

# Chapter 4

## CONSTITUTIONAL BASES

### Introduction

4.1 One of the concerns that was raised during both previous inquiries on the Bill, by the Senate Legal and Constitutional Legislation Committee and the PJCAAD, was the constitutionality of the proposed Bill.

4.2 Constitutional questions about legislation are complex and are ultimately only resolved when the High Court tests provisions in the context of a legal challenge. As Professor George Williams noted in evidence before the Committee, 'this is a very difficult issue to address the committee on because of the complete lack of information, as far as I have seen it, about the justified basis of this legislation'.<sup>1</sup>

4.3 Two fundamental constitutional questions that arose in the context of the Committee's consideration of this Bill are the constitutional basis or bases for the proposed measures and their consistency with constitutional limitations:

In terms of analysing the constitutional issues, they fall into two categories. You obviously, firstly, have to have a head of power in the Constitution to justify the legislation. ... But ... there is still a secondary issue ... that is, whether it breaches some other limitation in the Constitution, firstly, relating to incompatibility having a judge perform an office or a function that is non-judicial that actually undermines integrity in the judges and, secondly, and of far more significance, ... there is a very real and quite powerful argument that detention in these circumstances breaches the separation of powers.<sup>2</sup>

4.4 The 'head of power' issue is addressed in this Chapter. The other issues are dealt with separately in the context of the Chapters on Warrants and Detention.

4.5 The 'head of power' issue has clearly concerned the Government for some time. In 2001, the Prime Minister noted that '[o]ne difficulty the Commonwealth has in effectively fighting transnational crime and terrorism is that these crimes may not be strictly federal offences'. It was 'not absolutely certain that the Commonwealth has the necessary power, complete constitutional power ... to deal in the way that it might think appropriate for a terrorist attack on a particular part of Australia'.<sup>3</sup>

4.6 The Committee sought information from the Attorney-General's Department about the constitutionality of the bill, receiving only limited information.

---

1 *Hansard*, 13 November 2002, p. 58.

2 *Hansard*, 13 November 2002, p. 59.

3 The Hon. John Howard, MP, 'A Safer More Secure Australia', *Media Release*, 30 October 2001.

4.7 In evidence, the Attorney-General's Department indicated that, in accordance with the Attorney-General's view, the questioning and detention powers would be supported by the creation of terrorism offences in the *Criminal Code*, 'the creation of offences in the ASIO Bill' and 'upon the incidental powers of the Commonwealth'.<sup>4</sup> In turn, the terrorism offences would be supported by the defence power, the external affairs power and the 'implied incidental powers of nation protecting'.<sup>5</sup> Moreover, it was said that 'if there are in fact any gaps that might appear, they would be able to be underpinned by [the reference of powers from the States to the Commonwealth]'.<sup>6</sup>

4.8 Perhaps the most useful statement of the possible sources of the Commonwealth's power arises from a letter sent by Mr Keith Holland to the Senate Legal and Constitutional Legislation Committee during that Committee's inquiry into this Bill. Mr Holland stated that the measures primarily rely on the terrorist offences that were created by the *Security Legislation Amendment (Terrorism) Act 2002*:

The creation of these terrorist offences is supported by a number of powers within the Constitution. These include the external affairs power, the defence power, in addition to the implied power to protect the Commonwealth or national institutions. The powers of investigation and detention proposed in the ASIO Bill can generally be supported by the powers supporting the creation of the offences to which the powers relate, together with the Commonwealth's incidental power (s51(xxxix)).<sup>7</sup>

4.9 Section 51 of the Constitution allows the Commonwealth to make laws with respect to defence or 'the control of forces to execute and maintain the laws of the Commonwealth',<sup>8</sup> 'external affairs'<sup>9</sup> and 'matters incidental to the execution of any power vested by this Constitution in Parliament'.<sup>10</sup> Section 51(xxxvii) allows the States to refer powers to the Commonwealth. Section 61 provides that executive power 'extends to the execution and maintenance of this Constitution'. It is generally accepted that it also includes the Commonwealth's prerogatives,<sup>11</sup> one of which relates

---

4 *Hansard*, 12 November 2002, p. 10.

5 *Hansard*, 12 November 2002, p. 11.

6 *Hansard*, 12 November 2002, p. 11.

7 Keith Holland, 12 June 2002.

8 Section 51(vi).

9 Section 51(xxix).

10 Section 51(xxxix).

11 *Barton v. Commonwealth* (1974) 131 CLR 477.

to the defence of the realm,<sup>12</sup> and a range of (largely unexplored) powers derived from the 'character and status of the Commonwealth as a national government'.<sup>13</sup>

4.10 This chapter considers the main heads of legislative power that are relevant to the Bill:

- the defence power;
- the external affairs power;
- the implied self-protection power; and
- the implied incidental power.

