33</sup> This

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down again’, *Public Law Review*, vol. 25, 2014, p. 171.

<sup>26</sup> *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 463 [57]–[59].

<sup>27</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 463 [60].

<sup>28</sup> *ibid.*, 464–465 [65].

<sup>29</sup> *ibid.*, 465 [69].

<sup>30</sup> See, for example, *Victoria v Commonwealth* (1975) 134 CLR 338, 342–343; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 10; *Williams v Commonwealth* (2012) 248 CLR 156, 167. See also *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237, 242–243; *Brown v West* (1990) 169 CLR 195, 197; *Combet v Commonwealth* (2005) 224 CLR 494, 510–512.

<sup>31</sup> *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 466 [71].

<sup>32</sup> *ibid.*, 450 [13].

<sup>33</sup> *ibid.*



characterisation of the Commonwealth's arguments appears to demonstrate a level of frustration within the Court at the Commonwealth's continuing refusal to accept the constitutional limitations on its executive power.

***B Executive power of the Commonwealth cannot be equated with the executive power in Britain***

Following *Williams (No. 1)* it was suggested that the decision 'substantially alters our understanding of the Commonwealth Executive, and significantly removes it from our British origins and, on one view, from the intentions and expectations of the framers'.<sup>34</sup> It has previously been noted that, while the Constitution drew on 'British origins', the framers explicitly and deliberately departed from the British model in many respects. The limitations on the Commonwealth executive outlined in *Williams (No. 1)* therefore 'simply underscore Australia's unique constitutional arrangements—arrangements which should not automatically be equated with British traditions'.<sup>35</sup>

In *Williams (No. 2)* the High Court outlined the relevance of Australia's unique constitutional arrangements to the scope of the executive power in Australia. In this regard the Court pointed to 'more fundamental defects [than those outlined above] in the argument of the Commonwealth parties about the breadth of the Executive's power to spend and contract'.<sup>36</sup> In particular, the Court noted that underlying the Commonwealth's argument was the premise 'that the executive power of the Commonwealth should be assumed to be no less than the executive power of the British Executive'.<sup>37</sup> The Court stated that this 'premise is false'<sup>38</sup> and observed that the Commonwealth had not demonstrated:

why the executive power of the new federal entity created by the Constitution should be assumed to have the same ambit, or be exercised in the same way and same circumstances, as the power exercised by the Executive of a unitary state having no written constitution ...<sup>39</sup>

The Court acknowledged that '[t]he history of British constitutional practice is important to a proper understanding of the executive power of the Commonwealth', and particularly to understanding 'why ss 53–56 of the Constitution make the provisions they do about the powers of the Houses of the Parliament in respect of

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<sup>34</sup> Gabrielle Appleby and Stephen McDonald, 'Looking at the executive power through the High Court's new spectacles', *Sydney Law Review*, vol. 35, no. 2, 2013, p. 272.

<sup>35</sup> Ryall, *op. cit.*, pp. 137–9.

<sup>36</sup> *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 467 [75].

<sup>37</sup> *ibid.*, 468 [78].

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*, 468 [79].

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legislation, appropriation bills, tax bills and recommendation of money votes'.<sup>40</sup> Of course, it should be noted that while these provisions are informed by British constitutional practice, they also depart significantly from British traditions by ensuring that the Senate has nearly the same legislative powers as the House of Representatives, including the power to reject all bills, even 'money bills'.<sup>41</sup>

The Court further noted that British constitutional history also 'illuminates ss 81–83 and their provisions about the Consolidated Revenue Fund, expenditure charged on the Consolidated Revenue Fund and appropriation'.<sup>42</sup> However, the Court emphasised that this history:

says nothing at all about any of the other provisions of Ch IV of the Constitution, such as ss 84 and 85 (about transfer of officers and property), ss 86–91 (about customs, excise and bounties), s 92 (about trade, commerce and intercourse among the States), or ss 93–96 (about payments to States).<sup>43</sup>

The Court concluded that 'questions about the ambit of the Executive's power to spend must be decided in light of *all* of the relevant provisions of the Constitution, not just those which derive from British constitutional practice'.<sup>44</sup> Therefore, the assumption underpinning the Commonwealth's argument (that the Commonwealth has an executive power to spend and contract which is the same as the power of the British executive) was 'not right and should be rejected' because it 'denies the "basal consideration"<sup>45</sup> that the Constitution effects a distribution of powers and functions between the Commonwealth and the States'.<sup>46</sup>

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<sup>40</sup> *ibid.*, 468 [80].

<sup>41</sup> Ryall, *op. cit.*, pp. 137–9. This is a significant departure from British constitutional practice. At the time the Constitution was drafted the powers of the two houses in the United Kingdom in relation to financial legislation were governed by a resolution of 3 July 1678. This resolution declared that all financial grants were the 'sole gift' of the House of Commons, and that the Commons had the sole right to determine all financial legislation. Therefore, at the time that the Constitution was drafted, the House of Lords was, at a fundamental level, already a 'powerless second chamber', particularly in relation to financial matters. See Harry Evans, 'The Australian Constitution and the 1911 myth', *Papers on Parliament*, no. 52, December 2009, p. 88.

<sup>42</sup> *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 468 [80].

