CHAPTER 3

KEY ISSUES

3.1 Chapter 3 discusses the key issues raised in submissions and evidence during the committee's inquiry. Many of the substantive submissions received by the committee expressed strong support for the Bill and its objectives.

Improved democratic rights for territory citizens

3.2 Most submitters and witnesses who favoured the Bill emphasised the democratic right of territory citizens to be governed by their elected representatives, without a federal executive override.

General support for the Bill and its objectives

3.3 The Law Council of Australia (Law Council) noted its fundamental opposition 'to unwarranted and inappropriate interference with the legislative powers of Australia's self-governing Territories'.[1] In the Law Council's view, the Commonwealth's power to override laws in the territories significantly undermines their democratic legitimacy:

> Territorians elect representatives to their local assemblies in the expectation that those representatives will make laws for the peace, order and good governance of their communities within the parameters of the law making powers afforded them by the self-government Acts. It is an affront to the democratic process in which Territorians participate if legislation lawfully passed by their elected representatives is rendered invalid by the operation of Commonwealth laws, which are not of general application, but which are exclusively targeted at the Territories for the express purpose of interfering in their legislative processes.
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> While the current Bill does not completely remove the power of the Commonwealth to override Territory laws, it enhances the democratic quality of this process by requiring that Parliament consider and take responsibility for the decision to override, rather than the Executive.[2]

3.4 Professor Cheryl Saunders AO from Melbourne Law School supported the Bill 'as an overdue change to correct what has become an anachronism in the Australian system of government'.[3] Professor Saunders argued that the Bill should apply 'at least' to the ACT and the NT:

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1 *Submission 36*, p. 3.

2 *Submission 36*, p. 5.

3 *Submission 46*, p. 1.

> These Territories are self-governing polities with democratic institutions responsible to their electors. Their systems of government are broadly equivalent to those of the States and the Commonwealth. Elsewhere in Australia, we entrust such institutions with the power to make decisions that reflect the views of their respective electorates, subject to the overall constitutional framework. So it should be in relation to the Territories. In this regard it should be noted that for most other purposes, including intergovernmental arrangements, the Territories are treated under Commonwealth legislation and in practice as being akin to the States.[4]

3.5 Associate Professor Tom Faunce from the Australian National University also advocated passage of the Bill:

> [R]epealing section 35 of the ACT Self-Government Act is a measure that can and should be taken now. What the citizens of the ACT or NT vote about should be no concern of members of federal Parliament if it raises no issues that would create constitutional objections should the same legislation have been passed by the States. The geographical accident of being resident in a Territory should not be a ground for discrimination in terms of basic rights under the Australian Constitution.[5]

3.6 Professor George Williams submitted that, '[a]s a matter of good governance, the Commonwealth should not remove power from a self-governing jurisdiction to make laws on a topic'. Specifically, he argued:

> Removing power is a blunt instrument that prevents the making of any laws, for good or ill, including those that are clearly in the best interests of the local community. It also sends a clear signal that the Commonwealth believes that the Territories are not up the task of enacting appropriate laws on the subject. This is at odds with the fact that the ACT and the Northern Territory both have a larger population, and a better functioning system of self government, than some of the colonies that became [states upon Federation in 1901].[6]

Australian Capital Territory

3.7 The Chief Minister of the ACT, Mr Jon Stanhope MLA, argued that the Bill goes to 'a first and basic principle'[7] for citizens of the ACT:

> [W]e, the residents of the Australian Capital Territory, deserve the same consideration, the same respect and the same capacity to exercise our democratic rights without threat or prospect of interference as all other Australians—other than those in the Northern Territory and Norfolk Island—currently exercise their democratic rights...I and my government,

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4 *Submission 46*, p. 1.

5 *Submission 11*, p. 3.

6 *Submission 1*, p. 2.

7 *Committee Hansard*, 16 March 2011, p. 18.

