COMMONWEALTH SPENDING AFTER WILLIAMS (NO 2): HAS THE NEW DAWN RISEN?

INTRODUCTION

After the High Court's decision in *Pape v Federal Commissioner of Taxation*,[1] Duncan Kerr, then a former Commonwealth parliamentarian and now a Federal Court judge, mused that the nature of government is that it will not revise its practices in response to constitutional developments unless "faced with the necessity of doing so".[2] This comment examines the truth of Kerr's observation in the context of political responses to the High Court's further development of constitutional limits upon Commonwealth spending. The trilogy of cases that comprises *Pape*, *Williams v Commonwealth (No 1)*,[3] and *Williams v Commonwealth (No 2)*[4] have cumulatively challenged the Commonwealth's long practice of initiating and funding programs with little regard to their connection to its areas of constitutional responsibility or their intrusion upon matters which might have been assumed to be the concern of the States. But now with the last instalment in that trilogy having been decided almost a year ago, it is time to look back at the promise of an altered constitutional landscape held out by these cases and to ask: are we there yet?

THE TIGHTENING OF CONSTITUTIONAL LIMITS ON COMMONWEALTH SPENDING

Kerr's advice that government is unlikely to respond to the full ramifications of judicial indications that its power is more limited than previously assumed was offered to explain his view that predictions of a realignment of fiscal federalism in the wake of the *Pape* decision were "premature".[5] That assessment was correct. For in deciding that the power in s 81 of the Constitution to appropriate funds from Consolidated Revenue did not also supply the Commonwealth with the authority to spend those funds, but that this must be found elsewhere in the Constitution, *Pape* merely marked out the ground upon which subsequent challenges would be brought.

The two challenges made by Ron Williams to the National School Chaplaincy Program (NSCP) were facilitated by the reasoning of the Court in *Pape* – but tested its consequences in a more mundane setting. Under the NSCP, the Commonwealth contracted with "chaplaincy service providers" to pay the wages of chaplains who were placed in schools that had made an application to participate in the program. In *Williams (No 1)*, assessing the validity of that scheme involved critical attention to its lack of any statutory basis. A majority of four justices of the High Court overturned the so-called "common assumption" that the Commonwealth's executive power, including its capacity to contract and spend, extended at least to those areas in which the Constitution granted it legislative power. The principle of responsible government and the importance of the federal division of power were invoked in *Williams (No 1)* to insist upon the need, outside recognised and limited exceptions, for prior statutory authorisation of Commonwealth spending.

That result not only invalidated the NSCP but threw over 400 other Commonwealth spending programs into doubt. Unsurprisingly, and unlike *Pape*, the case did prompt a response from government. The Gillard Government amended the *Financial Management and Accountability Act 1997* (Cth) (FMA) by the addition of s 32B, which purported to provide statutory authorisation for arrangements or grants specified in the Regulations and under which public money "is, or may become, payable by the Commonwealth". This included expenditure "for the purposes of a program specified in the regulations". At the same time, the Parliament added the Commonwealth's existing spending programs across a diverse range of areas to Sch 1AA of the *Financial Management and Accountability Regulations 1997* (Cth). Item 407.013 in Sch 1AA identified school chaplaincy as a

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

[2] Kerr D, "Pape v Commissioner of Taxation: Fresh Fields for Federalism?" (2009) 9 QUTLJJ 311 at 319.

[3] *Williams v Commonwealth (No 1)* (2012) 248 CLR 156 (*Williams (No 1)*).

[4] *Williams v Commonwealth (No 2)* (2014) 252 CLR 416 (*Williams (No 2)*).

[5] Kerr, n 2 at 319. An example of such a prediction is Scott G and Hocking BA, "Federalism and Tax Bonuses: Reflection in the Australian Context" (2010) 39 *Common Law World Review* 379 at 411.

relevant "program" for the purposes of s 32B and accordingly, provided a new basis upon which the Commonwealth funding for school chaplains was to continue.

