



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION  
COMMITTEE

**Reference: Australian Capital Territory (Self-Government) Amendment (Disal-  
lowance and Amendment Power of the Commonwealth) Bill 2010**

MONDAY, 21 MARCH 2011

CANBERRA

BY AUTHORITY OF THE SENATE



## **INTERNET**

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

The internet address is:

**<http://www.aph.gov.au/hansard>**

To search the parliamentary database, go to:

**<http://parlinfo.aph.gov.au>**

**SENATE LEGAL AND CONSTITUTIONAL AFFAIRS**

**REFERENCES COMMITTEE**

**Monday, 21 March 2011**

**Members:** Senator Barnett (Chair), Senator Crossin (Deputy Chair) and Senators Furner, Ludlam, Parry and Trood

**Participating members:** Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Coonan, Cormann, Eggleston, Faulkner, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ian Macdonald, McEwen, McGauran, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

**Senators in attendance:** Senators Barnett, Bob Brown, Forshaw, Humphries and Pratt

**Terms of reference for the inquiry:**

To inquire into and report on: Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010

**WITNESSES**

**CLAY, Mr Stephen John, Acting Assistant Secretary, Territories East, Territories Division,  
Department of Regional Australia, Regional Development and Local Government ..... 3**

**YATES, Mr Julian Anthony, First Assistant Secretary, Territories Division, Department of  
Regional Australia, Regional Development and Local Government ..... 3**



**Committee met at 5.32 pm**

**CHAIR (Senator Crossin)**—I declare open this second public hearing of the Senate Legal and Constitutional Affairs Legislation Committee’s inquiry into the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010. The inquiry was referred by the Senate to the committee on 2 March 2011 for inquiry and report by 21 March 2011. We have received 207 submissions for this inquiry. Most of these submissions have been authorised for publication and are available on the committee’s website. The remainder are in the process of being made available.

I remind witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. The committee prefers all evidence to be given in public, but under the Senate’s resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice that they intend to ask to give evidence in camera.

I also remind senators that the Senate has resolved that an officer of a department of the Commonwealth or of a state should not be asked to give opinions on matters of policy and should be given reasonable opportunity to refer questions asked of officers to their superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies are adopted. Officers are reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for a claim.

Just before I welcome the officers of the Department of Regional Australia, Regional Development and Local Government, I want to draw the committee’s attention to a response that we have had from the President of the Senate. People may remember that last week we adjourned to seek a ruling from the President in relation to certain remarks that were made last Thursday afternoon on the *Hansard* record about the Speaker of the ACT Legislative Assembly. It is not my intention to waste our time this afternoon and read that letter into the Hansard, but the contents of the letter will be incorporated into Hansard so that it is there for people to see.

*The document read as follows—*

rc.pres.17643

21 March 2011

Senator Trish Crossin

Chair

Legal and Constitutional Affairs Legislation Committee The Senate

Parliament House

Canberra ACT 2600

Dear Senator Crossin

**INQUIRY INTO THE AUSTRALIAN CAPITAL TERRITORY (SELF-GOVERNMENT) AMENDMENT (DISALLOWANCE AND AMENDMENT POWER OF THE COMMONWEALTH) BILL 2010**

Thank you for your letter of 17 March concerning an incident during the hearing of the committee into the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 on 16 March 2011.

Senator Brandis made certain remarks about the Speaker of the ACT Legislative Assembly, Mr Rattenbury, during the evidence of another witness, Mr Seselja. Although you ruled the remarks out of order as a personal reflection, Senator Brandis did not withdraw them and the committee, at a private meeting, resolved to seek my views on the matter.

As you know, standing order 193(3) provides as follows:

A Senator shall not use offensive words against either House of Parliament or of a House of a state or territory parliament, or any member of such House, or against a judicial officer, and all imputations of improper motives and all personal reflections on those Houses, members or officers shall be considered highly disorderly.

Although you have asked for my view on the use of the word “impertinence”, it is not a question of whether this word should be considered as an offensive word within the meaning of the opening clause of the standing order. The relevant part of the standing order for these purposes is the latter part which refers to personal reflections on Houses, members or

officers. As both a member of the ACT Legislative Assembly and an officer of that House (its Speaker), Mr Rattenbury is entitled to the protection that standing order 193(3) provides against such personal reflections. It is apparent from his comment that Senator Brandis was attempting to cast doubt on the credibility of Mr Rattenbury's submission and that he was therefore making a personal reflection on his position as Speaker. Senator Brandis then went on to compound the offence on page 41 of the transcript by saying, "the only extramural function of a speaker is to speak on behalf of the parliament, so for Mr Rattenbury to have said that is impertinent and indeed ignorant". Your ruling that the remarks were a reflection on a member of another parliament and should be withdrawn was entirely consistent with the practices and precedents of the Senate.

