

***Williams v. Commonwealth*—A Turning Point for Parliamentary Accountability and Federalism in Australia?**

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I Introduction

*Williams v. Commonwealth*¹ has been heralded as a turning point in our understanding of Commonwealth executive power. Many were surprised when 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 cast doubt over the constitutional validity of a significant proportion of Commonwealth expenditure.

Williams, however, can be viewed not only as a turning point in our understanding of Commonwealth executive power, but also as a turning point for parliamentary accountability and federalism in Australia. Despite this, the decision has been unjustly criticised as not according with the intention of the framers of the Constitution. It has also been suggested that the court misunderstood the role of Parliament in reaching its decision. On the contrary, however, by highlighting the importance of parliamentary control of the executive branch the court clearly demonstrated a true appreciation of the role of the Parliament. While the legislative response to the decision may raise doubts as to whether, in a practical sense, *Williams* can be considered a turning point for parliamentary accountability and federalism, these doubts are ameliorated by the general consensus that if not all of the legislative response, at least certain spending schemes authorised under it remain invalid.

II Background to *Williams*

Under the National School Chaplaincy Program (NSCP), schools were eligible to apply for financial support from the Commonwealth to establish a chaplaincy program or enhance an existing program provided within the school. No statute was enacted for the creation, administration or funding of the NSCP—the Commonwealth instead relied entirely on its executive power in section 61 of the Constitution.² The plaintiff in the case, Mr Ron Williams, commenced proceedings in the High Court challenging

¹ (2012) 248 CLR 156 (*'Williams'*).

² 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, pp. 191–2.

the validity of a funding agreement under the NSCP between the Commonwealth and the Queensland Scripture Union. In the end, the critical question in the case was whether the ‘executive power was sufficiently broad, in the absence of statutory authority, to empower the Commonwealth to enter into the Funding Agreement and make payments under it’.³

Prior to the decision in *Williams* many had assumed that the scope of Commonwealth executive power in section 61 of the Constitution extended at least to the subject matters of the heads of Commonwealth legislative power within the Constitution. In addition, it was assumed that the Commonwealth executive did not require any specific statutory authority to engage in activities related to those subject matters. These assumptions have led to the Commonwealth executive implementing many direct spending schemes through executive contracts between the Commonwealth and private parties. These spending schemes have been used to implement a broad range of Commonwealth executive policy objectives without the support of legislative authority. It has been suggested that these executive contracts (which are often used in a regulatory manner to influence and control the behaviour of the recipients of funding)⁴ now account for between five and 10 per cent of all Commonwealth expenditure.⁵

III The decision in *Williams*

In *Williams* the High Court overturned all of the above assumptions. A majority concluded, primarily on the basis of federal and related parliamentary accountability considerations, that Commonwealth executive power is not coextensive with Commonwealth legislative power and that, in most circumstances, the Commonwealth executive requires statutory authority before it can enter into contracts with private parties and spend public money.⁶

Concerns relating to federalism

Defining federalism

Harrison Moore explained the meaning of ‘federal government’ in the following terms:

³ *ibid.*, p. 193.

⁴ Cheryl Saunders and Kevin Yam, ‘Government regulation by contract: Implications for the rule of law’, *Public Law Review*, vol. 15, no. 1, 2004, p. 53; Nicholas Seddon, *Government Contracts: Federal, State and Local*, 4th edn, Federation Press, Annandale, NSW, 2009, pp. 55–65; Gabrielle Appleby, ‘There must be limits: The Commonwealth spending power’, *Federal Law Review*, vol. 37, no. 1, 2009, pp. 93, 97.

⁵ Chordia, Lynch and Williams, *op. cit.*, p. 190.

⁶ *ibid.*, pp. 190–1.

A ‘federal government’ exists where, in a political community, the powers of government are distributed between two classes of organization—a central government affecting the whole territory and population of the Sovereignty, and a number of local governments affecting particular areas and the persons and things therein—which are so far independent of each other that the one cannot destroy the other or limit the powers of the other, or encroach upon the sphere of the other ...⁷

In relation to Australia, in *Capital Duplicators Pty Ltd v. Australian Capital Territory*, Brennan, Deane and Toohey JJ stated that:

The Constitution was enacted to give effect to the agreement reached by the people of New South Wales, Victoria, South Australia, Queensland, Tasmania, and Western Australia to unite ‘in one indissoluble Federal Commonwealth’. The Constitution is no ordinary statute; it is the instrument designed to fulfil the objectives of the federal compact ...⁸

