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State Referrals and Terrorism Law Reform
Paralysis: Cause and Effect?

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Abstract

The purpose of this comment is to challenge the claim made by the Commonwealth Attorney-General, Robert McClelland, that a range of amendments to the anti-terrorism laws in Part 5.3 of the Criminal Code ('the Code') cannot be enacted without prior amendment by State legislatures of their earlier referrals on this subject to the Commonwealth under section 51(xxxvii) of the Constitution. That assertion is surprising in light of the relevant underlying intergovernmental agreement, the provisions of the State referrals themselves and past experience of quite radical amendment of this Part of the Code unaccompanied by any need for State legislative attention. If correct, the Attorney-General's view threatens to substantially inhibit the flexibility of the reference power which underpins other laws of national significance. Lastly, the comment asks why the Attorney-General's Department appears reluctant to acknowledge and act upon the High Court's confirmation, since Part 5.3 was first enacted, that the Commonwealth's legislative power with respect to defence is sufficiently broad to support laws responding to domestic threats of political violence.

State Referrals and Terrorism Law Reform Paralysis: Cause and Effect?

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I Introduction

The purpose of this comment is to challenge the claim made by the Commonwealth Attorney-General, Robert McClelland, that a range of amendments to the anti-terrorism laws in Part 5.3 of the *Criminal Code* ('the Code') cannot be enacted without prior amendment by State legislatures of their earlier referrals on this subject to the Commonwealth under section 51(xxxvii) of the Constitution. That assertion is surprising in light of the relevant underlying intergovernmental agreement, the provisions of the State referrals themselves and past experience of quite radical amendment of this Part of the Code unaccompanied by any need for State legislative attention. If correct, the Attorney-General's view threatens to substantially inhibit the flexibility of the reference power which underpins other laws of national significance.¹ Lastly, the comment asks why the Attorney-General's Department appears reluctant to acknowledge and act upon the High Court's confirmation, since Part 5.3 was first enacted, that the Commonwealth's legislative power with respect to defence is sufficiently broad to support laws responding to domestic threats of political violence.²

II State Referrals and the Enactment of Part 5.3

The Commonwealth's scheme of terrorism offences in Part 5.3 of the Code was initially enacted in June 2002 using a 'patchwork' of legislative power, which notably did not specifically include that with respect to defence in s 51(vi) of the *Commonwealth Constitution* ('the Constitution').³ However, at a Council of Australian Governments meeting in April it had been agreed that given 'the importance of comprehensive, national coverage of terrorism offences...the states would remove any lingering constitutional uncertainty by means of constitutional 'references' to the Commonwealth Parliament in accordance with s 51(xxxvii) of the *Commonwealth Constitution*'.⁴ The recent experience of shoring up the Commonwealth's national corporations law through use of the constitutional device of State referral served both as an affirmation of the benefits of this approach and a model of how to proceed.

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¹ Aside from the anti-terrorism laws, the referrals power offers significant support to the *Corporations Act 2001* (Cth) and the *Fair Work Act 2009* (Cth).

² *Thomas v Mowbray* (2007) 233 CLR 307.

³ The then Attorney-General, Daryl Williams, listed several other powers which might, depending on the circumstances, support the new terrorism offences: Daryl Williams and James Renwick, 'The War Against Terrorism: National Security and the Constitution' (Summer 2002/2003) *Bar News: Journal of the NSW Bar Association* 42, 43. Although the legislation itself does not specify the relevant sources of power to the same degree, the concerns of s 100.4(5) of the Code essentially correspond with that list.

⁴ *Ibid.* See Criminal Code ss100.3(1)(b).



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

To take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation... The Commonwealth will have power to amend the new Commonwealth legislation in accordance with provisions similar to those which apply under Corporations arrangements. Any amendment based on the referred power will require consultation with and agreement of States and Territories, and this requirement to be contained in the legislation.