The basis of standing order 193 is the principle of comity between arms of government and Houses of parliament. The protection is extended explicitly to state and territory parliaments and their members, reflecting the Senate's position as the states' House. According to Odgers' *Australian Senate Practice* (12th edition, page 205) the standing order is also designed to "ensure that debate between those who are by virtue of their offices the principal participants in political debate is conducted in a privileged forum of Parliament without personally offensive language". Language is offensive when it offends the standing order Words which, in themselves, may not be considered as offensive words may nonetheless constitute offensive language for the purpose of the standing order where those words form a personal reflection on a protected person.

As chair, it is your role to maintain order in the committee and that includes applying the standing orders in accordance with the practices and precedents of the Senate. It is a well-established principle that it is for the chair to determine what constitutes offensive words, imputations of improper motives and personal reflections under this standing order. Rulings may be contested but there is a process for doing this and it was disappointing that participants in the hearing continued to challenge your authority as chair. As I said in a statement to the Senate on 1 March this year, "Respect for the chair is fundamental to the effective operation of the Senate, a matter for which all senators carry responsibility". The same principle applies in committees.

I intend to draw this episode to the attention of the Deputy President and encourage him to raise at a meeting of the Chairs' Committee the rights and responsibilities of chairs, including the right to expect that well-founded rulings (such as yours in this instance) should be respected by committee members.

Yours sincerely

(John Hogg)

cc. Deputy President

I understand that if people want to respond they can then do so in the chamber as a whole. That is the way I am going to proceed this afternoon. Everybody has received a copy—it has been emailed around.



[5.35 pm]

**CLAY, Mr Stephen John, Acting Assistant Secretary, Territories East, Territories Division, Department of Regional Australia, Regional Development and Local Government**

**YATES, Mr Julian Anthony, First Assistant Secretary, Territories Division, Department of Regional Australia, Regional Development and Local Government**

**CHAIR**—I now formally welcome the officers from the Department of Regional Australia, Regional Development and Local Government, Mr Yates and Mr Clay. Do you have any opening statements to make?

**Mr Yates**—I do. Thank you for the opportunity to make this opening statement. I thought it would be useful for the committee to understand the role of the department in relation to Australia's self-governing territories. I note here that this role is distinct to our work with the non-self-governing territories, but I will not address that area further here as they are not affected by the territories rights bill. The Department of Regional Australia, Regional Development and Local Government, through the Territories Division that was transferred to it following the machinery of government changes last year, provides support to the Australian government in relation to its policies in the self-governing territories—the Australian Capital Territory, the Northern Territory and Norfolk Island.

Each of these territories has unique characteristics and different priorities that influence our work. For example, the government's arrangements for the territories are founded on section 122 of the Constitution. For Norfolk Island, they are prescribed in the Norfolk Island Act of 1979, as amended in 2010 through the Territories Law Reform Act, to improve the Norfolk Island government's arrangements. Norfolk Island has its own Legislative Assembly with responsibility for making a wide range of laws for the governance of the territory. The island has an Administrator who acts on the advice of the Norfolk Island government for most issues, but must refer other issues, as specified in the act, to the Governor-General. The Governor-General has powers, under section 23 of the act, to disallow a Norfolk Island law within six months of the Administrator giving it his or her assent. The territories rights bill proposes to remove this power.

The Northern Territory's arrangements are specified in the Northern Territory (Self-Government) Act of 1978. The Northern Territory government has authority for most state level functions and has its own Legislative Assembly to make laws for the governance of the territory and, like Norfolk Island, has an Administrator who acts on the advice of the Northern Territory government. The Administrator has power under section 7 to refer proposed laws to the Governor-General if he or she does not assent to them directly. The Governor-General has powers, under section 9 of the act, to disallow a Northern Territory law within six months of the Administrator giving his or her assent. The territories rights bill proposes to remove this power.