A key theme at the National Australasian Convention debates was a desire to ‘put the preservation of state rights beyond the possibility of doubt’.⁹ Both the Commonwealth and the states would each be sovereign within their respective fields and each would be free to perform its functions and exercise its powers without interference, burden or hindrance from the other government. The Constitution was to be ‘an agreement among sovereign powers to give up some of their power to a new central body, but preserving their sovereignty over what they retained. The State was not subordinate to the Commonwealth, nor the Commonwealth to a State ...’¹⁰

Main federal concerns

Citing concerns about the federal balance, the majority dismissed a submission that the Commonwealth executive’s capacity to contract was effectively unlimited. For example, French CJ was concerned that attributing such a wide power to the Commonwealth executive would undermine the authority of the states:

⁷ W. Harrison Moore, *The Constitution of the Commonwealth of Australia*, 2nd edn, Charles F. Maxwell (G. Partridge & Co.), Melbourne, 1910, p. 68.

⁸ (1992) 177 CLR 248, 274.

⁹ *Official Report of the National Australasian Convention Debates*, Sydney, 5 March 1891, p. 82 (Alfred Deakin).

¹⁰ Leslie Zines, *The High Court and the Constitution*, 5th edn, Federation Press, Annandale, NSW, 2008, p. 1.

There are consequences for the Federation which flow from attributing to the Commonwealth a wide executive power to expend moneys, whether or not referable to a head of Commonwealth legislative power, and subject only to the requirement of a parliamentary appropriation ... Expenditure by the Executive Government of the Commonwealth, administered and controlled by the Commonwealth, in fields within the competence of the executive governments of the States has, and always has had, the potential, in a practical way of which the Court can take notice, to diminish the authority of the States in their fields of operation.¹¹

In addition, French CJ, Gummow and Bell JJ, and Crennan J also rejected the Commonwealth's submission that the executive 'was empowered to enter into contracts on matters that *could* be the subject of legislation, even if no such legislation had been enacted'.¹² In rejecting this submission, they drew heavily on, among other things, the principles of federalism, including the potential for section 96 to be bypassed, a diminished role for the Senate (as a 'states' house'), and an inability to resolve potential inconsistencies between Commonwealth and state activity.¹³

Hayne J and Kiefel J did not find it necessary to determine whether the Commonwealth executive was empowered to enter into contracts on matters that *could* be the subject of legislation because they determined that the Constitution did not empower the Parliament to enact a statute in support of the chaplaincy program.¹⁴ However, both Hayne J and Kiefel J expressed concerns about the potential widening of Commonwealth legislative powers 'by way of an unlimited executive power operating in combination with the incidental legislative power contained in s. 51(xxxix) of the *Constitution*'.¹⁵ For example, Kiefel J was concerned that such 'an extension of power may enable the Commonwealth to encroach upon areas of State operation and thereby affect the distribution of powers as between the Commonwealth and the States'.¹⁶

'Implied nationhood power' not applicable

The court was unanimous that this case was not an instance in which the 'implied nationhood power' would permit Commonwealth executive action in the absence of

¹¹ *Williams v. Commonwealth* (2012) 248 CLR 156, 192–3 [37].

¹² Chordia, Lynch and Williams, op. cit., p. 191.

¹³ *ibid.* See *Williams v. Commonwealth* (2012) 248 CLR 156, 192–3 [37], 203–4 [58], 205–6 [60]–[61] (French CJ), 232–3 [136], 234 [143], 235 [145] (Gummow and Bell JJ), 347 [501], 348 [503], 353 [522] (Crennan J).

¹⁴ Chordia, Lynch and Williams, op. cit., pp. 191, 214.

¹⁵ *ibid.*, p. 191.

¹⁶ *Williams v. Commonwealth* (2012) 248 CLR 156, 370 [581].

statutory authority.¹⁷ The court noted that that the states were capable of providing chaplaincy services, as highlighted by the Queensland Government's own funding scheme for school chaplaincy services. There was, therefore, no justification for Commonwealth incursion into an area of state competency by executive action alone:¹⁸

... 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 the Queensland Government. Funding for school chaplains is not within a discernible area of Commonwealth responsibility.¹⁹

Concerns relating to parliamentary accountability

Related to these concerns about federalism were the court's concerns about various accountability matters, such as parliamentary control over executive spending and the use of 'public moneys'.²⁰ The court noted that the system of responsible and representative government established under the Constitution required that the Parliament, as the directly elected representatives of the people, must have control over the expenditure of money by the executive.²¹ For example, Gummow and Bell JJ stated that:

... there remain considerations of representative as well as of responsible government in cases where an executive spending scheme has no legislative engagement for its creation or operation beyond the appropriation process.²²

Similarly, Crennan J noted that the 'principles of accountability of the Executive to Parliament and Parliament's control over supply and expenditure operate inevitably to constrain the Commonwealth's capacities to contract and to spend'.²³

¹⁷ Chordia, Lynch and Williams, op. cit., pp. 198–9.