4.11 The chapter then discusses some key issues, and the referral of powers from the States to the Commonwealth. More specific constitutional issues in relation to warrants for detention and questioning are considered separately in Chapters 5, 6 and 7.

## The defence power

4.12 Professor George Williams expressed the view that '[I]f the legislation is valid, it is likely to be primarily on the basis that it falls under the defence power'.<sup>14</sup>

4.13 The defence power relates to 'the naval and military defence of the Commonwealth and of the several States and the control of the forces to execute and maintain the laws of the Commonwealth'. It is a purposive power that will only support a law that is 'reasonably capable of being regarded as being appropriate and adapted' to 'the defence of the Commonwealth [etc.] [against external threats]'.<sup>15</sup>

4.14 There are some important things to note about the first limb of the defence power. As Professor Williams acknowledged, it can 'wax and wane according to both international and domestic aspects, including terrorism'.<sup>15</sup> Also, it has a primary and secondary aspect. The former deals directly with military and defence issues while the latter deals measures that are conducive to successful defence of the nation.

---

12 *Hampden's Case (the Case of Ship Money)* (1637) 3 St. Tr. 826 at p 976; *In re a Petition of Right* [1915] 3 KB 649 at p 659; *Attorney General v. De Keyser's Royal Hotel Ltd* [1920] AC 508; *Burmah Oil Co. (Burma Trading) Ltd v. Lord Advocate* [1965] AC 75; *Attorney-General v. Nissan* [1968] 1 QB 286.

13 *Victoria v. The Commonwealth and Hayden* (1975) 134 CLR 338, per Mason J at p 379. It permits the Commonwealth 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': *Davis v. The Commonwealth* (1988) 166 CLR 79 per Mason CJ, Deane and Gaudron JJ at p 111. See generally Dr Max Spry, 'The Executive Power of the Commonwealth: its scope and limits', *Research Paper No. 28 1995-96*, at <http://www.aph.gov.au/library/pubs/rp/1995-96/96rp28.htm>.

14 *Hansard*, 13 November 2002, p. 59.

15 *Hansard*, 13 November 2002, pp. 69-70.

4.15 It is this constitutional grey area surrounding the secondary aspect which clouds the question of how far, in its desire to counter and prevent terrorism, the Commonwealth today could use the defence power to regulate domestic areas and activities beyond the strictly military. To a large extent this depends on whether the current international situation amounts to an external threat to Australia's defence.

4.16 Professor Williams compared the international situation surrounding the Bill with the situation surrounding the *Communist Party Dissolution Act 1950*, suggesting that the 'parallels are quite striking between the issue then and the issue today':<sup>16</sup>

[In the *Communist Party Case*] [t]he High Court found that, even though Australia was then at the time of the decision engaged in a war in Korea, there was nothing that amounted to a war against communism that could justify legislation of that kind. In the context of Australia contemplating joining a war in Iraq, I think it is equally possible that the High Court would not find there is a war against terrorism of a sufficient magnitude that threatens the integrity of Australia that could justify [this] legislation.<sup>17</sup>

4.17 The other relevant point to emerge from the *Communist Party Case* is that in trying to enliven the secondary aspect of the defence power, the Commonwealth normally cannot resort to bringing evidence in front of the Court to substantiate a claim regarding the existence of an external threat or national emergency. The Court's assessment will be based on what is called 'judicial notice', which means the information within the ordinary knowledge of judges sitting on the case:

The High Court clearly decided in 1951 in the *Communist Party Case* that this parliament cannot recite itself into power by putting before the court a threat to the security of the nation. The parliament and the government must articulate a constitutional basis for its legislation; otherwise that is a clear reason why the legislation by itself would be unconstitutional.<sup>18</sup>

4.18 The second limb of section 51(vi) may also come into consideration. It has been argued that the expression 'execution and maintenance of the laws of the Commonwealth' may extend 'to the preservation of general law and order so far as such order may be disturbed by general disobedience to the laws of the Commonwealth'.<sup>19</sup> This view would regard section 51(vi) as adding to the Commonwealth's array of powers to prevent, investigate and punish terrorism.

4.19 The Attorney-General's Department may be taken to have argued primarily in favour of this second part of section 51(vi). In answers to questions on notice, they acknowledged that '[t]he limits of the defence power in relation to internal or domestic

---

16 *Hansard*, 13 November 2002, p. 71.