<sup>43</sup> *ibid.*

<sup>44</sup> *ibid.* For a recent discussion of the influence of the Constitution of the United States of America on the development of the Australian Constitution, see Kathleen Morris and James Allsop, 'The United States and the Australian Constitution: influence of US constitutional model on development and interpretation of the Australian Constitution', *Australian Law Journal*, vol. 89, 2015, pp. 309–30.

<sup>45</sup> *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237, 271–272 (Dixon J).

<sup>46</sup> *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 469 [82]–[83].

***C Potential unconstitutionality of new programs added to the FF(SP) Regulations***

A cursory examination of recent regulations purporting to provide legislative authority for spending schemes reveals items which may not be supported by a Commonwealth head of legislative power.<sup>47</sup> For example, the Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015, in part, purports to provide legislative authority for several initiatives including ‘Mathematics by Inquiry’ and ‘Coding across the Curriculum’. Without reflecting on the policy merits of these initiatives, there is a real question about whether they fall within the legislative competence of the Commonwealth and, consequently, as to whether they are constitutionally valid.

The objective of the ‘Mathematics by Inquiry’ program (to which the Commonwealth Government has committed \$7.4 million)<sup>48</sup> is:

To create and improve mathematics curriculum resources for primary and secondary school students:

- (a) to meet Australia’s international obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights; and
- (b) as activities that are peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.<sup>49</sup>

The objective of the ‘Coding across the Curriculum’ program (to which the Commonwealth Government has committed \$3.5 million)<sup>50</sup> is:

To encourage the introduction of computer coding and programming across different year levels in Australian schools:

- (a) to meet Australia’s international obligations under the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights; and
- (b) as an activity that is peculiarly adapted to the government of a nation and cannot otherwise be carried on for the benefit of the nation.<sup>51</sup>

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<sup>47</sup> The Senate Regulations and Ordinances Committee has undertaken significant work to ensure that explanatory statements for regulations that add new items into the FF(SP) Regulations explicitly state, for each new item, the constitutional head of power that purportedly supports each new spending program.

<sup>48</sup> Explanatory Statement, Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 (Cth), p. 3.

<sup>49</sup> Financial Framework (Supplementary Powers) Regulations 1997 (Cth) sch 1AB pt 4 item 75.

<sup>50</sup> Explanatory Statement, Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 (Cth), p. 4.

<sup>51</sup> Financial Framework (Supplementary Powers) Regulations 1997 (Cth) sch 1AB pt 4 item 76.

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The explanatory statement accompanying the regulation confirms that the objective of both items:

references the following powers of the Constitution:

- the external affairs power (section 51(xxix))
- Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)).<sup>52</sup>

However, the explanatory statement asserts that this ‘is not a comprehensive statement of relevant constitutional considerations’.<sup>53</sup> While it is not immediately clear what other constitutional considerations would be relevant, it seems that the Commonwealth is seeking to rely on the external affairs power and the executive nationhood power (coupled with the express incidental power) as relevant heads of legislative power to authorise the making of these provisions (and therefore the spending of public money under them). However, as discussed below, it is unlikely that the provisions in question would be supported by these heads of power.

### *1 External affairs power*

In relation to the external affairs power, it appears that the Commonwealth is attempting to rely on Australia’s international obligations under the *Convention on the Rights of the Child* and the *International Covenant on Economic, Social and Cultural Rights*. While it is beyond the scope of this paper to consider the terms of these treaties in detail, it is clear that for a legislative provision to be supported by the external affairs power in section 51(xxix) the relevant treaty ‘must embody precise obligations rather than mere vague aspirations, and the legislation must be “appropriate and adapted” to the implementation of those obligations’.<sup>54</sup> In other words, if a treaty obligation merely amounts to ‘a broad objective with little precise content’, and thus permits ‘widely divergent policies by parties’, the Commonwealth will not be able to rely on that provision to support legislation.<sup>55</sup> This position was outlined by the High Court in *Victoria v Commonwealth*:

When a treaty is relied on under s 51(xxix) to support a law, it is not sufficient that the law prescribes one of a variety of means that might be

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<sup>52</sup> Explanatory Statement, Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 (Cth), pp. 3–4.

<sup>53</sup> *ibid.*

<sup>54</sup> George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials*, 6th edn, Federation Press, Annandale, NSW, 2014, p. 923.

<sup>55</sup> Leslie Zines, *The High Court and the Constitution*, 5th edn, Federation Press, Annandale, NSW, 2008, p. 397.

thought appropriate and adapted to the achievement of an ideal. The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states.<sup>56</sup>

Therefore, it seems that it could not be cogently argued that the broadly expressed terms of the *Convention on the Rights of the Child* and the *International Covenant on Economic, Social and Cultural Rights* could support specific Commonwealth legislative provisions in relation to improving mathematics curriculum resources for primary and secondary school students,<sup>57</sup> or encouraging the introduction of computer coding and programming across different year levels in schools.<sup>58</sup>

## 2 *Executive nationhood power and the express incidental power*

The Commonwealth's purported reliance on the executive nationhood power (coupled with the express incidental power in section 51(xxxix)) is even more problematic given that this argument was rejected in *Williams (No. 1)* in relation to the NSCP. The nationhood power provides the Commonwealth executive with 'a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'.<sup>59</sup> As Twomey notes, 'the combination of the executive nationhood power with s 51(xxxix) of the Constitution potentially provided a legislative head of power to support the chaplaincy program'.<sup>60</sup> This was not accepted by the Court in *Williams (No. 1)*—all justices (other than Heydon J who held that the nationhood power was irrelevant to the case)<sup>61</sup> held that the chaplaincy program did not fall within the nationhood power.<sup>62</sup> Kiefel J, for example, stated that:

It may be accepted that the executive power extends to ... matters which are peculiarly adapted to the government of a nation. [This power does not] support the Funding Agreement and the payment of monies under it ... [as] there is nothing about the provision of school chaplaincy services which is peculiarly appropriate to a national government. They are the province of the States, in their provision of support for school services, as evidenced in this case by the policy directives and funding undertaken by

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<sup>56</sup> (1996) 187 CLR 416, 486.