The States duly enacted referring legislation⁵ in substantially the same terms as the existing Part 5.3 of the Code which the Commonwealth then re-enacted in reliance of those referrals.⁶ In accordance with the intergovernmental agreement, and as is standard in modern referrals, the States also referred to the Commonwealth a power to amend the textual provisions in question. The scope of this second aspect of the reference and the rules governing its use are central to an appreciation of the validity of the constraints recently claimed by the Commonwealth upon its capacity to reform Australia's anti-terrorism laws in the Code. It is to those claims that I now turn before an examination of the referring legislation.

III The National Security Law Amendment Bill and the Referrals Power

In July 2009, the Attorney-General's Department invited responses to a major Discussion Paper on National Security Legislation.⁷ The Discussion Paper purported to make a comprehensive response to a number of major reviews and inquiries into various aspects of the anti-terrorism regime.⁸ In addition to indicating how the many recommendations made in those reports would be implemented, the government proposed further changes at its own initiative.⁹ Many required amendment of legislation other than Part 5.3 of the Code – for example, both a new power of warrantless searches and a 7 day cap on extended pre-charge detention of terrorism suspects would be inserted into the *Crimes Act 1914*, while alterations to the conduct of trials involving evidence prejudicial to

⁵ As an example, see *Terrorism (Commonwealth Powers) Act 2003* (Vic).

⁶ *Criminal Code Amendment (Terrorism) Act 2002* (Cth).

⁷ Commonwealth, *National Security Legislation - Discussion Paper on Proposed Amendments*, July 2009.

⁸ Specifically, Australian Law Reform Commission, *Fighting Words – A Review of Sedition Laws in Australia* (July 2006); Parliamentary Joint Committee on Intelligence and Security (PJCIS), Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (December 2006) (this Review took into account recommendations made by the Security Legislation Review Committee (Sheller Committee) to which references are also made by the Discussion Paper; see Security Legislation Review Committee (SLRC), Parliament of Australia, *Report of the Security Legislation Review Committee* (2006)); PJCIS, Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995* (2007); and The Hon John Clarke QC, *Report of the Inquiry into the Case of Dr Mohamed Haneef*, November 2008.

⁹ For general analysis of the Discussion Paper see Andrew Lynch, 'The devil in the detail' *Inside Story*, 19 August 2009 <<http://inside.org.au/the-devil-in-the-detail/>>.

national security necessitated amendment of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.

The Discussion Paper did propose several significant changes in respect of Divisions 100-102 of Part 5.3 of the Code – though these were still far from ‘comprehensive’ in responding to the reviews.¹⁰ This comment is not directly concerned with the substance of these mooted amendments, but it should be noted that they included a number to the definition of ‘terrorism act’ itself,¹¹ the creation of a new hoax offence,¹² tightening the offence of providing support to a terrorist organisation in s 102.7,¹³ and an ability for the Attorney-General to formally recognise humanitarian aid organisations and thus exclude individuals dealing with them from possible liability under the training offence in s 102.5.¹⁴ This mixed bag of reforms attracted both support and criticism in the public submissions made to the Department. But it was a surprise when the government introduced the National Security Legislation Amendment Bill (‘the Bill’) to the Parliament in March of this year that, barring amendments to insert the word ‘substantial’ before ‘risk’ in section 102.1(1A)(c) (one part of the definition of ‘advocates the doing of a terrorist act’ by which an organisation may be proscribed) and to extend the duration of regulations proscribing terrorist organisations by a year,¹⁵ it made no other substantive alterations to Part 5.3 whatsoever.¹⁶

In his Second Reading speech to the Bill this March, the Attorney-General explained the omissions as follows:

I should take this opportunity also to point out that some of the measures that were included in the discussion paper that was circulated are not in this bill. These include proposed amendments to the definition of terrorist act and the proposed new terrorism-based hoax offence. These amendments will require the states to amend their legislation which referred power to the Commonwealth. The government will continue to work closely with the states to progress these measures.¹⁷

¹⁰ Several offence provisions were left untouched despite recommendations for their improvement: see Gilbert + Tobin Centre of Public Law, Submission on National Security Legislation Discussion Paper, 24 September 2009, 9, available <http://www.gtcentre.unsw.edu.au/publications/docs/pubs/National_Security_Legislation_Submission.pdf>.