The adequacy of this response, criticised by then Shadow Attorney-General, Senator Brandis, as an attempt at "umbrella form of statutory validation" for the Commonwealth's spending programs, was immediately doubted.[6] The Opposition had requested a copy of the government's legal advice but was refused. It was left to voice its "grave reservations",[7] describing the response as "a flawed bill that does not overcome the legislative gap or constitutional problem identified in the *Williams* case".[8] In a move which he may now regret, Senator Brandis read into Hansard a devastating assessment of the government's legislative cure offered in a blog post by the University of Sydney's Professor Anne Twomey.[9] Twomey not only pointed to the fact that the legislation could not supply constitutional power necessary to sustain programs where this was absent, but complained that s 32B established a mechanism whereby Commonwealth spending would continue to occur without effective parliamentary scrutiny. However, the Opposition, having unsuccessfully proposed a sunset clause to limit the law's operation until a more considered solution could be found, joined with the government to pass the Bill.

Those provisions, so far as they sustained the continuation of the chaplaincy program, now pointedly renamed the "National School Chaplaincy and Student Welfare Program" (NSCSWP), were the subject of Williams' second High Court challenge. In once more finding the program invalid for want of constitutional power, the Court unanimously affirmed the majority decision in *Williams (No 1)* regarding the limits on executive power and the necessity for statutory authorisation of spending. The attempt by the Commonwealth to reopen the arguments from the earlier case was firmly rebuffed. The central reason for the NSCSWP's invalidity on this occasion was that the "benefits to students" aspect of s 51(xxiiiA) of the Constitution did not support the validity of s 32B so far as it applied to the program's inclusion in the Regulations. The failure to come within that legislative power was due to both the program's lack of individuation in the delivery of chaplaincy services to students and because those services did not amount to "material aid provided against human wants which the student has by reason of being a student".[10]

Williams (No 2) thus emphatically extinguished any Commonwealth hopes that the destruction of the "common assumption" or the requirements imposed by the majority opinions in the earlier decision might be reversed. At the same time, it illustrated the consequences of the new constitutional settings – with the broad and loosely articulated chaplaincy program clearly failing to pass muster in bearing any sufficient connection to Commonwealth legislative power.

The Coalition Government's response to *Williams (No 2)* was almost comical in its similarity to that of the preceding Labor Government in 2012 – which it had, as already noted, so roundly criticised as deficient. Just two years on, Senator Brandis found himself, now as Attorney-General, rejecting any suggestion that the case had consequences for other programs in perfect contradiction to his own expression of that obvious fact after *Williams (No 1)*. He went so far as to describe the Labor Opposition's claim in this regard as "erroneous and ignorant".[11] But more crucially he preserved Labor's legislative response to *Williams (No 1)*. By amending legislation passed swiftly after *Williams (No 2)*, s 32B was rolled over as the key provision in the renamed *Financial Framework (Supplementary Powers) Act 1997* (Cth). The Regulations accompanying s 32B were similarly rebadged and preserved. At the outset of a new blog post, Twomey drily observed that "History clearly

[6] Commonwealth, *Parliamentary Debates*, Senate (27 June 2012) p 4650 (George Brandis).

[7] Commonwealth, n 6, p 4649.

[8] Commonwealth, n 6, p 4651.

[9] Twomey A, "Parliament's Abject Surrender to the Executive", *Constitutional Critique* (27 June 2012), http://blogs.usyd.edu.au/cru/2012/06/parliaments_abject_surrender_t_1.html. In Commonwealth, n 6, p 4650, the text read by Senator Brandis included Twomey's opinion that: "This Bill, in a bald-faced manner, rejects the fundamental propositions put by the High Court in the Williams case. The Commonwealth is clearly asking for another clobbering by the Court."

[10] *Williams (No 2)* (2014) 252 CLR 416 at [46] (French CJ, Hayne, Kiefel, Bell, Keane JJ), [99] (Crennan J).