The Australian Capital Territory arrangements are in the Australian Capital Territory (Self-Government) Act, 1988. Unlike the Northern Territory and Norfolk Island, the ACT does not have an administrator. Instead, laws passed by the ACT Legislative Assembly for the good governance of the territory generally come into effect on notification in the Territory Gazette. Under section 35 the Governor-General may disallow enactments within six months. The disallowance power under section 35 of the ACT (Self-Government) Act has only been exercised once, in June 2006, when the Governor-General, on advice of the Executive Council, disallowed the Civil Unions Act of 2006.

The policy of the Australian government is to strengthen the rights of the self-governing territories to ensure that the citizens of those territories enjoy the same rights as fellow Australians living in the states. Accordingly the government, subject to the advice of this committee, proposes to support the territories rights bill. This approach is consistent with support for the bill that was previously expressed by the Labor caucus in 2006. That closes my opening remarks.

**CHAIR**—We will go to questions.

**Senator BOB BROWN**—Having seen the legislation and the amendments that would extend it to the Northern Territory and Norfolk Island, do you see any problems as far as the transmission into law in those territories if this legislation were to pass?

**Mr Yates**—Senator, the role of my division and the department is to exercise the will of the parliament and the intents of the government. So should those amendments be passed we would of course carry them out. We do not have a strong view in terms of whether these things should be done or not—it is really up to the

parliament. The processes in the acts and the proposed amendments are straightforward and, from our viewpoint, do not pose any particular administrative difficulties to us in exercising should they come into law.

**Senator BOB BROWN**—And what administrative role would you have in transmitting the passage of this legislation through parliament if it were to happen to the territories?

**Mr Yates**—Our role in terms of its passage though the department is providing support to our minister in terms of his role in the parliament. Once the actual acts, if these amendments are passed, come into law then we act on them appropriately, I probably cannot go much further than that because you would be asking me to speculate about what the changes might impact when they are enacted.

**Senator HUMPHRIES**—When was the last time that the federal government, and I do not just mean this federal government, amended the ACT self-government legislation?

**Mr Yates**—I will have to take that one on notice, I do not have that level of detail with me.

**Senator HUMPHRIES**— I recall that there were some amendments, within a couple of years of the act being passed, reflecting some transfer of some responsibilities to the ACT—things like policing and so forth. But I cannot recall any significant amendments at all in pretty well the last 20 years.

**Mr Yates**—I think inherently you are right. I cannot recall any. My colleague has just shown me some minor amendments that were done as recently as 2009, but I cannot recall any amendments of substance in recent times. I have an awareness of changes in the period following self-government but not to the level of detail I could give here. I would need to take that piece of advice on notice.

**Senator HUMPHRIES**—Given that this act is effectively the constitution for the ACT, would you not regard it as being important to keep such an important piece of legislation under review? Is there a process—with regard to your department and its various predecessors, because this piece of legislation would have been handled by half-a-dozen different departments in the last 20 years—for eternally reviewing the status of legislation like that?

**Mr Yates**—In developing our advice for the government we obviously are aware of developments in the community—in the changing community standards and the general changing environment— and we may well provide advice on updates to legislation. If I can give a recent example, the Territories Law Reform Act 2010 is an example of where we went through a process of identifying proposed reforms, gave advice to governments which then led in turn to the development of an act and its passage through the parliament. In addition, the Joint Standing Committee on the National Capital and External Territories has been a particularly important process or capability that the Australian parliament has for reviewing legislation and making recommendations for government. I note here that that committee's reports influenced the development of the Territories Law Reform Act of last year.

**Senator HUMPHRIES**—In the evidence given to the committee last week, the ACT Chief Minister said he had made repeated requests—I think I am accurately summarising what he said—for a review of the self-government act. Has your department or its predecessors provided advice to the government on those requests by the Chief Minister?

**Mr Yates**—We have provided advice to the government. I am not at liberty to say what that advice is without taking that on notice to go back to my minister. What I can say though is that the Australian government has provided advice to the ACT government that the review of the self-government act is something that the ACT government could undertake of itself and that it would welcome any advice of the results of that review and would give it consideration.

**Senator HUMPHRIES**— But are you aware that your minister—again I am referring to the minister and his predecessors—has responded to those requests by the ACT Chief Minister? Do you know how many times a request has been made to the minister and how many times he has responded to a request for review of the self-government act?

**Mr Yates**— Not in a way that I could give numerically with any accuracy, Senator. It has been raised a number of times but I would have to take on notice precisely how many times.