¹¹ *Discussion Paper*, above n 7, 44-49 (clarifying that the United Nations may be a terrorist target; delimiting the requisite harm from ‘physical harm’; and addressing the inclusion of threat to commit a terrorist act in the definition of same).

¹² *Discussion Paper*, above n 7, 50-51.

¹³ *Discussion Paper*, above n 7, 62-65.

¹⁴ *Discussion Paper*, above n 7, 66-73.

¹⁵ National Security Legislation Amendment Bill 2010, Sch 2, items 2-3 respectively. See also *Discussion Paper*, above n 7, 56-59.

¹⁶ A number of minor alterations were made, the bulk of which involved recognition of same-sex relationships: National Security Legislation Amendment Bill 2010, Sch 2, Pt 2.

¹⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 2010, 2920. The government presumably views amendment of s 102.1(1A)(c) as exempt from this requirement because it was not amongst those of the initial text referred by the States and re-enacted by it in 2002.

In the Departmental submission to the Senate Committee Inquiry on the Bill, Geoff McDonald, head of the National Security Law and Policy Division, was more forthcoming about the need to rethink some of the proposals (notably that empowering the Attorney-General to declare those aid organisations with which individuals could safely deal), and also said that some States required more time to consider amendments such as those to s 102.7 (this seems extraordinary given the proposals were first raised nine months earlier).¹⁸ Mr McDonald went on to echo the view that ‘some of the proposed amendments will require the States and Territories to amend their reference legislation for the measures to be constitutionally supported’.¹⁹

While the failure of the Bill to make substantial amendments to Part 5.3 of the Code may rest on a number of factors, this comment disputes the specific claim that this is because legislative co-operation of the States is a necessary precondition.

IV The Amendment Reference and Part 5.3

Section 100.2(1) of the Code provides that:

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

Sub-section 2 of that provision is the ‘initial reference’ of the text contained in the Schedules of the States’ respective referring Acts (essentially, Part 5.3 as passed and amended by the Commonwealth up to that time) so as to facilitate the re-enactment by the Commonwealth of those provisions as described in Part II above.

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

- (3) This subsection covers the matter of terrorist acts, and of actions relating to terrorist acts, to the extent of making laws with respect to that matter by making express amendment of this Part or Chapter 2.²⁰

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

¹⁸ Geoff McDonald, Submission to Senate Legal and Constitutional Affairs Committee on National Security Legislation Amendment Bill 2010 and the Parliamentary Joint Committee on Law Enforcement Bill 2010, 28 April 2010, 2, available <http://www.aph.gov.au/Senate/committee/legcon_ctte/National_Security_Legislation/submissions.htm>.

¹⁹ Ibid, 3. The reference to Territories in this context is clearly erroneous – they do not enjoy any legislative power distinct from that held by the Commonwealth in respect of their jurisdiction (*Constitution*, s 122) and unsurprisingly are not mentioned in s 51(xxxvii).

²⁰ Chapter 2 of the Code addresses general principles of criminal responsibility.

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

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

In sub-s (3) it is stated that the 'operation of each paragraph of subsection (1) is not affected by the other paragraph' – in other words that the 'initial' and 'amendment' references are to be understood independently of each other. Section 3 of the Referring Act defines 'express amendment' as follows:

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

In *Thomas v Mowbray* Hayne J accepted the Commonwealth's argument that this same amendment reference would allow the insertion of new matter falling within the description of a law with respect to 'terrorist acts, and actions relating to terrorist acts' so long as 'that is done by express amendment to the law that was enacted in the form of the scheduled text'.²¹ Consequently, the only expressed restriction on the Commonwealth's very broad powers of amendment is against use of the referral to support legislative initiatives on the subject otherwise than as 'part of the text of the legislation'. Despite the fact that Division 104 under scrutiny in that case was distinctly novel (providing for a scheme of control orders 'for the purpose of protecting the public from a terrorist act')²² in comparison to those Divisions contained in the initial referral, Hayne J found the addition of Division 104 was valid as an 'express amendment' since it was an insertion to that text rather than located in a separate enactment.