> and I believe the vast majority of the residents of the Australian Capital Territory, reduce this issue to first and basic principles…[T]he people of the Australian Capital Territory, a self-governing territory within the Commonwealth of Australia, are currently not accorded the same democratic rights, the same respect, the same capacity to govern ourselves, consistent with mandates that we achieve through the ballot box, as other Australians. It is as simple as that…We really should be concentrating on a simple, basic principle—I would have thought a principle close to the hearts of every Australian—something that this nation stands for above all others: a commitment to democracy, a determination to fight for democracy and to support it, and to always live by it. We, the people of the ACT, are not being accorded the same rights to the same extent and to the same level as other Australians. We believe that is inappropriate.[8]

3.8 The Castan Centre for Human Rights Law at Monash University also expressed support for the Bill:

> It will enhance democratic rights in the ACT. At present, legislation emanating from territorial parliaments may be struck down by an exercise of executive power by the Governor General (acting on the advice of the responsible Ministers). In other words, the will of the people of the ACT, as represented by its Parliament, can presently be struck down on the basis that it does not conform to the will of the federal government of the day.[9]

3.9 The ACT Greens strongly endorsed the Bill's proposals, arguing that section 35 of the ACT Act 'is fundamentally offensive to representative democracy', which is 'premised on the basis that citizens have the opportunity to elect those who make decisions about the way their community is to function and the laws that govern it'. In addition:

> Currently the citizens of the ACT have no ability whatsoever to respond to a decision of a Commonwealth Minister, elected by electorates very distinct from their own, when that Minister using section 35 decides to overrule an enactment of the democratic parliament they do elect. Canberrans cannot vote against a Minister from Queensland or WA who exercises the power given to them by Section 35 that applies exclusively to the ACT. This is perhaps the only case where there is no electoral accountability for action taken by a Member of Parliament in Australia.[10]

3.10 Mr Michael Moore, a former independent member of the ACT Legislative Assembly, urged the committee to support the Bill as an important part of the development of the powers of the territory legislatures:

> The Territories have powers that are less than those of the States and, as such, should be reviewed from time to time to determine why it is that the

8 *Committee Hansard*, 16 March 2011, pp 18-19.

9 *Submission 45*, p. 1.

10 *Submission 47*, p. 1.

> Federal Parliament allows reduced democratic rights for approximately 800,000 Australian citizens.
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> Many have been critical of decisions that have been made by the ACT Legislative Assembly since self-government in 1989. However, this is the nature of democracy. There has also been criticism of many decisions taken by Federal governments in the same period, not to mention neighbouring New South Wales. We should have similar rights as other jurisdictions when it comes to decisions by our locally elected representatives.[11]

Northern Territory

3.11 The Chief Minister for the NT, the Hon Paul Henderson MLA, fervently endorsed the Bill's proposals as they pertain to the NT:

> It is a very basic principle that we are arguing for here. The 25 members of the Territory parliament, who make laws for the good governance of the people of the Northern Territory, are elected by Territorians and they are accountable through fixed-term elections every four years. For the Commonwealth executive arm of government to have the power, essentially at the stroke of a pen, to make a recommendation to the Governor-General to disallow a law in the Territory undermines democracy in the Northern Territory. It says to Territorians who go to the polls every four years: 'You can't be trusted. Your big brothers and sisters in the Commonwealth parliament do not trust you to elect a parliament to make laws for the good governance of the people of the Northern Territory.' I think that that is insulting to people in the Northern Territory who elect their members of parliament.[12]

3.12 Further, Mr Henderson argued that section 9 of the NT Act 'provides for a total lack of transparency and accountability to the people of the NT' because the federal executive is able to effectively amend or disallow a law that has been passed by the 'democratically elected' NT Legislative Assembly:

> The federal minister that would take a position to cabinet to amend or disallow a law that has been made through the Territory parliament is not accountable to the people of the Northern Territory. The cabinet that would make that recommendation to the Governor-General is not accountable to the Northern Territory. The ability for the federal executive to understand the innate intricacies and issues affecting the people of the Northern Territory is nowhere near to the same level of accountability and scrutiny as there is through the Territory parliament. So I would argue that the current provision is certainly lacking in transparency and accountability to the people of the Northern Territory.[13]

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11 *Submission 3,* p. 2.

12 *Committee Hansard*, 16 March 2011, p. 2.

13 *Committee Hansard*, 16 March 2011, p. 2.