**Senator HUMPHRIES**—If the ACT government were to conduct a review, which could be a way of dealing with this issue—as you say you have suggested through your minister—and it led to a suggestion for changes to the ACT (Self-Government) Act, what would be the usual process from that point on for dealing with those suggested amendments to federal legislation?

**Mr Yates**— I think there might be a couple of processes. There would be an internal one to government that would look at the merits of the proposals and that would be considered by the government in due course, if I can use that dreadful bureaucratic term. I think it would be potentially likely that the joint standing committee would have an interest in such a review and might well choose—and I am speculating here that the joint standing committee, on past evidence of its interests, would likely take an interest in that particular proposal—to conduct a review. Beyond that, and again I am getting too much into the world of speculating about what might happen, I think it has been made clear that if a review were undertaken by the ACT government the Australian government would consider that.

**Senator HUMPHRIES**— I think it was in the middle of 2008 that the joint standing committee made a series of recommendations for review or reform of the planning process in the ACT in the Way Forward report. Since that time the committee, when it has been briefed by the National Capital Authority, has regularly asked what progress has been made on the dialogue between the ACT's planning authority and the National Capital Authority about future reform of the shape of planning of the ACT. I think it is fair to say that every time we have asked the NCA that question we have been told that not much progress has been made in that dialogue. It is also fair to say that it is not clear to the committee why that is. Are you in a position to speculate to the committee as to why it is that, 2½ years after the committee recommended and the federal government accepted that there should be a dialogue to progress changes to the somewhat unsatisfactory nature of the planning of Canberra, there is no reported progress to be made?

**Mr Yates**— Rather than speculate, I can give some definitive advice of current actions. Dr Allan Hawke has been specifically tasked to take the work that has been done by the Australian government—which is broader than just the Territories Division; a range of agencies have been involved—and the ACT government and bring together all that work, with the aim of producing a coherent set of recommendations that both governments can consider and that will deal with the tensions between the planning responsibilities. Whilst it has been a difficult issue to work through from the viewpoint of both governments, the progress we have made, particularly in terms of getting agreement for Dr Hawke to undertake what we expect to be a final review and produce recommendations for both governments to consider, I think is reasonably substantial. This has only occurred in the last few months.

**Senator HUMPHRIES**— I note that process and I welcome it. But why would we expect that exercise to be more likely to produce any real progress on reforming these outstanding issues when the unanimous recommendations of a joint parliamentary committee after 2½ years produced no progress on those sorts of reforms?

**Mr Yates**— In response to that, from my knowledge, there was an enormous amount of work being done by officials on both the ACT government and the Australian government sides in working through the issues to give clarity to exactly where the difficulties were and to come up with some models that could be progressed to the point where Dr Hawke can take this work and synthesise it into something that both governments can consider and, we sincerely hope, will be able to achieve agreement on.

**Senator FORSHAW**— To go back to your opening statement, at the end I think you made a reference to the caucus. Can you repeat what you said?

**Mr Yates**— Yes, certainly. What I advised at the end of it was that the approach that the Australian government is taking, in terms of providing support for the bill, is consistent with what the Labor caucus had said in 2006 when they supported the bill originally.

**Senator FORSHAW**— What do you base that statement on?

**Mr Yates**— Our investigation of the facts of the situation, Senator.

**Senator FORSHAW**— And do you say there was a caucus decision at the time?

**Mr Yates**— That is what I have been advised. So we are not making any value judgment—

**Senator FORSHAW**— Oh, I appreciate that. I just wanted to be sure because you were actually referring to—

**Senator PRATT**— It is in our own papers.

**Senator FORSHAW**— But you are referring to a decision of the federal parliamentary Labor Party's caucus?

**Mr Yates**— That is correct.

**Senator FORSHAW**—But your earlier comments were about the government. That is fine—I just wanted to clarify that.

**CHAIR**—In terms of clarification, what you are saying is that the Labor Party has supported this in 2006? Is that what you are suggesting by that?

**Mr Yates**—That is correct, that is all I am saying.

**Senator FORSHAW**—That is not in issue, at least insofar as speeches were made in the Senate by individual senators to support this bill. There was no decision made, or there was no vote taken at the time. Your comment was about the caucus. I do not wish to pursue that any further with you because I do not think that is either necessary or appropriate to your situation. I want to go back to the earlier part of your opening comments. This bill proposes to delete section 35 in regard to the ACT legislation and section 9 in regard to the Territory legislation. You have correctly drawn attention to the situation that exists in the Northern Territory where there is an administrator, but there is not such a position in the ACT. Can you tell me what is the effect of deleting section 9 of the Northern Territory legislation on the other provisions in the Northern Territory legislation which refer to the power of the Administrator not to assent to a bill?

