Constitution Alteration (Rights and Freedom) Bill 1988

Date Introduced: 10 May 1988
House: House of Representatives
Presented by: Hon. Lionel Bowen, M.P., Attorney – General

Digest of Bill

Purpose

To amend the Commonwealth of Australia Act 1900 (the Constitution) to extend the right to trial by jury, and to confer a like right for offences against the laws of the States and the Territories; to provide that fair compensation must follow the acquisition of property under Commonwealth, State, or Territory laws, and to extend to the States and Territories the existing Commonwealth prohibition on interference with religious freedom.

Background

On 27 April 1988 the Constitutional Commission (the Commission) presented its first report on the revision of the Australian Constitution. This Bill addresses some of the Commission’s recommendations.

Jury Trial

Although Section 80 of the Constitution prescribes that indictable offences must be heard before a jury and cannot be dealt with summarily, in R. v. Archdale, the High Court held that federal Parliament was not required to lay down an indictment procedure for an offence which carries one year’s imprisonment as such offences could be dealt with summarily. Thus the jury trial guarantee can be avoided if legislation establishes forms of trial other than by indictment. The High Court has, to date, interpreted Section 80 to be a narrow procedural provision, and has left it to federal Parliament to determine whether any particular offence is to be tried on indictment or summarily. Since 1915, Section 80 of the Constitution has been interpreted as being inapplicable to proceedings for an offence against the law of a Territory.
With respect to trial by jury, the Commission recommended that:

1. in all cases where the accused is liable to capital punishment, corporal punishment or imprisonment for two years or more, except in cases of trial for contempt of court or the trial of defence force personnel under defence law, there be a right of trial by jury;

2. the right of trial by jury apply to offences against laws of the Commonwealth, States and Territories;

3. trial by jury of any offence against a law of the Commonwealth should be held in the State or Territory where the offence was committed;

4. legislatures of the Commonwealth, States, and self-governing Territories, to have the express power to make laws relating to waiver by the accused of the right to trial by jury, size and composition of juries, and majority verdicts.

Property Acquisition

Section 51(xxxi) of the Constitution grants the federal Parliament power to make provisions for the acquisition of property, real or personal, from either a State of the Commonwealth or a natural or corporate person. The acquisition by the Commonwealth must be related to Commonwealth purposes, and must provide just terms to the dispossessed.

There is no equivalent obligation for State laws to provide just terms for the acquisition of property. The High Court in *PJ Magennis Pty Ltd v. Commonwealth*⁵, confirmed that the States can acquire property on any terms which they may choose to provide for in a statute.

The High Court in *Teori Tau v. Commonwealth*⁶, held that the Commonwealth power to make laws for the government of a Territory includes a power equal to that possessed by the States to make laws for the compulsory acquisition of property. As this power is not limited by Section 51(xxxi) of the Constitution, the Commonwealth is not required to provide just terms when acquiring property from a person in a Territory or from a Territory.

The Commission has recommended that the Constitution be altered to provide that:

1. a law of a State may not provide for the acquisition of property from any person except of just terms;

2. a law of a Territory or made for the government of a Territory may not provide for the acquisition of property from any person except on just terms⁷.
Religious Freedom

Section 116 of the Constitution provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Section 116 of the Constitution applies only to the Commonwealth. Of the States, only Tasmania has a guarantee of religious freedom in its Constitution, and this provision can be repealed by the Tasmanian Parliament.

Section 116 of the Constitution is essentially concerned with the protection of the individuals right to freedom of belief and conscience. The provisions of Section 116 of the Constitution do not expressly apply to the exercise of executive power. In order to come within the terms of the Section the law must be for establishing, imposing or prohibiting the free exercise of any religion.

The Commission has recommended that the Constitution be altered to provide that:

1. The guarantees of freedom of religion contained in Section 116 of the Constitution apply to the Commonwealth, States, and Territories.

2. The omission of the words 'make any law' from Section 116 of the Constitution, so as to give the Section operation beyond the making of a statute.

Main Provisions

Clause 2 will insert a new Section 80 into the Constitution, which will provide a right to trial by jury for certain offences against Commonwealth, State, or Territory laws.

Under proposed sub – Section 80(1) the accused has a right to a trial by jury where he/she is liable to imprisonment for more than two years, or to any form of corporal punishment. Proposed sub – Section 80(1) does not apply in the case of trial for contempt of court or trial of a member of the defence force by court – martial for offences under a law relating to the discipline of the defence force.

Under proposed sub – Section 80(2) the Commonwealth Parliament may prescribe the place of trial by jury where an offence against a law of the Commonwealth was; not committed in a State or Territory; was committed in two or more of
the States and Territories; or was committed at a place or places unknown. In all other instances of offences committed against a law of the Commonwealth, a trial by jury must be held in the State or Territory where the offence was committed (proposed sub-section 90(3)).

Under proposed sub-section 80(4) the court may at any time during a trial, on application by the accused or the prosecution, transfer the trial to a court in another State or Territory.

Under proposed sub-section 80(5) a law may validly provide for the accused to waive the right of trial by jury; for the size or composition of the jury, or provide for majority verdicts.

Clause 3 will insert new Sections 115A and 115B into the Constitution. Under proposed Section 115A, a law of a State may not provide for the acquisition of property from any person other than on just terms. Under proposed Section 115B, a law made under Section 122 of the Constitution or a law of a Territory, may not provide for the acquisition of property from any person other than on just terms.

Clause 4 will insert a new Section 116 into the Constitution which applies equally to the Commonwealth, States, and Territories. Proposed Section 116 prohibits executive establishment of any religion, imposition of any religious observance, prohibitions on the free exercise of any religion, and no religious test is to be required as a qualification for any office or public trust under the Commonwealth, a State or a Territory.

References
2. (1928) 41 CLR 629.
5. (1949) 80 CLR 382, 397–8.
8. Section 45 of the Constitution Act 1934 (Tas)
For further information, if required, contact the Law and Government Group.

7 July 1988

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This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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