3.13 The Hon Jane Aagaard MLA, Speaker of the Legislative Assembly of the Northern Territory and Chair of the NT Legislative Assembly Standing Committee on Legal and Constitutional Affairs, strongly supported the Bill as a 'reform which improves the democratic capacity of a self governing Australian territory to participate as a more equal partner within the broader Australian federal system'. In particular, she argued:

> It remains contrary to the principles of democratic government that the laws made by the responsible Parliament in the Northern Territory should be overturned without reference to that Parliament.
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> Section 99 of the *Australian Constitution* prevents the Commonwealth discriminating in favour of (or against) one State over another, resulting in valid Commonwealth laws which apply equally to all.
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> Section 9 of the *Self Government Act* deviates from the underlying principle of s.99 and allows the Commonwealth to single out a territory for unequal treatment for no reason other than the Commonwealth has the constitutional power to treat a territory in an inferior manner. If the Commonwealth Government simply does not like a State law, its power to override that law is much more constrained.[14]

3.14 Speaking with, and on behalf of, members of the NT Standing Committee on Legal and Constitutional Affairs at the first public hearing, Mrs Aagaard emphasised the maturity of the NT Legislative Assembly:

> The Northern Territory has demonstrated in its 11 assemblies and almost 34 years of self-government that it is a mature body politic in the Australian system of government with a healthy representative democracy working on behalf of the electors of the Northern Territory. Section 9 of the self-government act provides that the Governor-General, on the advice of the Federal Executive Council, may disallow or recommend amendments to a law passed by the Legislative Assembly of the Northern Territory within six months after it is made. This power of the Commonwealth may be exercised by the federal executive in respect of any legislation passed by the Northern Territory Legislative Assembly, not just legislation relating to matters for which the Legislative Assembly is expressly precluded from making laws. The repeal of section 9 would not give the Northern Territory any greater legislative authority than it presently enjoys. It would, however remove the federal executive power to disallow valid laws passed by the Legislative Assembly. The federal parliament's power to override Territory laws would remain intact as it exists today.[15]

3.15 Mr Marshall Perron, a former NT Chief Minister, observed that self-government has been a substantial success in the Northern Territory. Mr Perron asserted that the history of the *Rights of the Terminally Ill Act 1995* (NT) demonstrates

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14 *Submission 4*, pp 1-2.

15 *Committee Hansard*, 16 March 2011, p. 10.

conclusively that an executive power to veto territory legislation is unwarranted and unnecessary:

> A decision to veto a law passed by the duly elected representatives of Australians living in the territories is a grave matter. It should not be done on the whim of a Minister or Prime Minister but duly considered by both houses of Federal Parliament…There is no ongoing need for a 'big brother' clause that allows a Federal Government minister to veto a law passed by the Legislative Assembly. If a proposed law is considered so dangerous or offensive to warrant trampling the decision of a subordinate democratically elected legislature, it should only be done by Federal Parliament in full session.[16]

Step towards statehood for the Northern Territory

3.16 The NT Chief Minister submitted that the move towards statehood in the NT is a primary motive for his endorsement of the Bill:

> This is all about the parliament of the Northern Territory and the people of the Northern Territory being accorded a small step along the way to statehood with the same rights and responsibilities through their elected parliament as all other people in Australia. I see the [Bill]…as very important in terms of the journey towards statehood for the Northern Territory. Any journey is made up of a number of steps, and this legislation is a small but significant step towards statehood and certainly towards respecting the rights of Territorians through their elected parliament in the Northern Territory.[17]

3.17 Mr Henderson noted that the Bill represents 'a step in recognising the inequities between the way the Commonwealth executive has powers over the territories that it does not have over the states'. Further:

> [T]he removal of that power by the support of this bill I would see sends a very significant signal by the parliament of Australia that the territories are moving towards statehood in terms of recognition of that…[T]he journey towards statehood will be taken through a number of steps and this would be a step of recognition by the Commonwealth power in regards to the progression of statehood for the Northern Territory. Where the ACT and Norfolk Island sit in that debate towards statehood is an issue for their jurisdictions.[18]

3.18 In a similar vein, Mrs Aagaard expressed the view that the Bill should be strongly supported as a move towards statehood for the NT:

> The proposed amendment to remove section 9 of the *Northern Territory (Self-Government) Act 1978* means this bill, if passed, will be a significant

16 *Submission 22*, p. 2.

17 *Committee Hansard*, 16 March 2011, p. 2.

18 *Committee Hansard*, 16 March 2011, p. 7.