¹⁸ *ibid.*, p. 199.

¹⁹ *Williams v. Commonwealth* (2012) 248 CLR 156, 373 [594] (Kiefel J).

²⁰ 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, pp. 270–2.

²¹ *ibid.*, p. 270.

²² *Williams v. Commonwealth* (2012) 248 CLR 156, 232–3 [136].

²³ *ibid.*, 351–2 [516].

Practical implications of the decision

It therefore appears that concerns about the impact of non-statutory executive spending schemes on federalism and the principles of parliamentary accountability underlying responsible and representative government—concepts which the court stressed are central to the Australian constitutional framework—underpinned the court’s decision. With these principles in mind, the court held that if the Commonwealth executive wishes to spend money in areas beyond the day-to-day running of the government it must be authorised to do so by legislation or alternatively it may utilise the provisions of section 96 of the Constitution to grant money to a state with relevant conditions attached. The court noted that if Commonwealth expenditure is limited in this way there is an opportunity for the people of each state, either through their elected state governments or their elected representatives in the Senate to exercise greater control over the expenditure.²⁴ In relation to the significance of section 96 in the federal structure, Gummow and Bell JJ noted with approval the reasons of Barwick CJ in the *AAP Case*.²⁵ Barwick CJ noted that the economic circumstances of a state may leave it with little option but to accept a section 96 grant with conditions attached but that at least such ‘intrusions by the Commonwealth into areas of State power ... wear consensual aspect’.²⁶

It has also been suggested that the principles which limit the Commonwealth executive’s capacity to contract and spend may also limit its capacity to participate in intergovernmental agreements. It is therefore possible that specific legislative authority is required before the Commonwealth executive can be empowered to enter into most types of intergovernmental agreements.²⁷ If this is the case it would underscore the importance of *Williams* as a turning point for parliamentary accountability given the increasing number of intergovernmental agreements which undermine usual parliamentary scrutiny processes. This occurs, for example, where the executive demands that the Parliament pass ‘uniform legislation’ without amendment because the legislation reflects an agreement reached with other jurisdictions—an agreement in which the Parliament has had no involvement at all.

Overall, the fact that the court has held that it is unconstitutional for the Commonwealth executive acting alone to spend money in areas beyond the day-to-day running of the government, and that the Parliament must be more involved in such decisions, means that *Williams* can be seen as a turning point for parliamentary accountability and federalism.

²⁴ Appleby and McDonald, op. cit., pp. 274–5.

²⁵ *Williams v. Commonwealth* (2012) 248 CLR 156, 235–6 [148].

²⁶ *Victoria v. Commonwealth* (1975) 134 CLR 338, 357.

²⁷ Chordia, Lynch and Williams, op. cit., p. 230.

IV Criticisms of the decision in *Williams*

Despite this, the decision in *Williams* has been subject to a number of criticisms. Of relevance here are the criticisms that the decision did not accord with the intention of the framers of the Constitution and that the court misunderstood the role of the Parliament, and in particular the Senate, in protecting responsible and representative government and federalism. It is necessary to address these criticisms in order to dispel suggestions that the victory for parliamentary accountability and federalism that *Williams* represents came about as a result of the court ‘getting it wrong’.

The decision does not accord with the framers’ intentions

Appleby and McDonald have suggested that the decision in *Williams* ‘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’.²⁸

In this context, however, it is important to note that while the Constitution drew on ‘British origins’, the framers explicitly and deliberately departed from the British model in many respects. In the Australasian Federal Convention debates, Sir Richard Baker, in answering a suggestion that the framers ‘ought to stick hard and fast by all the lines of the British Constitution’, stated that:

... in this constitution which we are now considering, we have departed at the very start from every line of the British Constitution, except that principle which is common to all manner of constitutions all over the world—that there should be representatives chosen by the people. We are to have two houses of parliament each chosen by the same electors ... We are to have, instead of a highly centralised government such as they have in Great Britain, a division of powers—in fact we are to have, at all events, an attempt at a federation.²⁹

The High Court has previously stated that ‘Probably the most striking achievement of the framers of the Australian instrument of government was the successful combination of the British system of parliamentary government containing an executive responsible to the legislature with American federalism’.³⁰ In *Williams*, the court has drawn on this combination of responsible and representative government

²⁸ Appleby and McDonald, op. cit., p. 272.