17 *Hansard*, 13 November 2002, p. 59.

18 Professor George Williams, *Hansard*, 13 November 2002, p. 58.

19 'Current Topics: Legal and constitutional problems of protective security arrangements in Australia', *Australian Law Journal*, Vol. 52, 1978, p. 298.

threats to security are not entirely clear'.<sup>20</sup> But, they said there were 'cogent arguments' to support the use of the second limb 'to deal with a range of internal security threats, including terrorism'. They cited the *Protective Security Review* for the proposition that this limb 'may be an important source of legislative power for the Commonwealth in law and order matters generally, and countering terrorism in particular'.<sup>21</sup>

## The external affairs power

4.20 As noted above, the Attorney-General's Department indicated that it thought the legislation was supported by this power. However, Professor Williams said:

I do not think the external affairs power is likely to support the legislation. I am not aware of a relevant international treaty. I do not think links with other external events are likely to justify coercive powers of this kind.<sup>22</sup>

4.21 As a general proposition the external affairs power will support a law regulating persons, places and matters which are physically external to Australia. Moreover, it will support a law that implements an international treaty or convention. When a law purports to give domestic effect to an international instrument, the primary question to be asked is whether it has selected means that are 'reasonably capable of being considered appropriate and adapted to implementing the treaty'.<sup>23</sup>

4.22 However, the power may not be confined to the implementation of treaties or treaty obligations. It is thought to support measures that address matters of international concern, at least where that concern is reasonably concrete.<sup>24</sup> It probably extends also to measures that implement recommendations of international agencies and may extend to measures that pursue agreed international objectives.<sup>25</sup>

4.23 In response to Professor Williams, the Attorney-General's Department argued that 'Australia's obligations to implement Resolution 1373 ... is sufficient'.<sup>26</sup>

4.24 UN Security Council Resolution 1373 includes terms that may be construed as 'decisions' under Chapter VII of the *Charter of the United Nations* which are formally binding. Key provisions include 'decisions' that 'all States shall ... prevent and suppress the financing of terrorist acts [and] [c]riminalize the wilful provision or

20 Attorney-General's Department, 'Answers to questions on notice', 21 November 2002, p. 1.

21 Protective Security Review, *Report (Unclassified Version)*, AGPS, Canberra, 1979, p. 32.

22 *Hansard*, 13 November 2002, p. 59.

23 *Victoria v. Commonwealth* (1996) 187 CLR 416 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at p. 487. See also at p. 488.

24 *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 per Murphy J at p. 242; *Polyukovich v. Commonwealth* (1991) 172 CLR 501 per Brennan J at pp. 560-562 and Toohey J at pp. 657-658.

25 See generally, *R v. Burgess, Ex Parte Henry* (1936) 55 CLR 608 per McTiernan J at p. 687; *Commonwealth v. Tasmania* (1983) 158 CLR 1 per Deane J at pp. 258-259 and Murphy J at pp. 171-172.

26 Attorney-General's Department, 'Answers to questions on notice', 21 November 2002, p. 1.

collection ... of funds by their nationals or in their territories with the intention that the funds should be used ... in order to carry out terrorist acts' and that all States:

Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is *brought to justice* and ensure that ... such terrorist acts are established as *serious criminal offences* in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.<sup>27</sup>

4.25 One difficulty in relying on Resolution 1373 is that while the obligations it imposes are binding they may be uncertain. Moreover the obligations it creates may not contemplate the measures proposed in the Bill. Aside from 'criminalising' the financing of terrorist organisations, creating 'serious offences' for terrorist acts and 'bringing the perpetrators to justice', there may be few other obligations on Australia.

4.26 In addition, any underlying 'international concern' may be qualified. Amnesty International endorsed an 'affirmation' made by the UN Commission on Human Rights in 2000 and 2001 that 'all measures to counter terrorism must be in strict conformity with international law, including international human rights standards'.<sup>28</sup> It urged that anti-terrorism laws should be 'guided by human rights principles contained in international law'.<sup>29</sup> It also argued that anti-terrorism measures must 'be necessary for public safety or public order ... and serve a legitimate purpose';<sup>30</sup> that any restrictive laws use precise criteria and 'not confer unfettered discretion on those charged with their execution';<sup>31</sup> that measures be proportionate<sup>32</sup> and appropriate<sup>33</sup> or 'the least intrusive instrument amongst those which might achieve that protective function'.<sup>34</sup>