> step towards the recognition of the ability of the Northern Territory to undertake self-government with less prospect of arbitrary interference. If the bill is passed it would assist the Territory to promote more understanding of the long-held aspirations to achieve statehood.[19]

Preference for parliamentary override of territory legislation

3.19 Many submissions and witnesses expressed a clear preference for a parliamentary override of territory legislation, as opposed to an executive one.

3.20 The ACT Chief Minister, Mr Jon Stanhope MLA, characterised the executive disallowance power as 'outdated, unaccountable and subject to partisan influence', and an 'unreasonable constraint' on democratic rights:

> That section 35 empowers the Commonwealth Government, with no popular mandate, to administratively override the laws of the Territory's legitimate legislature is a fundamental erosion of Australia's democratic standards. The disallowance power creates a high degree of uncertainty as to the status of existing and future enactments of the Legislative Assembly for the ACT and the scope of the Assembly's law making powers. In effect—and in a manner unique to the Territories—the provision affords citizens of the ACT no clear line of ultimate accountability for the laws passed by their elected representatives. This provides for a lower standard of democracy for the citizens of the ACT when compared to Australians living in one of the six States.
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> Such laws as have been duly formulated, debated and passed in the ACT's parliament by elected representatives should not be subject to the arbitrary, unilateral veto of federal Ministers elected outside the ACT.[20]

3.21 Similarly, Mr Shane Rattenbury MLA, Speaker of the ACT Legislative Assembly, contended that section 35 of the ACT Act should be considered to be as obsolete as sections 59 and 60 of the Constitution, which enable the Queen to disallow Commonwealth legislation or to have Commonwealth laws reserved for her assent. He submitted further that section 122 of the Constitution properly provides for the parliament rather than the executive to oversee the ACT, and that the executive's disallowance power creates uncertainty and doubt for ACT legislators.[21]

3.22 Although the NT Chief Minister, Mr Henderson, preferred that there be no Commonwealth override—either by the Federal Government or the Federal Parliament—he saw benefits in a legislative process as opposed to an executive one:

> The current process through section 9 of the Northern Territory (Self-Government) Act is not transparent, whereas if a piece of legislation is brought through to the parliament here it would be transparent, to the effect

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19 *Committee Hansard*, 16 March 2011, p. 10.

20 *Submission 20,* p. 4.

21 *Submission 29,* pp 4-8.

> that people are on the record as to whether they supported it, did not support it and the arguments for and against. At least a piece of legislation has a degree of transparency, as opposed to the total lack of transparency that is provided for under section 9…[22]

3.23 Mrs Aagaard also explained why a legislative override is preferable to an executive one:

> If the Commonwealth parliament decides that it wants to override our laws then there is a process for the people in the Northern Territory to be part of that process in terms of the transparency—we all have federal members of parliament; there is that process—as opposed to a single minister, with the executive, overriding laws, which I think in 2011 is really quite unconscionable.[23]

3.24 In a similar vein, Ms Gai Brodtmann MP, Federal Member for Canberra, and Mr Andrew Leigh MP, Federal Member for Fraser, contended:

> Without a constitutional change, the Australian Parliament will still have the right to overturn territory laws. But this power should only be exercised in the most extreme cases. Overturning territory law should require a decision of the federal parliament, and not remain the prerogative of the executive.
>
> Moving the veto power from the executive to the Australian Parliament will ensure that an open debate takes place, in which every Australian Parliamentarian—including the ACT's MPs and Senators—has the opportunity to speak out.[24]

3.25 Professor Cheryl Saunders AO argued that executive disallowance is an outmoded procedure that should give way to the openness of legislation:

> Because the Territories do not formally have statehood, they are subject to overriding legislation, on any subject, enacted by the Commonwealth Parliament. But this at least is an open process, requiring the executive to explain the reasons for the action that it wishes to take in the forum of the Parliament, which is designed to subject them to public scrutiny and debate. By contrast, disallowance of Territory legislation by the Commonwealth executive, acting through the Governor-General, is an outmoded procedure that is insulting to Territory voters and for which there is insufficient accountability at the Commonwealth level, given the significance of the action.
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> The disallowance procedure in the Self-Government Acts is modelled on colonial practice. In colonial times, the imperial authorities retained power over colonial legislatures through a power of the Monarch to disallow colonial enactments on the advice of the British executive. There are

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22 *Committee Hansard*, 16 March 2011, p. 8.