²⁹ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 17 September 1897, p. 789 (Richard Baker).

³⁰ *R. v. Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 275.

and federalism, and the role of the Senate as a ‘states’ house’, to provide the foundation of limitations on the Commonwealth executive.³¹

It is clear that the framers of the Constitution appreciated the tensions inherent in the integration of the traditional concept of British responsible government with federalism.³² However, in the end this tension was managed by, at least partially, moving away from this form of responsible government in order to accommodate federalism. This is demonstrated by the outcome in relation to the Senate’s powers with respect to ‘money bills’. Delegates from the larger colonies demanded that the ‘majority must rule’ and that the Senate should not have the power to reject or amend ‘money bills’.³³ On the other hand, delegates from the smaller colonies argued that if the traditional British conception of responsible government was not altered so that the Senate did have adequate financial powers ‘we may as well hand ourselves over, body and soul, to those colonies with the larger populations’.³⁴

The extent of the financial powers of the Senate was one of the most contentious issues at the debates and one in which the possibility of federation itself was at stake. For example, Sir John Forrest went on to say that if strict adherence to British responsible government were ‘the only terms upon which [the larger colonies] want Federation, they must federate for themselves, and leave the other colonies to stand out of the compact’.³⁵ In the end, the smaller colonies largely achieved their aims with the Senate having nearly the same legislative powers as the House of Representatives,³⁶ including the power to reject all bills. The framers therefore created a very powerful upper house with equal representation from each of the constituent bodies of the federation—a clear departure from the British conception of responsible government in order to accommodate federalism and representative government. Thus when the entirety of Australia’s constitutional arrangements are examined in their context it is inaccurate to contend that the decision in *Williams* resulted in a departure from the intention of the framers as Appleby and McDonald suggest. The limitations on the Commonwealth executive outlined in *Williams* simply underscore Australia’s

³¹ Appleby and McDonald, op. cit., p. 273.

³² *ibid.*, pp. 273–4.

³³ See, for example, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 13 April 1897, pp. 499–500 (Richard O’Connor).

³⁴ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 13 April 1897, p. 490 (John Forrest).

³⁵ *ibid.*

³⁶ Although proposed laws appropriating revenue or moneys, or imposing taxation, would not be able to originate in the Senate and the Senate would not be able to amend proposed laws which imposed taxation, appropriated revenue or moneys for the ordinary annual services of the government, or increased any proposed charge or burden on the people. The Senate would, however, be able to request amendments to bills it could not amend. (Constitution, s. 53)

unique constitutional arrangements—arrangements which should not automatically be equated with British traditions.

At the time the Constitution was being framed Robert Garran predicted that:

... the parliamentary system for federal purposes may develop special characteristics of its own ... Thus the familiar rule that a Ministry must retain the confidence of the representative chamber, may, in a Federation—where both Chambers are representative—develop into a rule that the confidence of both Chambers is required. This would mean that executive (as well as legislative) acts should have the support of a majority of States as well as of a majority of citizens.³⁷

Garran's prediction that a government may need to have 'the confidence of both Chambers' has long been demonstrated to be accurate. As former Clerk of the Senate J. R. Odgers noted:

... to form a Government a party or group needs the support of a majority of the members of the House of Representatives. In normal circumstances the composition of the Senate plays no part in the determination of which political group shall form the Government. However, as was illustrated by the double dissolutions of 1974 and 1975, a Government which has been denied Supply by the Senate cannot govern constitutionally and should either advise a general election or resign.³⁸

Leigh Sealy has suggested that the underlying proposition of the decision in *Williams* may be 'that the Commonwealth government is not only responsible to the people through the House of Representatives but is also (at least in a structural, if not a practical sense) responsible to the States, through the Senate'.³⁹ Rather than being a departure from the framers' intentions, the decision in *Williams* appears to be fully consistent with Garran's suggestion that 'executive ... acts should have the support of a majority of States as well as of a majority of citizens'⁴⁰ and his recognition of the centrality of federalism and representative government to Australia's constitutional framework.

³⁷ Robert Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government*, Angus & Robertson, Sydney, 1897, p. 150.

³⁸ J. R. Odgers, *Australian Senate Practice*, 6th edn, Royal Australian Institute of Public Administration, Canberra, 1991, pp. 2–3.