[11] Tillett A, "Schools' Chaplain Case Legally Faulty", *The West Australian* (Perth, 20 June 2014).

does repeat itself", before arguing that, in light of what the High Court has now said in both *Williams* decisions, the adequacy of the legislative response remains highly doubtful. On this occasion, Senator Brandis did not feel moved to once more place Twomey's criticisms on the parliamentary record. Nor, it must be said, did he or the Coalition make any attempt to explain the gulf between their well-founded criticisms of the Gillard Government's legislation after *Williams (No 1)* and their re-enactment of the same after *Williams (No 2)*.

Parliamentary division over constitutional questions is not a frequent occurrence.[12] This episode is particularly distinctive. When political actors behave so inconsistently, it risks giving rise to the impression that the voicing of constitutional doubts is merely a partisan weapon. But perhaps we should not be surprised that the Coalition's initial insistence that a more secure solution for Commonwealth spending programs be found had entirely dissolved once it was in government and enjoying the opportunities afforded by the flimsy legislative edifice erected by Labor. This simply demonstrates Kerr's claim – that government will persevere in the use of its powers, no matter how endangered they may appear, until they are truly extinct. While the *Williams* litigation has made it all too plain that a large number of Commonwealth spending programs are constitutionally suspect, ultimately the Court's orders affected only the one which paid for school chaplains.

A NEW ERA OF PARLIAMENTARY SCRUTINY?

However, that is far from being the end of the story. Although the chaplains will remain in schools through Commonwealth funding provided via the States in the form of financial assistance grants under s 96 of the Constitution, the *Williams* decisions have reverberated more widely. As just one example, in late 2014 the Department of Defence cancelled a high school education program in maths and science problem-solving citing difficulty with meeting the *Williams* requirements as the reason for withdrawing funding.[13] Additionally, the local government sector has been frank about its continued anxiety as to the implications of the *Williams* litigation for its federal funding, particularly in the area of infrastructure.[14] After *Williams (No 1)*, local government successfully campaigned for constitutional change to remove doubts created by the case. That Commonwealth parliamentarians shared those doubts is evidenced by their strong bipartisan support for a 2013 Bill amending s 96 of the Constitution to empower the direct federal funding of local government.[15] The scheduled referendum did not proceed – and yet nothing in *Williams (No 2)* would have allayed fears at the local government level.

But the most interesting development since *Williams (No 2)* has been the muscle flexed by the Senate Standing Committee on Regulations and Ordinances in respect of the government's addition of new programs to Sch 1AB of the *Financial Framework (Supplementary Powers) Regulations*. In August 2014, the Standing Committee considered 54 new programs added to Sch 1AB, ranging across 11 ministerial portfolios. The Committee said that its terms of reference include a requirement to ensure that instruments are made not just in accordance with their authorising legislation but also the Constitution. It then noted the recent decision of *Williams (No 2)* and said that in light of the Court's ruling:

[12] On this topic generally see Appleby G and Webster A, "Parliament's Role in Constitutional Interpretation" (2013) 37(2) MULR 255; Lynch A and Meyrick T, "The Constitution and Legislative Responsibility" (2007) 18 PLR 158.

[13] Vernon J, "Court Decision on Chaplaincy Funding Affects Hunter Maths and Science Program", *ABC News Online* (1 December 2014), http://www.abc.net.au/news/2014-12-01/court-decision-on-chaplaincy-funding-affects-hunter-maths-and-s/5929516.

[14] Bagkowski J, "High Court School Chaplains Decision Set to Choke Money from Canberra", *GovernmentNews* (19 June 2014), http://www.governmentnews.com.au/2014/06/high-court-school-chaplains-decision-set-choke-council-money-canberra/; Local Government Association, "Williams v The Commonwealth – The Case of the School Chaplaincy Program", Circular No 27.8 (2 July 2014), http://www.lga.sa.gov.au/page.aspx?c=40874.