<sup>57</sup> Financial Framework (Supplementary Powers) Regulations 1997 (Cth) sch 1AB pt 4 item 75.

<sup>58</sup> Financial Framework (Supplementary Powers) Regulations 1997 (Cth) sch 1AB pt 4 item 76.

<sup>59</sup> *Victoria v Commonwealth* (1975) 134 CLR 338, 397.

<sup>60</sup> Twomey, 'Post-*Williams* expenditure', op. cit., p. 23.

<sup>61</sup> *Williams v Commonwealth* (2012) 248 CLR 156, 319 [402] (Heydon J).

<sup>62</sup> *Williams v Commonwealth* (2012) 248 CLR 156, 179–180 [4] (French CJ); 235 [146] (Gummow and Bell JJ); 250–251 [196], 267 [240] (Hayne J); 346 [498] and 348 [503] (Crennan J); and 373 [591] and [594] (Kiefel J).

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the Queensland Government. Funding for school chaplains is not within a discernible area of Commonwealth responsibility.<sup>63</sup>

Similarly, Gummow and Bell JJ noted that:

the States have the legal and practical capacity to provide for a scheme such as the NSCP. The conduct of the public school system in Queensland, where the Darling Heights State Primary School is situated, is the responsibility of that State. Indeed, Queensland maintains its own programme for school chaplains.<sup>64</sup>

Crennan J held that:

contrary to the submissions of SUQ, the fact that an initiative, enterprise or activity can be ‘conveniently formulated and administered by the national government’, or that it ostensibly does not interfere with State powers, is not sufficient to render it one of ‘truly national endeavour’ or ‘pre-eminently the business and the concern of the Commonwealth as the national government’.<sup>65</sup>

Drawing on the reasoning outlined above, it is difficult to see how the provisions which purport to provide legislative authority in relation to the ‘Mathematics by Inquiry’ program or the ‘Coding across the Curriculum’ program could be supported by the nationhood power.

The ‘Mathematics by Inquiry’ program relates to ‘the development and implementation of innovative mathematics curriculum resources for school students’.<sup>66</sup> The ‘Coding across the Curriculum’ program relates to the development of resources that ‘will help engage students in computer coding and problem solving across all year levels in primary and secondary schools’.<sup>67</sup> There is nothing about the development of educational and curriculum resources that is ‘peculiarly adapted to the government of a nation and which cannot otherwise be carried out for the benefit of the nation’. It is clear that the states already operate in this area. For example, the Western Australian Department of Education has developed the ‘First Steps’ series of teacher resource books in areas such as literacy, mathematics, fundamental movement

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<sup>63</sup> *Williams v Commonwealth* (2012) 248 CLR 156, 373 [594] (Kiefel J).

<sup>64</sup> *Williams v Commonwealth* (2012) 248 CLR 156, 235 [146] (Gummow and Bell JJ).

<sup>65</sup> *Williams v Commonwealth* (2012) 248 CLR 156, 348 [504] (Crennan J).

<sup>66</sup> Explanatory Statement, Financial Framework (Supplementary Powers) Amendment (2015 Measures No. 3) Regulation 2015 (Cth), p. 3.

<sup>67</sup> *ibid.*, p. 4.

skills and VET.<sup>68</sup> First Steps Mathematics, for instance, is ‘organised around sets of mathematics outcomes for Number, Measurement, Space, and Chance and Data’ and ‘will help teachers to diagnose, plan, implement and judge the effectiveness of the learning experiences they provide for students’.<sup>69</sup> As the statement by Crennan J quoted above demonstrates, the mere fact that an activity can be ‘conveniently formulated and administered by the national government’ does not mean that it will fall within the ambit of the nationhood power.

Given that it appears that neither the external affairs power nor the executive nationhood power would support these provisions it must be concluded that there is a real risk that the programs are unconstitutional and therefore any payments made under them are invalid.

#### ***D Implications for the future***

In *Williams (No. 2)* the High Court (again) rejected the Commonwealth’s arguments about its own executive power. As a result, it would be prudent (and in accordance with the rule of law) for the Commonwealth to now accept these limitations and to change its practices accordingly. It is no longer tenable to continue ‘business as usual’ or, as has been suggested, to rely ‘on a combination of the unlikelihood of a constitutional challenge and the need for standing’<sup>70</sup> in order for particular initiatives to be challenged. At the very least, it would be appropriate for the Commonwealth to comprehensively and systematically review all of its spending initiatives to ensure that they are *clearly supported* by a head of legislative power. As former Chief Justice Spigelman has noted it is not appropriate for the Commonwealth to ‘proceed on the basis that an arguable case is good enough’.<sup>71</sup> Moreover, given the limited nature of the decision in *Williams (No. 2)* there also remains the broader question as to whether the process established by section 32B to authorise spending initiatives (including the purported authorisation of over 400 non-statutory funding schemes in the initial tranche of regulations)<sup>72</sup> is constitutionally valid. These broader questions (and the

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<sup>68</sup> Western Australian Department of Education, *First Steps: Steps Resources*, <http://det.wa.edu.au/stepsresources/detcms/portal/>.