³⁹ Leigh Sealy, 'Adrift on "the Sea of Faith": Constitutional interpretation and the School Chaplains Case', Paper presented at the 2013 Constitutional Law Conference, Sydney, 15 February 2013, p. 10.

⁴⁰ Garran, *op. cit.*, p. 150.

The court misunderstood the role of the Parliament

The importance of political accountability and the role of the Senate in Australia's federal system of representative government was highlighted in many of the judgments. This has also been subject to criticism. French CJ highlighted the requirements of 'political accountability' on the Commonwealth executive,⁴¹ and suggested that:

A Commonwealth Executive with a general power to deal with matters of Commonwealth legislative competence is in tension with the federal conception which informed the function of the Senate as a necessary organ of Commonwealth legislative power. It would undermine parliamentary control of the executive branch and weaken the role of the Senate.⁴²

He concluded by noting the Constitution must be understood by reference to the distinctive system of government created in Australia discussed above—a system which combined a 'truly federal government' and responsible government as central pillars of the Constitution.⁴³

Gummow and Bell JJ noted that there 'remain considerations of representative as well as of responsible government in cases where an executive spending scheme has no legislative engagement for its creation or operation beyond the appropriation process'.⁴⁴ They suggested that absence of such engagement means that there is 'a deficit in the system of representative government'⁴⁵ and that the NSCP contracts:

... present an example where within the Commonwealth itself there is a limited engagement of the institutions of representative government. The Parliament is engaged only in the appropriation of revenue, where the role of the Senate is limited. It is not engaged in the formulation, amendment or termination of any programme for the spending of those moneys.⁴⁶

Hayne J noted that the Constitution provides for parliamentary control 'over raising and expenditure of public moneys'.⁴⁷

⁴¹ *Williams v. Commonwealth* (2012) 248 CLR 156, 192 [35].

⁴² *ibid.*, 205 [60].

⁴³ *ibid.*, 205–6 [61].

⁴⁴ *ibid.*, 232–3 [136].

⁴⁵ *ibid.*, 234 [143].

⁴⁶ *ibid.*, 235 [145].

⁴⁷ *ibid.*, 258–9 [216].

Crennan J highlighted the fact that prior to federation ‘it was appreciated that the sharing of political power was an important mechanism for avoiding arbitrary government’.⁴⁸ She emphasised the importance of accountability of the executive to the Parliament through parliamentary debate, the requirement for the executive to provide information to the Parliament, and the fact that the ‘ultimate passage of a Bill into law may involve a number of compromises along the way, reflected in amendments which secure the Bill’s final acceptance’.⁴⁹ She concluded that these:

... mechanisms and layers of accountability ... permit the ventilation, accommodation, and effective authorisation of political decisions. The notion of a government’s mandate to pass laws and to spend money rests both on democratic representative government and on the relationship between Parliament and the Executive, involving, as it does, both scrutiny and responsibility. While the Executive has the power to initiate new policy and to implement such policy when authorised to do so, either by Parliament or otherwise under the *Constitution*, Parliament has the power to scrutinise and authorise such policy (if it is not otherwise authorised by the *Constitution*), and the exclusive power to grant supply in respect of it and control expenditure.⁵⁰

Before concluding that ‘expenditure by the Commonwealth Executive will often require statutory authority beyond appropriation Acts’,⁵¹ Crennan J noted that the NSCP had not ‘been subject to the parliamentary processes of scrutiny and debate which would have applied to special legislation’ and that the Senate had no power to amend the original appropriation Act.⁵²

Appleby and McDonald question why the Senate (and the Parliament more generally) must be involved in a stronger way in relation to the authorisation of executive expenditure.⁵³ They suggest that it is not obvious why the terms of the Constitution are said to require the positive enactment of legislation as a precondition for the expenditure of money, and query why it is not ‘sufficient that the Parliament has the power, should it choose to do so, to legislate to prevent spending without prior parliamentary approval, to apply pressure to Ministers or, in an extreme case, to withdraw its confidence in the government’.⁵⁴ They note that ‘the Parliament has undoubted power to pass a bill restricting the executive and preventing it from

⁴⁸ *ibid.*, 350 [510].

⁴⁹ *ibid.*, 351 [515].

⁵⁰ *ibid.*, 351 [516].

⁵¹ *ibid.*, 355 [534].

⁵² *ibid.*, 354–5 [532].

⁵³ Appleby and McDonald, *op. cit.*, p. 264.