[15] *Constitution Alteration (Local Government) Bill 2013* (Cth).

> the Explanatory Statement for all instruments specifying programs for the purposes of section 32B … should explicitly state, for each new program, the constitutional head of power that supports the expenditure.[16]

The Committee requested the Minister provide this information in respect of each item added to the regulations.

In correspondence appended to the Committee's November 2014 report, the Minister for Finance, Senator Mathias Cormann, responded to this request by acknowledging that the effect of the two *Williams* decisions is that "it will often be the case that spending activities require legislative authority in addition to an appropriation".[17] But he went on to say that:

> the Government does not agree, however, that this means explanatory statements must in effect set out the constitutional and other legal reasoning taken into account in formulating legislation and expenditure programmes.[18]

However, the Minister did provide a table listing, "without being exhaustive", the source of power claimed in respect of each of the new 54 programs in the instrument but signalled the government would not be doing so as a matter of course.[19]

In response, the Committee dug its heels in, repeating its expectation that the Explanatory Statement accompanying further delegated legislation involving expenditure will explicitly identify the supporting head of constitutional power – and quoted from the joint judgment in *Williams (No 2)* by way of emphasis. It also pointed out that Senate Standing Order 23 requires the Committee to ensure that such instruments do not breach a number of scrutiny principles, the first being that "instruments are made in accordance with their authorising Act as well as any constitutional or other applicable legal requirements".[20] In its December 2014 report, the Committee noted three new items had been added to Sch 1AB via the s 32B mechanism. For only one of them, the funding of the Information Sharing Centre pursuant to the *Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia*, did the Explanatory Statement identify the source of constitutional power.[21] The Committee insisted that a power be identified for the other two, and in its February report, correspondence from the Minister provided that information. It appears the Committee has won this small battle.

The insistence of the High Court that, exceptional circumstances aside, statutory approval is required for Commonwealth spending has obviously created an opportunity for Parliament to take on an oversight role. In responding to that opportunity, the Committee has successfully instituted a practice whereby the government points to which of its constitutional powers it is relying upon to support the addition of a spending program to Sch 1AB of the Regulations. However, while it is refreshing to see Parliament insisting that executive power is not unlimited and requires constitutional authorisation, this exercise is more superficial than substantive. It is clear that the Committee is easily satisfied and does not see its role to include challenging the answers given by government. It has accepted without question the power identified by the Minister in every single case. But of course, this does not mean that these are all valid as a matter of law – and indeed, serious doubts remain about many despite the powers which the Commonwealth has purported to rely upon.

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[16] Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, No 10 of 2014 (27 August 2014) p 11.

[17] Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, No 15 of 2014 (19 November 2014) p 4.

[18] Monitor No 15 of 2014, n 17, p 4.

[19] Monitor No 15 of 2014, n 17, pp 4-5.

[20] Monitor No 15 of 2014, n 17, p 6.

[21] Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, No 17 of 2014 (3 December 2014) p 3.

DETERMINING VALIDITY: THE CHALLENGE OF JUDICIAL REVIEW

In his initial response to the Committee, Senator Cormann justified his reluctance to identify sources of constitutional power by saying, "the validity of any legislation generally turns on judicial consideration of its text rather than on what is said in explanatory material".[22] The correctness of that statement is the simplest explanation of why the Committee has been content to push its oversight only so far. But it also prompts reflection on a future challenge for the High Court. Assuming for present purposes, as the Court itself did in *Williams (No 2)*, that the "wider questions of construction and validity" of s 32B as a delegation to the Executive are not reached,[23] how is the constitutionality of various spending under the *Financial Framework (Supplementary Powers) Regulations* to be determined?