<sup>69</sup> Western Australian Department of Education, *First Step Mathematics*, <http://det.wa.edu.au/stepsresources/detcms/navigation/first-steps-mathematics/>.

<sup>70</sup> Andrew Hemming, ‘Williams v Commonwealth: much ado about nothing’, *University of Queensland Law Journal*, vol. 33, no. 1, 2014, pp. 239, 242.

<sup>71</sup> Spigelman, *op. cit.*

<sup>72</sup> The initial tranche of regulations was enacted by Parliament in Schedule 2 to the FFLA Act. However, if the plaintiff’s broad submission in *Williams (No. 2)* is accepted then these regulations (despite being enacted by Parliament) may be invalid. See Ronald Williams, ‘Plaintiff’s Submissions’, Submission in *Williams v Commonwealth (No. 2)*, no. S154 of 2013, 28 February 2014, 21 [87]; Attorney-General (WA), ‘Annotated Written Submissions of the Attorney General for Western Australia (Intervening)’, Submission in *Williams v Commonwealth (No. 2)*, no. S154 of 2103, 14 March 2014, 4 [18]–[19].

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benefits of establishing spending schemes in primary legislation) are discussed in further detail below.

#### **IV Spending money unconstitutionally**

Before considering these broader issues it is appropriate to consider the Commonwealth's immediate response to *Williams (No. 2)*. In response to the decision invalidating its chaplaincy program, the Commonwealth announced that it would invite states and territories to participate in a new program. The Commonwealth would provide funding to states and territories for the new program, so long as they agreed to certain conditions.<sup>73</sup>

##### ***A Unconstitutional payments not recovered***

Importantly, the government also announced that all the payments that had been made (unconstitutionally) under the invalidated program would not be recovered by the Commonwealth:

It follows from the court's judgement that Commonwealth payments to persons under the school chaplaincy program were invalidly made. The effect of the decision is that these program payments, totalling over \$150 million, are now debts owing to the Commonwealth under the Financial Management and Accountability Act. However, under that act, the Minister for Finance has the power to approve a waiver of debt of an amount owing to the Commonwealth which totally extinguishes that debt. I am advised by my friend Senator Cormann that he has today agreed to waive the program payments made to date. That decision will provide certainty to funding recipients that these debts will not be recovered in consequence of that decision.<sup>74</sup>

The Australian National Audit Office confirmed that the invalid payments made under the chaplaincy program became debts owing to the Commonwealth following the decision in *Williams (No. 2)* and that on the day that the decision was handed down (19 June 2014) the Minister for Finance waived those debts (totalling \$156.1 million) under paragraph 34(1)(a) of the FMA Act.<sup>75</sup> This also meant that the chaplaincy program could continue for the remainder of 2014 (even after the decision

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<sup>73</sup> Senator the Hon Scott Ryan, Parliamentary Secretary to the Minister for Education, 'National School Chaplaincy Programme to go ahead', Media release, 27 August 2014, <https://ministers.education.gov.au/ryan/national-school-chaplaincy-programme-go-ahead>.

<sup>74</sup> Senate debates, 19 June 2014, p. 3412 (George Brandis).

<sup>75</sup> Australian National Audit Office, *Audits of the Financial Statements of Australian Government Entities for the Period Ended 30 June 2014*, ANAO Report no. 16, 2014–15, p. 41.



invalidating the program) because service providers had already received payments from the Commonwealth for the entire year.

### ***B Commonwealth avoiding the constitutional limits on its power***

As Benjamin Saunders notes,

[i]t seems highly problematic for the Commonwealth to be able to avoid constitutional limits on its power merely by waiving debts owed to it after invalid payments have already been made. This is clearly a strategy that could be employed in the future.<sup>76</sup>

Saunders suggests that there is a balance to be struck in relation to payments that are invalidly made. On the one hand, if the Commonwealth were under a duty to recover the unconstitutional payments this would potentially be ‘highly unfair to those organisations who have relied on the payments’, and if such organisations were sued to recover the payments they may have a claim in restitution against the Commonwealth for services provided in consideration for payment. On the other hand, there is a legitimate question as to whether it is appropriate for private law principles of restitution to effectively take precedence over the Constitution.<sup>77</sup>

The case law in relation to claims in restitution against a government party arising out of a void contract ‘is sparse and the principles not very certain’.<sup>78</sup> The House of Lords has pronounced that where a government contract is void for lack of power the ‘consequences of any *ultra vires* transaction may depend on the facts of each case’.<sup>79</sup> Much of the limited (potentially) relevant case law relates to local authorities in England (which possess only those powers conferred upon them by statute and therefore their power to contract extends only to agreements which are incidental to their authorised functions).<sup>80</sup> In this context, where services have been provided to a public authority under an *ultra vires* ‘contract’ there has generally been some difficulty in allowing a claim in restitution against the government party. This is because to allow a claim is often contrary to the same policy which causes the law to hold the contract itself void: it requires the public entity to pay for something which it

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<sup>76</sup> Benjamin Saunders, ‘Williams [No 2] Symposium: some curiosities and further thoughts on Williams [No 2]’ on *Opinions on High* (10 July 2014), <http://blogs.unimelb.edu.au/opinionsonhigh/2014/07/10/saunders-williams-2/>.