⁵⁴ *ibid.*, p. 270.

spending in particular ways’ and that if the Senate favoured such a bill and the House of Representatives refused to pass it ‘the Senate could press the House to pass it and, in the most extreme case, could refuse to deal with other business unless and until the Bill were passed’.⁵⁵ Alternatively, it is suggested that the Parliament could subsequently legislate so as to prevent or claw back expenditure of which it did not approve.⁵⁶

While the above propositions are correct, the response to Appleby and McDonald’s queries appears to lie in the aspects of the judgments of the majority outlined above. The methods of parliamentary control outlined by Appleby and McDonald would not answer the majority’s concerns in relation to federalism and the principles of parliamentary accountability which underlie representative and responsible government—both of which the court has stressed are central to Australia’s constitutional framework. For example, preventative measures or measures to claw back expenditure of which the Parliament did not approve could be impractical—for example, how would the Parliament know that it does not approve of a particular spending scheme before it is even created and if the Parliament did ‘claw back expenditure’ how would the Commonwealth recover the money from recipients? Moreover, such measures would not result in parliamentary engagement in the ‘formulation, amendment or termination’⁵⁷ of any spending scheme, nor would it ‘permit the ventilation, accommodation, and effective authorisation of political decisions’.⁵⁸ In addition, it would not allow the Senate to fulfil its constitutional mandate of ensuring equal representation of the people of the states in political decisions at the Commonwealth level.

In this context it is important to note that it is extremely unlikely that a bill which sought to restrict the executive from spending in particular ways would pass the House of Representatives which is invariably dominated by MPs forming or otherwise supporting the executive government. As French CJ notes, the ‘Executive has become what has been described as “the parliamentary wing of a political party” which “though it does not always control the Senate ... nevertheless dominates the Parliament and directs most exercises of the legislative power”’.⁵⁹ It is true that the Senate could utilise various mechanisms to encourage the executive-dominated lower house to pass such a bill. However, this would not answer the majority judges’ concerns in relation to the need for active parliamentary oversight in the ‘formulation, amendment or termination’⁶⁰ of spending schemes—oversight which the court

⁵⁵ *ibid.*, p. 265.

⁵⁶ *ibid.*, p. 270.

⁵⁷ *Williams v. Commonwealth* (2012) 248 CLR 156, 235 [145].

⁵⁸ *ibid.*, 351 [516].

⁵⁹ *ibid.*, 205 [61].

⁶⁰ *ibid.*, 235 [145].

highlighted is a necessary condition of the centrality of federalism and representative and responsible government to Australia's constitutional framework.

V The legislative response

As noted above, on the face of the decision, it appears that *Williams* was a turning point for parliamentary accountability and federalism. However, it is necessary to consider the Commonwealth's legislative response to the decision. The immediate legislative response was the *Financial Framework Legislation Amendment Act (No. 3) 2012* (Cth) (FFLA Act). The FFLA Act purports to retrospectively provide the legislative support for over 400 non-statutory funding schemes whose validity was thrown into doubt following *Williams*.⁶¹ Any future additions to the list of spending schemes will be made by the executive in the form of a disallowable instrument.⁶²

The former Chief Justice of the New South Wales Supreme Court, James Spigelman, has expressed concerns about the Commonwealth ignoring the limits on executive power in the Constitution—particularly after the decision in *Pape*.⁶³ In relation to the FFLA Act he noted that 'the Commonwealth proceeded to virtually replicate its view of the Executive power in the form of a statute'.⁶⁴ He expressed concerns that this may amount to a breach of the rule of law:

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.⁶⁵

Constitutionality of the FFLA Act

Several specific concerns about the constitutionality of the FFLA Act have been raised. First, there are concerns that by providing for approval of expenditure by regulation the FFLA Act will not answer the High Court's concerns in relation to parliamentary accountability and federalism. Secondly, it appears that many of the

⁶¹ Daniel Stewart, 'Williams v. Commonwealth and the shift from responsible to representative government', *AIAL Forum*, no. 72, 2013, p. 75.

⁶² Appleby and McDonald, op. cit., p. 277.

⁶³ *Pape v. Federal Commissioner of Taxation* (2009) 238 CLR 1.

⁶⁴ James Spigelman, 'Constitutional recognition of local government', Speech delivered at the Local Government Association of Queensland 116th Annual Conference, Brisbane, 24 October 2012, p. 12.

schemes provided for in the FFLA Act may not be supported by a head of legislative power.

