

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CONSTITUTION ALTERATION (RIGHTS AND FREEDOMS) BILL 1988

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Hon Lionel Bowen MP)

CONSTITUTION ALTERATION (RIGHTS AND FREEDOMS) BILL 1988

GENERAL OUTLINE

The purpose of this Bill is to amend the Constitution

- (a) To extend the right given by section 80 of the Constitution to trial by jury for offences against laws of the Commonwealth, and to confer a like right to trial by jury for serious offences against the laws of the States and the Territories;
- (b) to ensure that acquisitions of property under State and Territory laws, and acquisitions under Commonwealth law from persons in the Territories, must be on just terms; and
- (c) to extend to the States and the Territories the existing prohibition on Commonwealth interference with religious freedom.

Jury trials

2. Section 80 of the Constitution currently provides that the trial on indictment of any offence against the laws of the Commonwealth shall be by jury.

3. There are a number of deficiencies in the present section 80. In the first place, it gives a right to trial by jury only where the Parliament provides that an offence is to be tried on indictment. If the Parliament provides that an offence, no matter how serious or no matter what penalty the accused might face if convicted, is to be tried summarily, there is no right to trial by jury (R v. Archdall and Roskrige (1928) 41 CLR 128). Secondly, the section applies only in relation to offences against laws of the Commonwealth. In its terms, it does not apply to offences against State laws, and it has been

held by the High Court not to apply to trials in the Territories (R v. Bernasconi (1915) 16 CLR 629). Thirdly, where a Commonwealth law provides for trial on indictment, the accused may not waive the right to trial by jury (Brown v. R (1986) 160 CLR 171). Fourthly, while the section deals with the place where a trial may be held in the case of an offence committed within a State (in which case the trial must be held within that State), and also in the case of an offence not committed within any State (in which case the Parliament may prescribe the place where the trial is to take place), section 80 does not deal with the case where the place of commission of the offence is unknown or where the commission of the offence takes place in more than one State.

Acquisition of property

4. The Constitution presently requires that any acquisition of property by the Commonwealth shall be on just terms - s.51(xxxi) - subject to an exception in the case of property in a Territory (Teori Tau v. Commonwealth (1969) 119 CLR 564). There is, however, no constitutional requirement that acquisitions of property by a State shall be on just terms.

Freedom of religion

5. Existing s.116 prohibits the Commonwealth from making any law for establishing any religion, imposing any religious observance or prohibiting the free exercise of any religion. It further forbids the imposition of any religious test as a qualification for any 'office or public trust under the Commonwealth'. It does not in its terms apply in relation to the States, but whether it would apply to laws made under s.122 has not been settled by the High Court (Lamshed v. Lake (1958) 99 CLR 132 at p.143; Teori Tau v. Commonwealth (1969) 119 CLR 564 at p.570; Attorney-General (Victoria) (at the relation of Black) v. Commonwealth (1981) 146 CLR 559 at p.593).

NOTES ON INDIVIDUAL CLAUSESClause 1 : Short titleClause 2 : Trial by jury

6. This clause substitutes a new section 80 in the Constitution guaranteeing a right to trial by jury for certain offences against Commonwealth, State or Territory laws.

7. Under the new section 80, the right to trial by jury does not depend upon the mode of trial. Instead, what determines whether the accused is entitled to a jury trial is the penalty that may be imposed on the accused. If that penalty is imprisonment for more than 2 years or any form of corporal punishment, the entitlement exists. Imposition of the death penalty is a form of corporal punishment. The reference to corporal punishment does not imply any intention that the Constitution should condone any form of corporal punishment, including the death penalty, but the reference is necessary to deal with the case of any law that might provide for such a penalty.

8. The only exceptions permitted to the right to trial by jury under subsection 80(1) are trials for contempt of court and trials of members of the Defence Force by court-martial for offences under a law relating to the discipline of the Defence Force.

9. The proposed section 80 applies to trials of Commonwealth, State and Territory offences. The difficulty that in Tasmania the Criminal Code provides an absolute discretion to sentence a convicted person for up to 21 years imprisonment for any crime was addressed by the Advisory Committee to the Constitutional Commission on the Australian Judicial System (1987). At paragraph 6.14 of its report, the Committee said that the problem could be overcome, consistently with the proposed

guarantee, by limiting to 2 years the maximum sentence that can be imposed after a summary trial. The Bill follows the Committee's draft to give effect to this intention.

10. Under the proposed subsection 80(2) the Commonwealth Parliament is given power to provide for the place of trial by jury for an offence against a law of the Commonwealth where the offence was committed beyond the boundaries of Australia and the Territories (for example, an offence committed on the high seas), or where the offence was committed in two or more States and Territories, or where the place of commission of the offence is not known. In all other cases a jury trial for an offence against Commonwealth law must be held in the State or Territory where the offence was committed - proposed subsection 80(3).

11. However, proposed subsection 80(4) provides for a change of venue to another State or Territory upon the application of either the prosecution or the accused. Under present section 80 there is no provision for change of venue in the case where an offence against the law of the Commonwealth was committed within a State. The trial must be held in that State.

12. By virtue of proposed subsection 80(5), a law may validly provide for an accused to waive the right to trial by jury. Subsection (5) also allows the making of laws, and the continued operation of existing laws, to regulate the size or composition of juries and to provide for majority verdicts. No express limit is placed on the power of a legislature to enact such a law. However, if a law departed so far from the ordinary concept of trial by jury as to negate the basic idea of trial by jury, it would not be authorised by the subsection - see the Report of the Advisory Committee to the Constitutional Commission on the Australian Judicial System (1987), para.6.17.

Clause 3: Acquisition of property

13. This clause inserts new sections 115A and 115B into the Constitution. The purpose of proposed new sections 115A and 115B is to extend the obligation to provide just terms to acquisitions of property under State law, to acquisitions under laws made by the Parliament of the Commonwealth under section 122 and to acquisitions under Territory laws. It should be noted, however, that the proposed section 115B does not require the provision of just terms where the property to be acquired is the property of a Territory as a body politic (contrast the reference to a 'State' in s.51(xxxi) and see the First Report of the Constitutional Commission, April 1988, Volume 11, pages 616-617).

Clause 4: No establishment etc. of religion

14. This clause substitutes a new section 116. Proposed section 116 expressly applies to the Commonwealth, the States and the Territories. The prohibitions contained in the new section against the establishment of religion, the imposition of any religious observance and the prohibition of the free exercise of any religion are not confined to the case where these are done under a law, but extend to any case where these are done by executive action. The prohibition against imposing a religious test as a qualification for any office or public trust is continued. There is, however, no change that would render the decision of the High Court in Attorney-General (Victoria) (at the relation of Black) v. Commonwealth (1981) 146 CLR 559 inapplicable to the new section.