<sup>77</sup> *ibid.*

<sup>78</sup> Nicholas Seddon, *Government Contracts: Federal, State and Local*, 5th edn, Federation Press, Annandale, NSW, 2013, p. 100.

<sup>79</sup> *Hazell v Hammersmith and Fulham Londonborough Council* [1992] 2 AC 1, 36 (Lord Templeman).

<sup>80</sup> Sue Arrowsmith, ‘Ineffective transactions, unjust enrichment and problems of policy’, *Legal Studies*, vol. 9, no. 3, 1989, p. 308; *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) 7 HL 653.

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is not permitted to purchase at all.<sup>81</sup> Thus, the English case law appears to point towards non-recovery by the non-governmental ‘contracting’ party in cases where the government entity acts beyond power; however, the law in this area is uncertain.

In any event, as noted above it is clear that, when considering whether it is appropriate for the Commonwealth not to recover payments that are invalidly made, a choice has to be made between competing interests. On the one hand, the non-government ‘contracting’ party has provided services to the government such that, if the payments for services are recovered, the Commonwealth will have been able to obtain the benefit of the services for free and the non-government entity would be financially disadvantaged. On the other hand, if the payments are not recovered the Commonwealth has been able to spend money that it is not entitled to spend under the Constitution.

In this context, the importance of adhering to the provisions of the Constitution must be taken as being more significant than considerations in relation to local government bodies acting outside their statutory remit. As Guy Aitken and Robert Orr note, the Constitution ‘is the fundamental law of Australia binding everybody and everything, including the Commonwealth Parliament and the parliaments of the States’.<sup>82</sup> Furthermore, the High Court has noted that the Constitution’s status as the fundamental law of Australia rests on the ‘sovereignty of the Australian people’—that is, on the Australian people’s decision during the 1890s to approve the Constitution, and on their continuing commitment to remain bound by its terms. This popular sovereignty is reinforced by section 128, which provides that the Constitution can only be changed if the people of Australia approve of the change.<sup>83</sup>

It is therefore suggested that where a payment is held to be unconstitutional it is not appropriate for the Commonwealth to avoid the constitutional limits on its power by choosing not to recover the invalid payments. While this is undoubtedly a regrettable outcome for the non-government contracting parties, it is the only outcome which respects the Constitution’s standing as Australia’s fundamental law. It would also ensure that the Commonwealth cannot rely on an ability to waive debts as a ‘back up plan’ to avoid the consequences arising from the making of constitutionally invalid payments. As a result, the Commonwealth may choose to more closely examine whether its spending schemes are supported by a firm constitutional foundation—this can only be positive from a rule of law perspective because it would ensure that the Commonwealth does not ignore the constitutional limits on its power.

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<sup>81</sup> Arrowsmith, *op. cit.*, p. 310.

<sup>82</sup> Guy Aitken and Robert Orr, *Sawyer’s: The Australian Constitution*, 3rd edn, Australian Government Solicitor, Canberra, 2002. p. 22.

<sup>83</sup> *ibid.*, p. 23.

## **V The limited nature of the decision**

As noted above, the fact that the High Court did not need to consider the plaintiff's broader arguments in *Williams (No. 2)* is important as it underscores the remaining uncertainty surrounding the constitutionality of executive spending schemes. The joint judgement of the High Court noted that it was not necessary to consider certain arguments advanced by the plaintiff:

if, as Mr Williams' arguments based on *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan*<sup>84</sup> suggested, s 32B does present some wider questions of construction and validity, they are not questions which are reached in this case and they should not be considered.<sup>85</sup> Rather, it is enough to consider whether, in their operation with respect to the agreement about and payments for provision of chaplaincy services, s 32B and the other impugned provisions are supported by a head of legislative power.<sup>86</sup>

The Commonwealth Attorney-General highlighted the limited nature of the decision in *Williams (No. 2)* on the day the decision was handed down. In this regard he noted that the Court:

did not consider the broader question of whether division 3B of the Financial Management and Accountability Act was a valid law. It merely decided that, insofar as that act purported to validate the school chaplaincy program, it was ineffective because the school chaplaincy program was not supported by any constitutional head of power.<sup>87</sup>

### ***A Remaining constitutional uncertainty in relation to section 32B and the FFLA Act***

In a 'Litigation Note' published following *Williams (No. 2)* the Australian Government Solicitor (AGS) seems (at least at first glance) to suggest that Mr Williams' broad argument (i.e. that the legislative response to *Williams (No. 1)* is wholly invalid) was outright rejected by the High Court:

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<sup>84</sup> (1931) 46 CLR 73.

<sup>85</sup> See, for example, *Lambert v Weichelt* (1954) 28 ALJ 282, 283 (Dixon CJ); *Wurridjal v Commonwealth* (2009) 237 CLR 309, 437 [355] (Crennan J); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 199 [141] (Hayne, Kiefel and Bell JJ).

<sup>86</sup> *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 457 [36] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>87</sup> Senate debates, 19 June 2014, p. 3412 (George Brandis).