**Mr Yates**—Senator, you will appreciate I cannot actually give you legal advice on that side of it. My understanding is that removing the disallowance power, which is proposed through the territories rights bill, does not have any effect on those provisions.

**Senator FORSHAW**—So the provisions would still continue to exist whereby the chief administrator of the Northern Territory could decide not to assent to a bill that is presented to him having been passed by the Northern Territory legislature?

**Mr Yates**—That is my understanding, Senator.

**Senator FORSHAW**—That is not dissimilar to what a state governor could do with respect to a state parliamentary law or, in theory, what a Governor-General could do to a federal parliamentary law. That power includes referral back if, for instance, the administrator or the state governor or the Governor-General in each of those situations wanted to put points of view forward to the respective governments, they have that authority in each case.

**Mr Yates**—That is my understanding.

**Senator FORSHAW**—Okay. In the ACT that situation does not exist because there is no effective governor or administrator, there is the Governor-General.

**Mr Yates**—That is correct.

**Senator FORSHAW**—This bill proposes to remove the reference in the ACT legislation with respect to a Governor-General's power to disallow a law which will continue to exist in one form or another in regard to the Northern Territory, I assume, as I understand it to Norfolk Island territory and indeed through the exercise by governors in states. Is that your understanding?

**Mr Yates**—That is my understanding.

**Senator FORSHAW**—I appreciate it is not a legal issue but it is a straight reading of the legislation.

**Mr Yates**—That is my reading of the legislation.

**Senator FORSHAW**—In other words, there is something that follows from that. It puts the ACT in a position where it removes one layer, the only sort of executive authority, if you like, that exists in relation to other states and the Northern Territory.

**Mr Yates**—I note—

**Senator FORSHAW**—The parliamentary powers would still continue to exist, I understand, in regard to the Northern Territory and the ACT, but that is not what we are dealing with here because it is said here that that power is still protected or still exists and effectively cannot be removed in terms of section 122 of the Constitution. Thank you; that is all I wish to clarify.

**Senator BARNETT**—I want to pursue that if I could in regard to Norfolk Island and how it operates. There is a legislative assembly and there is an administrator. For a bill to become a law in that territory what has to happen?

**Mr Yates**—Norfolk Island is again slightly different. It has in its act two schedules, schedules 2 and 3. Each of those lists a series of matters. Schedule 2 lists, if you like, the state type matters that the Norfolk Island

government has the ability to make laws for. The administrator, if he assesses that the proposed law is a schedule 2 matter, can then give his assent or not in accordance with the law.

**Senator BARNETT**—Does that happen from time to time where the administrator does not provide assent?

**Mr Yates**—It is a very infrequent event. I would have to take on notice the number of times it has occurred. None comes to mind immediately.

**Senator BARNETT**—If you could take that on notice.

**Mr Yates**—Schedule 3 has a much shorter list of those things that the administrator has to take advice from the minister responsible for territories on prior to giving assent. Those matters are really Commonwealth type matters that would normally go to higher-level consideration. Again, not a great deal of those have occurred. Anything that is not listed in schedules 2 or 3 has to be referred to the Governor-General for consideration. So it is a slightly different system again.

**Senator BARNETT**—How many of those would there be?

**Mr Yates**—Again, it is a very low number. I would have to take it on notice.

**Senator BARNETT**—Can you take each of those on notice?

**Mr Yates**—We can. For some of those, because of the passage of time since it might have occurred, we will need to look at the records.

**Senator BARNETT**—How many in the legislative assembly and what is the population of Norfolk Island?

**Mr Yates**—The population is under 2,000 it is probably around the 1,800 or 1,900 mark. The legislative assembly has nine members. The Territories Law Reform Act made some changes to how it operates in terms of appointment of chief minister and ministers to give it a stronger Westminster style of operation.

**Senator BARNETT**—Are you aware of the level of interest in this issue on Norfolk Island?

**Mr Yates**—I was on the island last week and we had some public meetings. I had a lot of discussions with members of the general community and members of the Legislative Assembly and I would have to say that nobody raised it as an issue.