Providing for approval of spending schemes by regulation

The process by which the FFLA Act itself was passed and the fact that it simply listed over 400 schemes, or purposes of schemes, in the regulations, resulted in extremely limited parliamentary oversight and virtually no involvement of the Parliament in the ‘formulation, amendment or termination’⁶⁶ of the schemes.⁶⁷ By amending the regulations through an Act, the usual disallowance, drafting, publication, parliamentary scrutiny and consultation procedures provided for in the *Legislative Instruments Act 2003* (Cth) did not apply. Noting the concerns raised by the High Court in relation to parliamentary accountability, it has been suggested that the usual disallowance and other procedures should have applied to the listing of the schemes to provide for a greater opportunity for parliamentary scrutiny of each of the schemes.⁶⁸ Former Chief Justice Spigelman suggested that:

The essential character of the Act is that, to a significant degree, it abdicates Parliamentary control of expenditure. No doubt, this is based on the political popularity of the expenditure, or at least most of it, coupled with a sense of urgency. However, this conduct was not consistent with the central significance of such Parliamentary control in the text of our Constitution and in our Constitutional history, not least as manifest in the English Civil War or, to bring the drama home, in the dismissal of the Whitlam Government.⁶⁹

The Senate Standing Committee for the Scrutiny of Bills has queried ‘whether it is appropriate to delegate to the Executive (through the use of regulations) how its powers to contract and to spend are to be expanded’ and has also expressed some concerns in relation to the transitional provision which provided for retrospective validation of the schemes.⁷⁰

New additions to the list of schemes will be subject to the usual disallowance and other parliamentary scrutiny mechanisms. However, the Senate Standing Committee

⁶⁵ *ibid.*, pp. 12–13.

⁶⁶ *Williams v. Commonwealth* (2012) 248 CLR 156, 235 [145].

⁶⁷ Amanda Sapienza, ‘Using representative government to bypass representative government’, *Public Law Review*, vol. 23, 2012, pp. 165–6.

⁶⁸ *ibid.*, pp. 162–4.

⁶⁹ Spigelman, *op. cit.*, p. 14.

⁷⁰ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest*, no. 7, 27 June 2012, pp. 5–6; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Report*, no. 11, 19 September 2012, p. 380.

on Regulations and Ordinances has expressed concerns about the lack of information provided about new schemes that have been added by regulation since the passage of the FFLA Act.⁷¹ In any event, these mechanisms are not comparable to the level of parliamentary scrutiny that would be applied to new schemes established by an Act of Parliament—there remains virtually no ‘engagement of the institutions of representative government’ as mandated by the court.⁷² Moreover, as Sapienza notes, when the broad wording of the regulation-making power is put together with the broad wording of the schemes many new spending initiatives may be able to be instituted by the executive without any parliamentary scrutiny at all.⁷³

It has been suggested that ‘the emphasis in the judgments on the parliamentary role may raise questions as to whether the legislative function of authorising expenditure by the executive can properly be the subject of delegated legislation’.⁷⁴ In this regard, Leslie Zines has suggested that limits on the Parliament’s power to delegate its legislative power ‘should be based on the policies behind the separation of powers or the principle of responsible government’.⁷⁵ If the FFLA Act were invalid on the basis that it is not constitutionally permissible for the Parliament to delegate its legislative function in relation to authorising executive expenditure this would go some way to upholding the principles of federalism and representative and responsible government outlined by Zines and in the *Williams* decision itself.

Overall, Anne Twomey has suggested that the FFLA Act simply attempts to restore what the Commonwealth ‘wrongly believed to be its former powers, without actually listening to or taking to heart the High Court’s concerns about a democratic deficit, the important role of parliamentary scrutiny and the importance of federal considerations’.⁷⁶ She argued that the FFLA Act ‘in a bald-faced manner, rejects the fundamental propositions put by the High Court in the *Williams* case’.⁷⁷ Similarly, former Chief Justice Spigelman came to the conclusion that:

⁷¹ Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, no. 1, 7 February 2013, p. 26. See also Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, no. 1, 7 February 2013, p. 36 (regarding the ‘Mature-Age Participation – Assistance Program’).

⁷² *Williams v. Commonwealth* (2012) 248 CLR 156, 235 [145].

⁷³ Sapienza, op. cit., p. 165.

⁷⁴ Appleby and McDonald, op. cit., p. 279; referring to Geoffrey Lindell, ‘*Williams v. Commonwealth*: How the school chaplains and Mr Pape destroyed the “common assumption” regarding executive power’, Paper presented at AACL Seminar, Sydney, 13 August 2012, p. 25.

⁷⁵ Zines, op. cit., p. 203.