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### **Section 32B is not invalid**

The plaintiff contended that s 32B of the FMA Act is wholly invalid. However, the Court held that s 32B of the FMA Act is supported by every head of legislative power that supports the making of the payments that s 32B deals with.<sup>88</sup>

While the AGS goes on to note that it was not necessary for the Court to consider the plaintiff's wider questions of construction and validity, given the importance of section 32B to the validity of a very wide range of government initiatives it may have been useful to specifically highlight the plaintiff's 'wider questions of construction and validity' which could, in the future, be important to determining the validity of section 32B in its entirety. This is because *Williams (No. 2)* leaves many broader questions unanswered.

Of course, one obvious question is what other Commonwealth spending programs are constitutionally invalid and therefore at risk? Twomey specifically notes the remaining constitutional uncertainty in relation to section 32B and also why it is unsatisfactory for the Commonwealth to continue to rely on this process (and the associated regulations) to authorise programs that do not fall within a Commonwealth head of power:

the status of s 32B was left in even greater uncertainty. At the very least, it must be read down so that it does not support what would appear to be a significant number of programs described in the regulations which do not fall within a Commonwealth head of power. This leads to the unfortunate outcome that while the statute book says that certain programs are authorised, they are in fact not authorised and expenditure upon them is invalid. Such a gap between what is stated on the face of the law and its constitutional effectiveness has the tendency to bring the law into disrepute.<sup>89</sup>

Moreover, there 'also remains the bigger question of whether s 32B is valid at all'.<sup>90</sup> In this regard, there is uncertainty in relation to the extent that the parliament can delegate to the executive the power to make the legislation that authorises further executive action.<sup>91</sup> This uncertainty remains because the Court did not need to reach the question of whether section 32B involved a delegation of legislative power that

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<sup>88</sup> Australian Government Solicitor, *op. cit.*, p. 3.

<sup>89</sup> Twomey, 'Déjà Vu', *op. cit.*

<sup>90</sup> *ibid.* As noted above, this broader constitutional uncertainty is also relevant to the validity of over 400 non-statutory funding schemes purportedly authorised in the initial tranche of regulations.

<sup>91</sup> Evans, *op. cit.*, p. 167.

was so excessive or vague that it transgressed the Constitution,<sup>92</sup> nor did the Court need to consider whether the provision was invalid because of the ‘necessary role of the Parliament in supervising expenditure of public money’.<sup>93</sup>

## **VI Benefits of establishing spending schemes in primary legislation**

Noting the above, it may be prudent for government advisers to clearly highlight the fact that, in addition to the need for programs to be supported by a head of legislative power, there is some constitutional uncertainty in relation to the process for authorising spending initiatives by regulation. This is particularly important as judicious government officials may wish to take such matters into account when structuring new government spending programs. After establishing that a proposed initiative is within the legislative competence of the Commonwealth Parliament, officials may wish to establish the legislative authority for their programs through statute. Such an approach would remove any constitutional uncertainty (of the type discussed above) in relation to the validity of the program, increase accountability in relation to the expenditure of public money, and ensure that spending initiatives are well-considered from a constitutional, policy and financial perspective.

### ***A Democracy and accountability***

Importantly, from a democratic and accountability perspective, establishing legislative authority for spending initiatives through statute would answer the High Court’s concerns expressed in *Williams (No. 1)* which emphasised the importance of the role of the parliament in supervising the expenditure of public money. For example, Gummow and Bell JJ expressed concern in relation to the NSCP because there was only a limited engagement of the institutions of representative government.<sup>94</sup> Their Honours noted that parliament was engaged ‘only in the appropriation of revenue, where the role of the Senate is limited. It [was] not engaged in the formulation, amendment or termination of any programme for the spending of those moneys.’<sup>95</sup>

In this regard, it is important to note that direct spending schemes through executive contracts between the Commonwealth and private parties have been used over many years to implement a broad range of executive policy objectives *without the support of legislative authority or any parliamentary oversight*. Significantly, these executive contracts (which are often used in a regulatory manner to influence and control the

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<sup>92</sup> Cheryl Saunders, ‘Williams [No 2] Symposium: Cheryl Saunders on the executive power of the Commonwealth after Williams [No 2]’ on *Opinions on High* (25 June 2014), <http://blogs.unimelb.edu.au/opinionsonhigh/2014/06/25/saunders-williams/>.

<sup>93</sup> Graeme Hill, ‘Williams [No 2] Symposium: Graeme Hill on narrowing the issues’ on *Opinions on High* (23 June 2014), <http://blogs.unimelb.edu.au/opinionsonhigh/2014/06/23/hill-williams/>.

<sup>94</sup> *Williams v Commonwealth* (2012) 248 CLR 156, 235 [145].

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behaviour of funding recipients)<sup>96</sup> now account for between five and 10 per cent of all Commonwealth expenditure.<sup>97</sup>

As a result of the legislative response to *Williams (No. 1)*, this position, in practical terms, is virtually unchanged—there remains no effective parliamentary engagement in the formulation, amendment or termination of executive spending schemes. Despite constitutional uncertainty, the executive continues to rely on the legislative authority purportedly provided by existing items in the FF(SP) Regulations<sup>98</sup> (and the process in section 32B to add new items to the regulations) to implement its policy objectives through executive contracts. This process for adding new items involves no formal parliamentary engagement beyond scrutiny by the Senate Regulations and Ordinances Committee and the potential for disallowance. Even where new schemes are added to the regulations, there remains no formal consideration by parliament of the underlying policy rationale for these schemes. Very little (if any) detail in relation to how the schemes will actually be conducted or administered is provided to the parliament and, as a result, the parliament is unable to properly consider the appropriateness of a particular scheme or to propose amendments to a scheme.

