

The Committee Secretary
Senate Legal and Constitutional Committees
Parliament House
CANBERRA ACT 2600

Inquiry into the Australian Capital Territory (Self-Government) Amendment (Disallowance and
Amendment Power of the Commonwealth) Bill 2019

Submission

In introducing the Australian Capital Territory (Self-Government) Bill 1988 in the House of
Representatives on 19 October 1988 Mr Clyde Holding, the Minister for the Arts and Territories stated:

As I have said before, the Territory is home to the nation's capital-this fact cannot be ignored. The Commonwealth will continue to have the ultimate responsibility for ensuring the Territory's good government. Consequently, this part includes a provision for the Governor-General to dissolve the Assembly and appoint a Commissioner if the Assembly is incapable of performing its functions, or is conducting its affairs in a grossly improper manner. In this eventuality, a general election must be held within 90 days.

Though clearly referring to what is now section 16 of the *Australian Capital Territory (Self-Government) Act 1988* (the ACT Self-Government Act), not section 35 which is the subject of the Bill before the committee, I believe the opening two sentences of that quote encapsulate what this enquiry should be about to the extent that it focuses on the Australian Capital Territory.

It is to implications of the proposed law to the ACT that I will direct my remarks, though I note that an amendment has been circulated that widens the scope of the Bill significantly to encompass the Northern Territory and Norfolk Island. These jurisdictions are different in nature and aspirations to the ACT, but it is the ACT's position as the seat of government that leads me to the conclusion that it would be unwise for the Senate to agree to the Bill.

I have read with interest the background to the Bill outlined in Bills Digest No. 73 and also the published submissions on the inquiry. I have also undertaken a little research though restricted time and a (metaphorically) coughing and wheezing p.c. have limited my researches somewhat, especially in regard to section 122 of the Constitution.

The point I would like to place before the committee is that the Constitution not only places on the Commonwealth Parliament the power to make laws for the Government of the Territory, it also places on the Executive in particular the responsibility for the execution and maintenance of the Constitution and of the laws of the Commonwealth. I note the comments that have been made about the rights of Territorians vis a vis those resident in the States, and that is important, but the key fact is that the ACT is the seat of government, it is of a somewhat peculiar though important and sensitive status and will never be a State. The Commonwealth must retain its powers under both sections 16 and 35 of the Self-Government Act and to dilute these by repealing Section 35 would be a retrograde step. (It should be borne in mind that section 35 gives the Government of the day the necessary ability to act expeditiously – subject to the will of either House through the disallowance procedures).

The issue is not so much about the scope of the Territory's law making power – It is about the responsibilities of the Commonwealth in administering the Seat of Government.

Because of the position of the Territory as the seat of government, should a law be enacted in the Territory which, in the opinion of the government of the day of the Commonwealth, is mistaken or misguided or both, it has a duty to consider its position and, if need be, advise the issue of an legislative instrument to disallow that particular enactment or advise the Governor-General to recommend an appropriate amendment. Though such a law may be enacted in the Territory with the best of intentions, its enactment for one will be associated with the Commonwealth Government and could have to effect of compromising its dealings with other States and Territories and with other nations. Secondly and perhaps more importantly, its enactment, in the eyes of the Commonwealth may not be in the best interests of the governance of the Territory. (I would not be surprised, in fact, if that on a number of occasions since self government there have been vigorous informal communications between the Commonwealth and the ACT Executive that have lead to compromise being reached before the power was activated.¹)

Also, we should not lose sight of the fact that the Australian Capital Territory is represented in the Commonwealth Parliament by two Senators and two Members of the House of Representatives. Not only are they there to represent the electors of the Territory on general matters, they have the ability to lodge notices of motion and any legislative instrument made pursuant to 35 (2) of the Self-Government Act is subject to disallowance by either House.

Section 35, as it stands, is the same in substance as that provision enacted back in 1988. There was a proposal for change in 1990 where the Assembly's Select Committee on Self-Government recommended that the Chief Minister request the responsible Commonwealth Minister to amend the Act to, inter alia, remove the power of the Governor-General to disallow or amend an ACT Legislative Assembly law except that the Governor-General should be able to exercise the power when it was necessary for action to be taken temporarily pending the Commonwealth Parliament taking Action.² Unfortunately, I have not had the time to follow up on the consideration that was given to that proposal. I note that later debate in the Assembly on the issue is summarised at pages 2 to 7 of the *Companion to the standing orders of the Legislative Assembly for the Australian Capital Territory*.³

(Mark McRae)

9 March 2011

¹ In its 1990 report the ACT Legislative Assembly's Select Committee on Self- Government refers to comments in the Senate by Senator Macklin to the effect that the equivalent provisions in the Northern Territory (Self-Government) Act had been threatened a number of times. The reference is to Senate *Hansard* of 24 November 1988 at page 2808.

² Legislative Assembly for the Australian Capital Territory, Select Committee on Self-Government, Report 1990, pages 50-57. That committee was of the view that the power was more likely to be used in the ACT than in the Northern Territory because the ACT was the Seat of Government. *Ibid*, p.54

³ See also comments at page xii.