⁷⁶ Anne Twomey, ‘Parliament’s abject surrender to the executive’, *Constitutional Critique* (Constitutional Reform Unit, Sydney Law School), 27 June 2012, <http://blogs.usyd.edu.au/cru/2012/06/parliaments_abject_surrender_t_1.html>.

⁷⁷ *ibid.*

Whatever may have been the need for a temporary stop-gap, this legislation, some of which, in my opinion, is unconstitutional, if left as a permanent feature, will create a very real risk of continued, and quite possibly frequent, disappointment of the Commonwealth's expectations.⁷⁸

If the High Court also came to the view that the FFLA Act does not adequately address its concerns about the importance of federal considerations and responsible and representative government (demonstrated through effective parliamentary scrutiny of proposed spending schemes) then it is possible that the FFLA Act, and the mechanism established under it for approval of spending schemes, may be invalid in its entirety.

Not supported by a head of legislative power

As noted above, concerns have also been raised in relation to whether the schemes provided for in the FFLA Act are supported by a head of legislative power. Twomey notes that many of the schemes will fall under a head of legislative power and that 'it is conceivable (although contestable)' that the FFLA Act would be enough to support them. However, others will not be supported by a head of legislative power and will remain invalid.⁷⁹ For example, grants relating to schools, higher education and research institutions, local government, and the NSCP itself may remain invalid.⁸⁰

In relation to the NSCP, there are 'serious doubts as to whether the High Court will find the legislative authorisation of this program bears a sufficient connection to a head of Commonwealth legislative competence', particularly as Hayne and Kiefel JJ held that a hypothetical law authorising the program would not be valid.⁸¹ In addition, because of the way in which many of the schemes are defined by very broad 'objectives' as indicated above, it is possible that 'a law authorising expenditure on them could not be characterised as a law with respect to any subject matter of Commonwealth legislative power'.⁸²

By attempting to restore, in essence, 'the understanding since Federation ... that the Government could rely on executive power to make certain payments (e.g. grants to individuals or community groups)'⁸³ [which the High Court has determined was an inaccurate understanding], the legislative response to the decision does appear to have

⁷⁸ Spigelman, op. cit., p. 14.

⁷⁹ Twomey, op. cit.

⁸⁰ Appleby and McDonald, op. cit., p. 277.

⁸¹ *ibid.*, p. 278.

⁸² *ibid.*

⁸³ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Report*, no. 11, 19 September 2012, p. 389.

raised doubts as to whether, in a practical sense, *Williams* could be considered a turning point for parliamentary accountability and federalism in Australia. However, the doubts are ameliorated by the general consensus that if not the whole FFLA Act, at least certain spending schemes (such as the NSCP) authorised under it, remain invalid and would be struck down by the court in any future litigation.

VI Conclusion

Of course, a single decision of the High Court will never completely halt Commonwealth intrusions into areas that have traditionally been state responsibilities or rectify the vertical fiscal imbalance in the Australian federation, nor will it ensure that there is a perfect system of responsible and representative government in Australia. Any consideration of the impact of the decision in *Williams* must therefore take this into account. With this in mind, it has been suggested that, on balance and even taking into account the legislative response, *Williams* can be considered a turning point for parliamentary accountability and federalism in Australia. The fact that the court has held that it is unconstitutional for the Commonwealth executive to spend money in areas beyond the day-to-day running of the government without statutory authority means that it is now clear that the Constitution mandates (when compared to the erroneous understanding prior to *Williams*):

- an increase in executive responsibility to the Parliament
- an increase in executive responsibility to the people through improved political processes and procedures and
- improved state ‘sovereignty’.

The decision can also be seen as a positive one more broadly because, as Cheryl Saunders suggests:

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.⁸⁴

It is clear, however, that this story is far from over. Recently, the Senate Appropriations and Staffing Committee stated that it intends to consider the implications of the *Williams* decision and the legislative response ‘with a view to ensuring that the Senate’s constitutional rights are not affected’.⁸⁵ Moreover, Mr

⁸⁴ Cheryl Saunders, ‘The scope of executive power’, *Papers on Parliament*, no. 59, 2013, p. 30.

⁸⁵ Senate Appropriations and Staffing Committee, Parliament of Australia, *Annual Report 2012–13*, p. 5.

Williams' second challenge to the NSCP⁸⁶ suggests that it is too early to establish the extent to which *Williams* represents a turning point for parliamentary accountability and federalism in Australia. However, it is clear that starting this journey is a significant step in itself.

⁸⁶ *Williams v. Commonwealth*, Case no. S154/2013, High Court of Australia.