The only other judge to address this issue in *Thomas* was Kirby J who reached a contrary conclusion and insisted that the amendment reference could not be used by the Commonwealth to depart from 'the referred provisions... in the terms, or substantially in the terms, of the text' of the initial referral. He viewed the insertion of Div 104 as a

²¹ *Thomas* (2007) 233 CLR 307, [454].

²² Code, s 104.1.

radical addition that could not be said simply to amend the initial text but required a fresh referral.²³ Even if this view of the scope of the amendment reference is accepted, a distinction between the addition of an entirely new Division creating civil orders potentially applicable to non-suspects²⁴ and amendments to the text of existing Divisions, such as those proposed by the Commonwealth's 2009 Discussion Paper, is not hard to draw.

The legislative purpose behind recognizing a restriction as to only the location, rather than content, of the 'express amendment' appears to be to ensure adherence to the requirement of s 100.8(2) of the Code that an 'express amendment...is not to be made unless the amendment is approved by (a) a majority of the group consisting of the States, the Australian Capital Territory and the Northern Territory; and (b) at least 4 States'. For a variety of reasons, section 100.8(2) was declared to be invalid by three Justices in *Thomas* (with the rest not deciding).²⁵ That view is very probably correct, but either way, it should be noted that, contrary to the Attorney-General's statement in the Second Reading speech, the provision does not require any legislative attention by the States to their referring Acts but merely executive assent (and even then, not of all States). A requirement of legislative action prior to enactment of fairly limited amendments to the provisions supported by the initial reference threatens to substantially defeat the utility of State referrals.

In conclusion:

- The amendment reference is expressed very widely both in terms of the subject 'terrorism matters' and the nature of the amendment which may be performed;
- The referring legislation stipulates that the scope of the amendment reference is to be read independently of the initial text reference;
- In *Thomas*, Hayne J accepted that the introduction of an entirely new Division to Part 5.3 of the Code could be supported by the amendment reference, and while Kirby J did not, nor did he adopt so restrictive a reading of that reference as to render it otiose;
- Prior to the enactment of *Anti-Terrorism Act (No 2) 2005* the States were not required to (and nor did they) amend their referral legislation so as to allow the Commonwealth to insert Division 104 into Part 5.3;
- Section 100.8 establishes a mechanism for State approval of 'express amendments' which, if even valid, certainly does not require legislative action.

V Beyond the referral

The States already recognise that the Commonwealth may make amendments to the initial text using those legislative powers it holds aside from the State references.²⁶ The

²³ *Thomas* (2007) 233 CLR 307, [204]-[205].

²⁴ *Thomas* (2007) 233 CLR 307 [97] (Gummow and Crennan JJ).

²⁵ *Thomas* (2007) 233 CLR 307, [210] and [213] (Kirby J); [456] (Hayne J); and [605] (Callinan J).

²⁶ Eg *Terrorism (Commonwealth Powers) Act 2003 (Vic)* s 4(4). The insertion of s 102.1(1A) by *Anti-Terrorism Act [No 2] 2005 (Cth)* Sch 1 is apparently an example of this.

impact of the result in *Thomas* upon this should be recognised by the Commonwealth.²⁷ The apparent breadth of the Commonwealth's defence power under s 5(vi) of the Constitution seriously undermines the continued relevance of s 51(xxxvii) and the associated State referrals as the substantial basis for Part 5.3 of the Code. With a 6:1 majority finding that s 51(vi) supports the creation of a scheme of control orders as a preventative tool against internal threats of terrorism, a strong argument can be made that this power also sustains those earlier Divisions which criminalise terrorist acts and any later amendments that might be made to them. Consequently the need for any State involvement in making such amendments appears much reduced, if not altogether extinguished.

It seems unlikely that the failure of the Commonwealth to take advantage of the judicial endorsement of s 51(vi) as a major source of its power to enact anti-terrorism laws stems from respect for the co-operative federalism which initially secured Part 5.3. Equally, it is extraordinary to see the Commonwealth erect even higher obstacles to its command of the legislative framework than State involvement was previously thought to require.

²⁷ Hernan Pintos-Lopez and George Williams, "'Enemies Foreign and Domestic' *Thomas v Mowbray* and the New Scope of the Defence Power" (2008) 27 *University of Tasmania Law Review* 83.