4.27 Similar 'affirmations' were made by other UN bodies. The UN Committee Against Torture reminded states considering anti-terrorist laws of the 'non-derogable nature of most of the obligations undertaken by them in ratifying the [Torture] Convention'.<sup>35</sup> The High Commissioner for Human Rights also urged States 'to refrain from any excessive steps, which would violate fundamental freedoms and

---

27 Resolution 1373, para 1(a) and 1(b) and para 2(e).

28 Amnesty International, *Submission 136*, p. 4.

29 UN Doc E/C/N.4/2002/18 (27 February 2002), para 1.

30 Ibid, para 4(b)

31 Ibid, para 3.

32 Ibid, para 4(f).

33 Ibid, para 4(g).

34 Ibid.

35 Statement of the Committee against Torture, [CAT/C/XXVII/Misc.7.](#), 22 November 2001.

undermine legitimate dissent'<sup>36</sup> and criticised the detentions at Guantanamo Bay, Cuba.<sup>37</sup>

## The implied incidental power

4.28 As the Attorney-General's Department has noted, support may also be found from the incidental powers that are implied within each of the powers in section 51.

4.29 These implied incidental powers essentially support every federal criminal law. The Commonwealth does not have legislative power over 'criminal activity'. But, within limits, the Parliament can make laws which create criminal offences, and provide for their investigation, prosecution and punishment.

4.30 In general, offences must either fall directly within, or be incidental to the exercise of, a head of constitutional power. A law relying on an incidental power must be *reasonably necessary* for the effective operation of a wider regime. It is not essential to show that the law is *necessary* to effect a legitimate purpose, but a law may be invalid if it exceeds rather than expands the main power. Key concepts are reasonableness and proportionality. 'In short, and generally speaking, Commonwealth criminal law is ancillary to the performance of the responsibility of the Commonwealth to protect itself, its *Constitution*, its institutions and services and to enforce its own laws.'<sup>38</sup>

## The implied self-protection power

4.31 The last, although perhaps not least, of the powers cited in support of the Bill was the 'implied power to protect the Commonwealth or national institutions'.

4.32 The High Court has said that the Commonwealth has an 'inherent right of self-protection',<sup>39</sup> a right to prevent 'intentional excitement of disaffection against the Sovereign and Government'<sup>40</sup> and a legislative power to preserve its institutions which was seen to 'follow almost necessarily from their existence'.<sup>41</sup> Thus, it has the power 'to protect its own existence and the unhindered play of its legitimate activities'<sup>42</sup>

---

36 [Joint statement by Mary Robinson, UN High Commissioner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the OSCE Office for Democratic Institutions and Human Rights](#), 29 November 2001.

37 [Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantanamo Bay, Cuba](#), 16 January 2002.

38 Sir Garfield Barwick, Crimes Bill 1960, Second Reading Speech, *House of Representatives Hansard*, 8 September 1960, pp. 1020–1021.

39 *R v. Kidman* (1915) 20 CLR 425 per Isaacs J at p. 440.

40 *Burns v. Ransley* (1949) 79 CLR 101 per Latham CJ at p. 110.

41 *Ibid* per Dixon J at p. 116.

42 *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 per Dixon J at p. 188.

which might be found in a mosaic of powers,<sup>43</sup> or in 'an essential and inescapable implication which must be involved in the legal constitution of any polity'.<sup>44</sup>

4.33 The 'implied incidental powers of nation protecting' may also fall within the (largely unexplored) implied nationhood power. This power has been characterised as being incidental to the operation of the executive power in section 61. It has also been characterised as an implied power that is deduced from the 'character and status of the Commonwealth as a national government'.<sup>45</sup> Broadly, it permits the Commonwealth 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>46</sup>

## Observations

4.34 One difficulty in relying on the defence power or the 'implied incidental powers of nation protecting' is that the proposed questioning and detention powers may not have a sufficient connection with the subject matter of the main power:

While the Commonwealth has power over "defence" and in relation to matters affecting the "nationhood" of Australia, it could be argued that there is insufficient nexus between legislation detaining persons who may have relevant information concerning terrorism and the "defence" or "nationhood" of Australia so as to serve as a basis for the legislation.<sup>47</sup>

4.35 The issue may be complicated by the fact that the proposed measures rely on other measures, such as the primary and secondary offences in the *Criminal Code*, that may themselves stretch the limits of the implied incidental power discussed above.

4.36 Dr Carne pointed to the fact that all of these heads of power 'are purposive in nature or have a purposive aspect'.<sup>48</sup> The defence power will only support a law that is 'reasonably capable of being regarded as being appropriate and adapted' to 'the defence of the Commonwealth [etc.]'. The external affairs power will support a law that is, among other things, 'reasonably capable of being considered appropriate and adapted to implementing the treaty'. The implied incidental power will support a law that is reasonably necessary for the effective operation of another law.

