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COMMENTS

Extraordinary Powers without Judicial Oversight: A Separation of Powers Dilemma – *Rebecca Ananian-Welsh* 249

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ARTICLES

Refining the Australian Counter-terrorism Legislative Framework: How Deliberative Has Parliament Been? – *Dominique Dalla-Pozza*

This article examines the legislative process by which three post-Howard era alterations to Australia's counter-terrorism laws were made. Using deliberative democratic standards, the article assesses the extent to which the Commonwealth Parliament functioned as a deliberative democratic assembly, concentrating on the *National Security Legislation Amendment Act 2010* (Cth), the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) and the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth). Two conclusions are identified. First, the Parliament is likely to make major changes to counter-terrorism laws when legislating in the shadow of a crisis. In those circumstances, there are pressures frustrating Parliament's ability to utilise its deliberative capacities. Secondly, the enactment of the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) demonstrates that it is possible for Parliament to function deliberatively. However, this deliberative process resulted from unexpected developments in the political environment. These insights affirm that the Australian counter-terrorism legislative process is deficient due to its lack of institutional mechanisms obliging the Parliament to utilise its deliberative capacities when altering these important laws. 271

The Constitutional and Regulatory Dimensions of Plebiscites in Australia – *Paul Kildea*

In September 2016, the Federal Government introduced legislation to enable a plebiscite on same-sex marriage to be held in February 2017. It was subsequently voted down in the Senate and it is now unlikely that a vote will be held. Nonetheless, the debate surrounding the proposed poll placed a spotlight on the use of the plebiscite as a democratic device. One topic that warrants more attention is the constitutional and regulatory framework within which plebiscites operate. The Constitution does not contemplate plebiscites, and they are an unfamiliar presence in a parliamentary democracy that entrusts almost all law-making and policy decisions to elected representatives. There is, moreover, no standing legislation on how federal plebiscites should be run. This article examines how the ill-defined constitutional and legal status of plebiscites affects how they are initiated and conducted. It considers these issues in a general sense, but also analyses how they arose with respect to the proposed vote on same-sex marriage. It argues that the absence of

express constitutional authority and established rules of practice means that federal governments face choices, and considerable uncertainty, about the most basic matters, including: the constitutional foundation of the vote; the use of compulsory voting; the consequences of a plebiscite if it is carried; the drafting of the question; the breadth of the franchise; the method of conducting the vote; and the rules around campaign information, funding and expenditure. The article suggests that long-term measures, such as standing legislation, should be considered, but that this should be preceded by a broader debate about the appropriate use of plebiscites within Australia's constitutional arrangements. 290

The Entrenchment of Certiorari and Habeas Corpus: A Reconceptualisation of the Source and Content of Judicial Power – *Ying Hao Li* and *Kevin Ngo*

Can certiorari and habeas corpus be abolished? Recent history has seen a spectacular increase in the volume of public law litigation brought about by co-ordinated efforts between Parliament and the executive to shield executive decision-making from judicial review. In such a political context it is not inconceivable that Parliament may be tempted to restrict the availability of or abolish these ancient common law remedies. This article examines, as an elementary question of constitutional interpretation, whether certiorari and habeas corpus are liable to abolition. We argue that certiorari and habeas corpus are entrenched in the Constitution as an indispensable element of the judicial power of the Commonwealth, and further they are available as long as any head of jurisdiction – not just the jurisdiction to issue prohibition or mandamus in s 75(v) – is attracted. Thus the power to issue the writs and the jurisdiction to seek them may be more greatly entrenched and widely available than that currently contemplated. 311

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