The Senate Standing Committee for the Scrutiny of Bills has recently expressed concern in relation to the process established in section 32B to authorise spending schemes. The Public Governance, Performance and Accountability (Consequential and Transitional Provisions) Bill 2014 moved section 32B from the FMA Act to the new *Financial Framework (Supplementary Powers) Act 1997 (Cth)*. In commenting on this bill the committee noted the decision in *Williams (No. 2)* and:

restate[d] its preference that important matters, such as establishing legislative authority for arrangements and grants, should be included in

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<sup>95</sup> *ibid.*

<sup>96</sup> Cheryl Saunders and Kevin Yam, 'Government regulation by contract: implications for the rule of law', *Public Law Review*, vol. 15, 2004, p. 53; Seddon, *op. cit.*, pp. 40–1; Gabrielle Appleby 'There must be limits: the Commonwealth spending power', *Federal Law Review*, vol. 37, 2009, p. 97.

<sup>97</sup> Shipra Chordia, Andrew Lynch and George Williams, 'Williams v Commonwealth: Commonwealth executive power and Australian federalism', *Melbourne University Law Review*, vol. 37, no. 1, 2013, p. 190.

<sup>98</sup> In this regard it is important to note that many of the spending schemes already in the FF(SP) Regulations are described in very broad terms. This means that new spending initiatives may be able to be instituted by the executive under these broadly framed items without the need for new regulations (and therefore any parliamentary scrutiny at all). Examples of broadly worded schemes include: '421.001 Regional Development; Objective: To strengthen the sustainability, capacity and diversity of regions through focused stakeholder consultation and engagement, research, policy development, and program delivery activities' and '421.002 Local Government; Objective: To build capacity in local government and provide local and community infrastructure, and to improve economic and social outcomes in local communities'. See Amanda Sapienza, 'Using representative government to bypass representative government', *Public Law Review*, vol. 23, 2012, p. 165.

primary legislation to allow full Parliamentary involvement in, and consideration of, such proposals.<sup>99</sup>

### ***B Consideration of constitutional issues (and federalism)***

As well as answering the High Court's concerns in relation to parliamentary scrutiny of public money, establishing schemes in primary legislation has the incidental benefit of ensuring that there is structured consideration of potential constitutional issues. This would ensure, among other things, that the 'federal character of the Constitution'<sup>100</sup> is at least contemplated because there would be formal consideration as to whether the Commonwealth has the power to legislate in relation to a particular proposed scheme.

At the Commonwealth level government bills are drafted by the Office of Parliamentary Counsel (OPC). Importantly, the constitutional validity of each bill is considered by OPC as part of the drafting process. The OPC Drafting Manual states that:

Constitutional law is extremely important to drafters in OPC. There are two main aspects to this. First, every provision of every Act must be supported by a constitutional power. Secondly, there are a number of constitutional prohibitions that must not be contravened.<sup>101</sup>

OPC Drafting Direction 3.1 covers a range of constitutional matters. It notes that prior to submitting bills to the legislation approval process, a Senior Executive Service bill drafter must give an assurance that he or she is satisfied that the bill is constitutionally valid (and if he or she has any concerns or reservations about constitutional validity these must be set out). To assist in this regard, OPC has developed a constitutional checklist for use by bill drafters. The checklist is used as a tool for ensuring that the consideration bill drafters give to the constitutional validity of the legislation is systematic and thorough.<sup>102</sup> Thus, if a spending initiative is established through primary legislation the chance of such a program being constitutionally invalid is diminished (assuming, of course, that any constitutional issues identified during drafting have been appropriately addressed).

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<sup>99</sup> Senate Standing Committee for the Scrutiny of Bills, *Eleventh Report of 2014*, 3 September 2014, p. 558.

<sup>100</sup> *Williams v Commonwealth* (2012) 248 CLR 156, 179 [4] (French CJ).

<sup>101</sup> Office of Parliamentary Counsel, *OPC Drafting Manual*, October 2012, pp. 15–16.

<sup>102</sup> Office of Parliamentary Counsel, *Drafting Direction No. 3.1: Constitutional Law Issues*, October 2012, p. 19.

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As noted above, it appears that some schemes that are purportedly authorised by the FF(SP) Regulations may not be supported by a head of legislative power. It is therefore unclear whether the same level of constitutional scrutiny is applied in relation to new programs added to the FF(SP) Regulations.

In any event, it is clear that bills are subject to a higher level of parliamentary and public scrutiny than delegated legislation and therefore constitutional issues are more likely to be identified by interested stakeholders where a program is established by primary legislation.