In articulating its spending programs under the Regulations, very little detail is used by the Commonwealth – the items are typically described in a matter of a few lines – and yet precision as to the recipients of services, the mode of delivery, and how the cost of provision is calculated all seem important to establishing the requisite connection of a particular program to a source of constitutional power. This was demonstrated, possibly to a fairly high degree, by *Williams (No 2)* itself where those features of the chaplaincy service were central to rejecting it as authorised under the "benefits to students" aspect of s 51(xxiiiA). Supporting departmental guidelines explaining the spending items in the Regulations are no answer in pinning down these sorts of details. For one thing, in *Williams (No 2)*, the Court said it is "by no means obvious that the guidelines … can properly be taken into account in either construing the relevant legislative provisions or determining their validity".[24] Secondly, and more fundamentally, while constitutionality is typically established by reference to the rights, duties and privileges given effect by legislation, this is a matter that is addressed at only a general level of abstraction in the guidelines. In short, the guidelines are no substitute for a legislative scheme.

What, then, will judicial review of the Regulations look like in this context? Consider, for example, the validity of spending allocated to the many discrete programs and services included within the Families and Children Activity administered under the Department of Social Services' Families and Communities Programme.[25] As described by the Minister in his response to the Committee on this spending item, the objectives of this Activity are to:

(a) support families to improve the wellbeing of children and young people;
(b) enhance family and community functioning;
(c) increase the participation of vulnerable people in community life.[26]

These are advanced by the Commonwealth providing funding:

(d) to family law services that provide alternatives to formal legal processes for families who are separated, separating or in dispute to improve their relationships and make arrangements in the best interests of their children;
(e) to family and relationship services to strengthen family relationships, prevent family breakdown and ensure the wellbeing and safety of children through the provision of broad-based counselling and education to families of different forms and sizes;

[22] Monitor No 15 of 2014, n 17, p 4.

[23] The Court said these questions were not reached in the case and it was "enough to consider whether, in their operation with respect to the agreement about and payments for provision of chaplaincy services, s 32B and the other impugned provisions are supported by a head of legislative power": *Williams (No 2)* (2014) 252 CLR 416 at [36] (French CJ, Hayne, Kiefel, Bell and Keane JJ). The validity of s 32B per se may yet depend upon the considerations raised by Dixon J's observation in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 101 that "[t]here may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of power".

[24] *Williams (No 2)* (2014) 252 CLR 416 at [41].

[25] Australian Government, Department of Social Services, *Families and Communities Programme: Families and Children Guidelines Overview* (November 2014), https://www.dss.gov.au/sites/default/files/documents/12_2014/families_and_children_final_26_november_2014.pdf.

[26] Monitor No 15 of 2014, n 17, p 22.

(f) to develop and facilitate whole-of-community approaches to support and enhance early childhood development and wellbeing for children from birth to 12 years;
(g) to provide early intervention and prevention services and resources that are aimed at improving the development and wellbeing of children aged from birth to 12 years and to support the capacity of those in parenting roles;
(h) for community-based interventions for vulnerable young people who are at risk of disengaging with family and community, including those at risk of homelessness;
(i) for specialist adult support services to improve outcomes and enhance wellbeing for people adversely affected by past institutional and child-welfare practices and policies.[27]

The Minister for Finance provided a list of nine possible constitutional powers in support of this funding:

> social welfare power (s 51(xxiiiA)); territories power (s 122); external affairs power (s 51(xxix)); aliens power (s 51(xix)); marriage power (s 51(xxi)); divorce and matrimonial causes (s 51(xxii)); grants to States/Territories (s 96); Commonwealth executive power (s 61); bankruptcy and insolvency (s 51(xvii)).[28]

It is tempting to see this response as the Commonwealth throwing everything it has at the question of what supports funding these activities in the hope that something will stick.