**Senator BARNETT**—It is my understanding that this committee wrote to the Chief Minister of Norfolk Island and to the Speaker of Norfolk Island seeking their input into this particular bill and asking them to make a submission if they wished to. And the response was, I am advised, from the Speaker no response, and from the Chief Minister a written response that said no, they declined to make a submission. I think that would send a message about the level of interest/ importance, from at least their perspective, with respect to the bill. Would that make sense to you?

**Mr Yates**—I cannot look into their minds. I can only report that no-one raised it with me while I was there.

**Senator BARNETT**—You were not aware of that correspondence?

**Mr Yates**—Not of that correspondence. We were aware that no submission had been made from looking at the committee's web page.

**Senator BARNETT**—So you were aware that no submission had been made?

**Mr Yates**—Yes.

**Senator BARNETT**—I just want to pursue this point that you made in the interchange with Senator Forshaw. I think in your opening remarks you made the point that the Labor government supports the bill?

**Mr Yates**—Yes.

**Senator BARNETT**—On what basis did you make that statement? Secondly, since the hearing last Wednesday in Parliament House, Canberra, have you received advice or a communication from your minister, Simon Crean, on this issue?

**Mr Yates**—Senator, to answer your last point first, no, we have not. We consult with our minister's office to understand the position of the Australian government.

**Senator BARNETT**—When was that consultation?

**Mr Yates**—It has been ongoing over the last week, approximately, since the territories bill came into the House.

**Senator BARNETT**—How often? Once a week? Or once a month? It was introduced in September last year relating only to the ACT and then amendments were subsequently made to apply to the Northern Territory and Norfolk Island. So how often and when were those communications?

**Mr Yates**—Senator, we are in regular contact with our office. I cannot actually give you an exact number at the moment.

**Senator BARNETT**—Could you take that on notice?

**Mr Yates**—I can take that on notice.

**Senator BARNETT**—And could you say whether that view ever changed? Was it always consistent that the government would be supporting both the original bill, which applied to the ACT, and the subsequent bill as amended by Senator Brown?

**CHAIR**—Can I just clarify something here? Senator Barnett, I just need to clarify your first question to Mr Yates about support for the legislation. In your opening statement you were referring to this bill when it was introduced in 2005 or 2006, weren't you?

**Mr Yates**—That is correct.

**CHAIR**—That is the context in which you talked about support for this bill?

**Mr Yates**—And the form of words I used was to differentiate—because the Labor Party is in government at the moment I just needed to differentiate between it being in government and in opposition.

**Senator HUMPHRIES**—But you also said that the government now supports this present bill?

**Mr Yates**—That is correct.

**Senator BARNETT**—And you are going to take on notice when those communications were held with the minister with respect to that issue?

**Mr Yates**—Yes.

**Senator BARNETT**—What I want to ask you is: did the government give you advice to confirm its support for the original bill back in September when the ACT bill was first introduced by Senator Brown?

**Mr Yates**—I will need to take that on notice.

**Senator BARNETT**—Can you say whether it was supportive of the bill?

**Mr Yates**—To my knowledge it has been supportive since the original position in 2006.

**Senator BARNETT**—All right, because I make the point again that it was amended, which I would say was a substantial amendment because it applied only to the ACT. Am I correct?

**Mr Yates**—That is correct.

**Senator BARNETT**—And it was substantially amended to apply to the Northern Territory and Norfolk Island. I have not got the date in front of me, but they were circulated on 1 March. So did you get advice from the government post 1 March that that support would continue?

**Mr Yates**—Yes, we did.

**Senator BARNETT**—And you will let us know when you received that?

**Mr Yates**—Yes.

**Senator BARNETT**—Thank you. Have you received legal advice, or has the government received legal advice, as to the constitutionality of the bill?

**Mr Yates**—We have received legal advice on the bill, but I am not able to answer about whether there has been any constitutional advice given on it.

**Senator BARNETT**—You have received legal advice, but you are saying it may or may not include constitutional advice?

**Mr Yates**—I would have to take that one on notice, Senator. As you know, with the provision of legal advice we need to refer that to our minister.

**Senator BARNETT**—I would like you to take that on notice and I would like to obtain a copy of that legal advice. Was it more than one piece of advice?