### ***C Consideration of policy and financial issues***

Even if there were no constitutional uncertainty in relation to a particular program, ensuring full parliamentary involvement in the formulation, amendment and termination of new spending initiatives through the process of enacting a statute would enable these programs to be fully considered from a financial and policy perspective. Bills seeking to implement spending initiatives would be able to be scrutinised by parliamentarians representing a broad range of electors and interests, and may be considered by Senate committees thereby enabling advocacy groups, experts and the broader public to provide input into the structure of proposed spending schemes. As Cheryl Saunders notes, full parliamentary consideration of spending initiatives is not only positive from a democratic and accountability perspective, but is also positive for the executive because:

At a time of financial constraint there is much to be gained from procedures that ensure that spending programs are not undertaken hastily, that there is a broad-based commitment to them, that they are well designed and implemented and that money is well spent.<sup>103</sup>

## **VII Conclusion**

The decision in *Williams (No. 2)*, while limited in some respects, was important in a number of ways. Of course, it represents an important development in our understanding of Commonwealth executive power, at least to the extent that it reaffirmed principles espoused in previous decisions. The decision is also of interest because it detailed the High Court's apparent frustration at the Commonwealth's continuing refusal to accept limitations on its executive power and reiterated that the executive power of the Commonwealth cannot be equated with the executive power in Britain.

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<sup>103</sup> Cheryl Saunders, 'The scope of executive power', p. 30.



At a practical level, all payments made under the chaplaincy program became debts owing to the Commonwealth following *Williams (No. 2)*. The Commonwealth's decision to waive these debts raises important questions because by doing so the Commonwealth has, in effect, invalidly spent over \$150 million. Noting the Constitution's status as Australia's fundamental law, it is suggested that where a payment is held to be unconstitutional it is not appropriate for the Commonwealth to, in effect, avoid the constitutional limits on its power by choosing not to recover the invalid payments.

*Williams (No. 2)* (again) made it clear that Commonwealth spending initiatives with no connection to a head of legislative power are (in most circumstances) invalid. It is therefore no longer tenable to continue 'business as usual'. In this regard, it would be appropriate for the Commonwealth to comprehensively and systematically review all of its spending initiatives to ensure that they are *clearly supported* by a head of legislative power. As former Chief Justice Spigelman has noted:

It is not permissible to approach the Constitution on the basis that whatever is in the institutional interests of the Commonwealth must be the law. It is not consistent with the rule of law that the Executive and the Parliament proceed on the basis that an arguable case is good enough, as distinct from a genuine, predominant opinion as to what the law of the Constitution actually is ... The Constitution is a document which is to be obeyed. It is not an envelope to be pushed.<sup>104</sup>

In addition to the clear need for spending initiatives to be supported by a Commonwealth head of legislative power, the limited nature of the decision in *Williams (No. 2)* means that there is constitutional uncertainty in relation to the extent that the parliament can delegate to the executive the power to make legislation that authorises executive spending schemes. In this regard it is particularly important to note the significance that the High Court has attributed to the role of the parliament in controlling and supervising the expenditure of public money.<sup>105</sup>

It has been suggested that the requirement in *Williams (No. 1)* for increased parliamentary oversight of the expenditure of public money 'may have come at a high practical cost in terms of governmental efficiency'.<sup>106</sup> Of course, as the High Court

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<sup>104</sup> Spigelman, *op. cit.*

<sup>105</sup> *Williams v Commonwealth* (2012) 248 CLR 156, 258–259 [216] (Hayne J); 351–352 [516] (Crennan J).

<sup>106</sup> Geoffrey Lindell, 'The changed landscape of the executive power of the Commonwealth after the Williams case', *Monash University Law Review*, vol. 39, no. 2, 2013, p. 386.

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has explained, it is difficult to see how perceived ‘inconvenience’ could ‘bear upon the resolution of an important question of constitutional law’.<sup>107</sup>

Moreover, it has been suggested that ‘[d]emocratic considerations need to be counterbalanced by the additional need for governments not to be hamstrung and prevented from acting decisively and promptly in the face of pressing popular demands’.<sup>108</sup> This is also an interesting argument given that in the Australian *democratic* system it is the parliament (particularly the Senate),<sup>109</sup> not the government, that is most effectively able to represent a broad range of ‘pressing popular demands’. If a government is unable to ‘act decisively’ because it cannot secure passage of a bill to support a spending initiative, such an outcome does not indicate that the government is being ‘hamstrung’, rather it is likely to indicate that what is proposed by the government lacks broader popular support (noting that governments regularly win office with only around 40 per cent of the vote).<sup>110</sup> As has been demonstrated, increased parliamentary oversight of the expenditure of public money is positive not only because it enhances democracy and accountability—it also ensures that spending initiatives are well-considered from a constitutional, policy and financial perspective.

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<sup>107</sup> *Williams v Commonwealth (No. 2)* (2014) 252 CLR 416, 464 [65].

<sup>108</sup> Lindell, *op. cit.*, p. 386.

<sup>109</sup> The party composition of the Senate almost invariably reflects the party disposition of voting in the electorate more closely than does the House of Representatives (where government is formed). The electoral system of the House of Representatives regularly awards a majority of seats (and government) to parties which secure only a minority of electors’ votes (occasionally less than 40 per cent) and on several occasions less than those of the major losing parties. See Harry Evans and Rosemary Laing (eds), *Odgers’ Australian Senate Practice*, 13th edn, Department of the Senate, Canberra, 2012, pp. 10–18.

<sup>110</sup> Harry Evans, ‘The case for bicameralism’ in Nicholas Aroney, Scott Prasser and J.R. Nethercote (eds), *Restraining Elective Dictatorship: The Upper House Solution?*, University of Western Australia Press, Crawley, WA, 2008, p. 73.