As might be expected, to some extent some of the nominated powers are likely to sustain funding for particular programs. Services funded under the Family Law Services Sub-Activity are the least vulnerable since these bear a tolerably clear connection to the Commonwealth's two legislative powers with respect to marriage and divorce and matrimonial causes. Court-ordered family counselling or family dispute resolution are the best examples of this, regulated, as they are, by Pt II of the *Family Law Act 1975* (Cth). But the other services under this Sub-Activity are not directly provided for in that Act and depend on s 32B for their statutory basis. These include services arranging children's contact with separated parents, programs for the support of both children and parents going forward post-separation, and an anonymous Family Relationship Advice Line.[29] To varying degrees, these other services may be related to the circumstance of family breakdown. It is an open question whether these schemes would be seen as sufficiently connected to the Commonwealth's relevant powers of marriage and divorce and matrimonial causes. For most, the case for validity is at least arguable.

That is harder to say in respect of services under the other sub-activities of the Families and Children Activity – regardless of the fact that they may be hugely beneficial to users and, in individual cases, may possess features which bear a reasonable connection to some obvious constitutional power (most simply by virtue of being delivered inside a Territory).[30] Take, for example, the Children and Parenting Sub-Activity which is described in the guidelines as providing:

> funding to early intervention and prevention services and resources that are aimed at improving children's development and wellbeing and supporting the capacity of those in a parenting role. Services have a primary focus on children aged 0-12 years, but may include children up to age 18 years.[31]

By way of example, it is said that services "could include community playgroups, supported playgroups, parenting courses, home visiting and peer support groups" or funding for "organisations that develop resources that provide information about children's development and parenting skills".[32] Most of the legislative powers nominated by the Minister for Finance bear no obvious connection to these activities. That includes the "social welfare power" of s 51(xxiiiA). The content of what is

[27] Monitor No 15 of 2014, n 17, pp 22-23.

[28] Monitor No 15 of 2014, n 17, pp 22-23.

[29] Australian Government, Department of Social Services, n 25, pp 7-9.

[30] For example, the Intensive Family Support Services component of the Parents and Children Sub-Activity is described in the Department of Social Services guidelines as operating with respect to "the most vulnerable families in identified communities in the Northern Territory and South Australia": Australian Government, Department of Social Services, n 25, p 11.

[31] Australian Government, Department of Social Services, n 25, p 10.

[32] Australian Government, Department of Social Services, n 25, p 11.

authorised by that power is much more specific and limited than simply "social welfare". In connection with family life it refers to maternity and family allowances and child endowment. Those are even more precise terms than "benefits", which was narrowly interpreted in *Williams (No 2)*. Those other aspects of s 51(xxiiiA) are highly unlikely to support Commonwealth funding of this program.

However, recent indications suggest that the power that may be most useful in supporting funding activities for the benefit of the nation's children is that of "external affairs" under s 51(xxix). The Committee's February 2015 report contained the Minister's answer to a query in December 2014 about the constitutional basis for a grant to fund the:

> operational costs of the National Office of Life Education Australia associated with the ongoing development and implementation of school-based student resilience and wellbeing programs and resources for schools.[33]

Given the parallels this spending appeared to have to the NSCSWP, which was unsuccessfully defended by the Commonwealth in *Williams (No 2)*, it was unsurprising that the Minister avoided mention of s 51(xxiiiA) in his response. Instead, "noting that it is not a comprehensive statement of relevant constitutional considerations", he identified s 51(xxix) alone, saying it was:

> in conformity with Australia's international obligations under the *Convention on the Rights of the Child* and the *International Covenant on Economic, Social and Cultural Rights*, to fund research, development, monitoring, evaluation, relationship management, marketing, fundraising and other activities associated with the Life Education programme.[34]

This use of s 51(xxix), operating as it does by reference to broadly worded international instruments, is likely to be the mainstay of government claims that it has constitutional authority to spend in this area.