**Mr Yates**—We have only received the one piece of advice.

**Senator BARNETT**—When did you receive it?

**Mr Yates**—It was on 11 March I believe, but I will confirm that when I respond.

**Senator BARNETT**—So it was post the amendments? It would include this post the amendments on 1 March?

**Mr Yates**—That is correct.

**Senator BARNETT**—If you could take that on notice, I would like the committee to have a copy of that advice.

**Mr Yates**—I will take it on notice, certainly.

**Senator BARNETT**—Thank you. The ACT government of course have had an ongoing interest and effort to introduce marriage type legislation in the ACT. You are aware of that?

**Mr Yates**—Yes.

**Senator FORSHAW**—Chair, on a point of order, to be perfectly correct so the witness is not being asked a question that is not based on a fact, I think Senator Barnett might need to rephrase that to say there have been attempts by various groups, whether it is individual members of the ACT Legislative Assembly, members of the Greens party or members of the Labor Party. He said ‘government’. I think that is a bit—

**Senator BARNETT**—The ACT government.

**Senator FORSHAW**—I am just conscious that the use of the term ‘government’ can be a little bit—

**Senator BARNETT**—Well, how else do we refer to the ACT government?

**Senator FORSHAW**—I have just made the point.

**CHAIR**—I think you said originally the ‘government’, which you interpreted as ACT and I think Senator Forshaw interpreted it as something else. Let us just ask the question again and be mindful that we need to be clear which government we are referring to.

**Senator FORSHAW**—I am also mindful that sometimes legislation may have been mooted or proposed by individual members—

**CHAIR**—Also, and I know, Senator Barnett, that you are more than aware of this, but these are officers from the department of regional development so if we want to enter into a discussion about legislation that refers to the Marriage Act, it is probably the A-G’s Department more than these people. They may well not be the right people; they are territories experts.

**Senator BARNETT**—With respect, I am asking the questions and if you think they are out of order, rule me out of order. But I totally reject any suggestion that these questions are out of order, so let me proceed. The ACT government attempted to pass, and indeed did pass, the Civil Unions Act in 2006. Is that correct?

**Mr Yates**— Yes.

**Senator BARNETT**— And that was disallowed by the Governor-General, to be specific, at the time?

**Mr Yates**—That is correct.

**Senator BARNETT**—On instruction no doubt from the Howard government, and I think Philip Ruddock was the Attorney-General at the time. Anyway, that is my recollection and I stand to be corrected. How many times has the ACT government, from your memory and from your advice, introduced or publicly announced their intention to introduce legislation to support gay marriage in one form or another?

**Mr Yates**—I am unable to answer that question with the information we have got. The Marriage Act is under the Attorney-General’s Department so it is not something that we particularly monitor or keep information on. We can attempt to take that on notice and provide a response, but this is one that the Attorney-General’s Department would probably be better placed to respond to.

**Senator BARNETT**—Sure. Perhaps you could take it on notice and feel free to speak to the A-G’s office and advise, to the best of your ability, a response to the committee. Are there any other areas where they have attempted to introduce or promote legislation that has then been flagged as inappropriate by the federal government and they have ceased to proceed accordingly—whether it be euthanasia or other issues? Are you aware of that?

**Mr Yates**—I am not aware of any, Senator, but I would not want that taken as a definitive answer. I am simply not aware. The only one is the euthanasia debate where there was of course the specific exclusion put

in there in the acts of all three of the self-governing territories, but my memory does not tell me whether the ACT was proposing anything—

**Senator BARNETT**—Are you aware of the current intention of the ACT government and its position with respect to euthanasia?

**Mr Yates**—No.

**Senator BARNETT**—The Northern Territory government, through their Chief Minister last week, put on the record, and I think other representatives from the Northern Territory government as witnesses to our committee indicated that there was no current intention in the Northern Territory to proceed with respect to gay marriage or euthanasia. I am just summarising as I recall it. So that appears to be somewhat different to the position of the ACT government. I simply share that as an observation. I think that covers the questions from my point of view and I thank you for your feedback.

**Senator PRATT**—Would you agree with the statement that the bill does not upset the current laws such that a territory's laws cannot be inconsistent with Commonwealth laws?

**Mr Yates**—I would agree with that observation.

**Senator PRATT**—So in a sense, whether its banning paintball, marriage, euthanasia or any particular issue, all this bill would achieve is that the states and territories would have more similar rights than previously to legislate in whatever area they choose, notwithstanding the fact that the Commonwealth parliament will still retain the power to actually pass a resolution through both houses.

**Mr Yates**—My understanding is the bill simply removes the disallowance referral power and it obviously does not affect, and cannot affect, the section 122 power of the Constitution that gives the parliament the ability to make laws for the territories.