4.37 These purposive aspects translate into a requirement for proportionality:

---

43 The precise constitutional bases of the 'inherent right of self-protection' are discussed in Elizabeth Ward, 'Call Out the Troops: an examination of the legal basis for Australian Defence Force involvement in 'non-defence' matters', *Research Paper No. 8 1997-98*, at <http://www.aph.gov.au/library/pubs/rp/1997-98/98rp08.htm> [5/7/00]

44 *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 per Fullagar J at p. 260.

45 *Victoria v. The Commonwealth and Hayden* (1975) 134 CLR 338 per Mason J at p. 379.

46 *Davis v. The Commonwealth* (1988) 166 CLR 79 per Mason CJ, Deane and Gaudron JJ at p. 111. See generally Dr Max Spry, 'The Executive Power of the Commonwealth: its scope and limits', *Research Paper No. 28 1995-96*, at <http://www.aph.gov.au/library/pubs/rp/1995-96/96rp28.htm>.

47 Public Interest Advocacy Centre, *Submission 52*, p. 5.

48 *Submission 24*, p. 6.



[T]he relevant test developed by the High Court ... is to ask whether the legislation in question is reasonably capable [of] being considered appropriate and adapted to an identified constitutional purpose under the relevant head of power. In other words, [it] applies a proportionality test to these powers to assess the constitutionality of the relevant law.<sup>49</sup>

4.38 While of the view that the Committee was entitled to a fuller answer to its questioning of what head of power the Government might use for this Bill, Dr Gavan Griffith QC did not discuss this issue at length, beyond acknowledging the possibility of this being brought into question in a constitutional challenge to the Bill:

On the question of power, there seems to be - as I have listed - many express powers under paragraph 2.1 of my submission. There are so many powers that one would have to go through the full panoply. It might well be a case here that even nationhood would be something that could at last have legs. I think it is difficult to be dogmatic about this, other than to say that there could be an issue of attaching a power. It may be that the greater difficulty is to say you have gone too far, for some reason. It might be to do with, as Senator Kirk pointed out, the constitutional rights under chapter 3; it may be with respect to some other aspect - the issue of detention without invoking criminal charges. On the general aspect of power, I would have thought that, with the rag-bag of powers—running to the incidental power, the nationhood power, the executive power—there is a real possibility of making out power. I mentioned influx of criminals, even. That is an untested power but, surprisingly, it was pleaded by my predecessor against me in a case involving a refugee to Australia in *Salemi* in 1981. It is difficult to be dogmatic about it, other than to say that there are issues there.<sup>50</sup>

## **The referral of powers from the States to the Commonwealth**

4.39 Section 51(xxxvii) of the Constitution provides that the Commonwealth Parliament may make laws with respect to: '[m]atters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law'. It is not necessary for all States to refer a matter to the Commonwealth. If only some States make a reference, the Commonwealth law can apply only in those States. Once the law is passed, it may be 'adopted' by the Parliaments of other States and so come into effect there as well.

4.40 At the Leader's Summit on Terrorism and Multi-Jurisdictional Crime in April 2002, the Prime Minister and State and Territory Leaders negotiated an *Agreement on Terrorism and Multi-Jurisdictional Crime*. In April 2002 it was announced that part of the agreement involved a referral of powers by the States to the Commonwealth under section 51(xxxvii) of the Constitution 'so that the Commonwealth can legislate *across the board* in relation to terrorism'. In reality, this was an 'in principle' agreement which required further consultation on the form of the referral. On 8 November 2002 the

---

49 *Submission 24*, p. 6.

50 *Hansard*, 22 November 2002, p. 154.

Attorney-General announced that the Standing Committee of Attorneys-General had reached an agreement on the form of the referral to the Commonwealth.

## **Conclusion**

4.41 The Government clearly considers it has a sufficient head of power for the legislation. While some submissions argue against this proposition, the case can also be made in favour of it. However, regardless of these broad 'head of power' issues, there may be other issues that arise out of express or implied constitutional limitations.

4.42 As suggested in the introduction, the submissions and evidence indicated that the most obvious constitutional limitations related to the incompatibility of the power to issue warrants with the exercise of judicial power and the possible inconsistency of the proposed detention powers with the requirement for separation of powers.

4.43 Other issues that were raised but not pressed before the Committee related to the potential for the proposed measures to breach other express or implied limitations, for example with respect to freedom of religion or freedom of speech or association.