But it is at this point that the difficulty of constitutional review becomes stark. In *Williams (No 2)*, the oddity of holding a program described in just a few lines in a statutory instrument against a constitutional provision was somewhat masked by the very particular and confined approach that the Court took to the latter. How can it hope to meaningfully engage in judicial review of the statutory authorisation of a spending program in the area of children's wellbeing that the government chooses to defend under the external affairs power? While formally this is the same task as occurred in *Williams (No 2)*, there is no denying that it will, in practice, be different – and hugely open-ended. How, for instance, is the issue of proportionality between the international obligation and the domestic law to be handled when the latter is not a legislative scheme but merely a statutory foothold for Commonwealth spending that is described in only the most general terms in departmental guidelines? Then there is the more principled objection, which echoes that of an earlier generation, concerned about the potential for the external affairs power to destroy Australian federalism.[35] It would be deeply ironic if the High Court's invocation in *Williams (No 1)* of the federal distribution of power to insist on limits to Commonwealth spending was simply worked around by recourse to the broad justifications found in international instruments. It is one thing for the external affairs power to enable the Commonwealth to enact legislative schemes that are tailored towards the execution of international obligations in the domestic sphere. In that context, the domestic law is both empowered and constrained by the terms of the international instrument. It is another thing altogether to allow the Commonwealth to rely on s 51(xxix) to unlock areas for spending by the national government on the basis of a crude connection between an international instrument and the domestic beneficiary of programs and services.

The difficulty becomes even more apparent when the funded program is in an area that is not as directly addressed by international law as the rights and welfare of children. For example, the Young People Sub-Activity in the Families and Children Activity emphasises community-based interventions to stem the risk of youth homelessness. It has been argued that a number of clauses in both the

[33] Monitor No 17 of 2014, n 21, p 2.

[34] Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Delegated Legislation Monitor*, Monitor No 1 of 2015 (11 February 2015) p 100.

[35] For example, Dawson D, "The Constitution – Major Overhaul or Simple Tune-up?" (1984) 14 MULR 353 at 358-359.

International Covenant on Civil and Political Rights and the *International Covenant on Economic, Social and Cultural Rights* recognise homelessness as a human rights violation.[36] But does this mean that the Commonwealth may rely upon Australia's ratification of these instruments to provide, via the external affairs power, a constitutional basis for its funding of homelessness initiatives? That seems an unlikely prospect. But at the same time, it is not at all apparent which of the other eight powers identified by the Minister would supply power for funding in this Sub-Activity. This may explain his inclusion of the power with respect to bankruptcy and insolvency, given the role those events might have in creating homelessness, but that appears to draw rather a long bow. The other powers offer nothing obvious either. For example, the element of "unemployment benefits" in s 51(xxiiiA) would seem, given the approach taken to "benefits" in *Williams (No 2)*, to be of little use as a justification for schemes as broadly described as those under the Young People Sub-Activity, in which work and training appear as just one aspect of what is to be addressed.

CONCLUSION

More than a few of the programs included in both Sch 1AA of the *Financial Framework (Supplementary Powers) Regulations* at the time of initial enactment and those since added to Sch 1AB lack a perceptible connection to constitutional power. The efforts of the Minister for Finance, after some resistance, to identify support for exercises of Commonwealth spending added to the Regulations since *Williams (No 2)* are manifestly inadequate in several instances. While those indications will apparently suffice to placate the Senate Committee, it is unlikely that the powers identified might even plausibly be pressed into service to defend relevant programs should a Brian Pape or Ron Williams figure emerge to challenge them.

Williams (No 2) drew a firm line under the "common assumption" about the scope of executive power to spend and contract. But the decision was not only a conclusion to the trilogy of cases on this question that commenced with *Pape*. It also appears to mark the start of a new and distinctly unfamiliar endeavour for the High Court – the judicial review of Commonwealth spending that has received a bare statutory authorisation through the addition to the Regulations of programs described with extreme brevity. How the Court will actually engage in the process of characterisation in this setting remains to be seen.

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[36] Lynch P and Cole J, "Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation" (2003) 4 Melb J Int'l L 139.