**Senator PRATT**—I suppose I get a little bit confused about the idea that somehow we can use this particular legislation to define these issues in the nation, when in fact all we are simply doing is giving a territory the same right as a state with respect to whether they can be overruled by the executive on any legislation that they make. Am I correct in my understanding?

**Mr Yates**—I believe so, Senator. I would a somewhat more narrow construction on it than that.

**Senator PRATT**—How would you simplify that?

**Mr Yates**—It simply removes the ability of the Governor-General to disallow the piece of legislation from those three territories, which in turn of course itself can be disallowed by the parliament.

**Senator PRATT**—So a fairly simple proposition. Thank you, Mr Yates.

**Senator FORSHAW**—Can I just follow up that last exchange you had? Are you aware of section 59 of the Constitution?

**Mr Yates**—In very broad terms.

**Senator FORSHAW**—What does it actually provide for?

**Mr Yates**—I could not tell you precisely.

**Senator FORSHAW**—Let me refresh your memory. And this has been the subject of submission and debate about whether this section of the Constitution should continue to exist. It says:

The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.

It is my understanding—I do not have the precise quotes—that that is the way it also works in the states. So there is a provision in the Constitution that actually gives the Queen the right to annul or disallow a law of the federal parliament. It can be said, quite rightly, that it has never been used and is unlikely to be unused, but it exists. The proposal here is to remove what is effectively a similar provision. In this case, there is no governor of the ACT because it is not a state—and it has been put to this committee that it cannot be a state. It is the capital; it is the seat of government of the national parliament. In the absence of a governor the provision you have is what is in the Australian Capital Territory (Self-Government) Act, which is that the Governor-General has the equivalent power that the Queen has under our Constitution and I assume—I might be mistaken—it is a similar situation in the states. On that basis, at least, the situation is not that simple.



**Mr Yates**—Senator, you are asking me to comment on a constitutional law issue which I am simply not competent—

**Senator FORSHAW**—Yes, I know, but just a moment ago you were commenting on whether this bill is simple and whether it produces a particular result. It is argued that it puts the ACT in the same position as all the states. I am arguing that it does not. I am also arguing that that may be able to be achieved through making the ACT and the Northern Territory state governments which is what they obviously desire. But they are not state governments at the moment. All I am saying is that there is, in relation to the federal parliament and state parliaments, the notion of royal assent. Hand in hand with that goes this power—albeit it may be regarded as anachronistic—to disallow laws. That is my point.

**Senator PRATT**—I do not know that the officers can comment on that. I think we would need A-G's.

**Mr Yates**—I would simply have to say that is not a matter—

**Senator FORSHAW**—I know. But I think you understand what I am saying. You were asked a question: do you agree that, by making this simple amendment to remove one section of the ACT act and one section of the Northern Territory act, it has an effect of making the situation the same as everywhere else? I am putting to you that a lot more would have to be done to do that.

**Mr Yates**—I think that in my response I made a comment that I have put a slightly more narrow construction on what was put to me.

**Senator PRATT**—You did indeed.

**Senator BARNETT**—Just following up what Senator Forshaw said, he has a very good point that the self-government acts operate in different ways in the different territories. Would you agree with that?

**Mr Yates**—I do indeed.

**Senator BARNETT**—So you have the three territories. This is why I am somewhat perplexed. The original bill—Senator Brown's bill—related only to the ACT. Correct?

**Mr Yates**—That is correct.

**Senator BARNETT**—With these amendments that have come in, you are changing the self-government arrangements in the Northern Territory and on Norfolk Island in a very significant way. Is that in accordance with your thinking?

**Mr Yates**—Again, I come back to our comments about the proposed changes in the bill, in that they remove only the disallowance power of the Governor-General; it is not for me to judge whether that is significant or not.

**Senator FORSHAW**—Of the Governor-General—not of others. That is the point. That is the absolute point in respect of the Northern Territory. This bill does not remove the disallowance power of the Chief Minister.

**Mr Yates**—Of the Administrator.

**Senator FORSHAW**—That is right.

**Senator BARNETT**—And does that apply to Norfolk Island?

**Mr Yates**—It does not affect the Administrator's powers; they are unchanged as a result of the proposed amendments.

**CHAIR**—Mr Yates and Mr Clay, thank you very much for your time this evening.

**Committee adjourned at 6.19 pm**