23 *Committee Hansard*, 16 March 2011, p. 12.

24 *Submission 56*, p. 1.

> remnants of this still in section 59 of the *Constitution*, which has long since fallen into disuse. There is no justification for continuing to use a practice of this kind in 21st century Australia.[25]

3.26 The Law Council agreed that the Bill represents a marked improvement on the current process:

> [A parliamentary] approach, which requires the full consideration of both Houses of Commonwealth Parliament and removes from the Executive the power to interfere in the internal affairs of another properly-elected government on an ad hoc basis, to better align with the grant of self government and demonstrates a greater respect for the democratic processes of the elected parliaments of the Australian territories.[26]

3.27 Professor George Williams pointed out that the effect of repealing section 35 of the ACT Act is merely to alter the process by which the Commonwealth might override ACT laws, but that a parliamentary process is to be preferred:

> Instead of enabling this to occur under section 35 by way of an executive decision, subject to disallowance by either house of the Federal Parliament, such an override would need to occur by way of legislation passed through both the House of Representatives and the Senate. This latter course is a more appropriate method of achieving this outcome, and is consistent with both good democratic practice and the importance of ensuring that Australian citizens in both States and Territories have, so far as possible, the same democratic rights to self-government.[27]

3.28 In response to questioning by the committee about whether the current parliamentary disallowance power is an adequate check on any disallowance of a territory law by the federal executive, Professor Williams provided the following view:

> I would certainly recognise that it is an important check and it does need to be considered as part of this. But it is a far weaker check, I believe, than having a requirement that a bill be passed through both houses of federal parliament. One reason is that the initiation of it by the executive as opposed to the initiation of a bill in parliament is a very different hurdle. I think also that there are very different processes involved in disallowing a regulation or legislative instrument as opposed to making legislation fresh in the first place, including inquiry processes and the like. I think also it just comes down to good constitutional principle. When you are dealing with overriding a law of a subordinate parliament then it is the high-level parliament that should play the role in doing that. It is not appropriate to

25 *Submission 46*, p. 1.

26 *Submission 36*, p. 4.

27 *Submission 1*, p. 1.

> have that depending upon, initially at least, an executive decision. It just gets the separation of functions wrong.[28]

3.29 Professor Williams continued:

> We are talking about two processes that are different but both involve a level of parliamentary involvement. This is a change of process, not an opening of the door to a range of matters that are just beyond the scope of this bill. I would say, though, that there is a fundamental difference when it comes to the principle involved and the way it is done and, in particular, the lead role being taken for a veto by the executive as opposed to the lead role being taken by parliament. When it comes to the development, whether by the British parliament or other parliaments around the world, this type of veto would be seen as inappropriate, given the way it operates, even though…there is an important level of parliamentary control nonetheless.[29]

Review of the self-government Acts

3.30 The committee received evidence in relation to whether a comprehensive review of the relevant self-government Acts should be undertaken prior to any legislative changes such as those proposed by the Bill. Most of this evidence related to a review of the ACT Act and issues associated with the ACT's right to full autonomy.

3.31 In this regard, the Canberra Liberals called for a wide-ranging review of the situation in the ACT, and expressed concerns that passing the Bill in isolation might inhibit the opportunity for broader reform in the future:

> Given the history of self-government in the ACT, the view of the Canberra Liberals is that it is only rarely that the opportunity presents itself to review the ACT's enabling legislation, in effect its constitution. Any such opportunity, therefore, should not be squandered on a single-issue of an individual political party.
>
> This is impossible to achieve under the cloud of the narrow focus of the Bill in question and without the appropriate consultation of the people of the ACT and the people's representatives in the Legislative Assembly.
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> This is especially so when the Bill is proposed without due process of consultation, either with all of the Parties represented in the ACT Legislative Assembly or, more broadly, the people of Canberra.
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> Any reforms of the ACT's 'constitution' should be developed and proposed as a package that has the backing of the ACT community through all of its

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28 *Committee Hansard*, 16 March 2011, p. 33.

29 *Committee Hansard*, 16 March 2011, p. 34. Professor Williams also noted that the ACT 'would still be subject to a far more stringent level of federal oversight than is the case for any state jurisdiction in Australia' because of the combination of section 122 and the fact that the ACT Act restricts the ACT Legislative Assembly from legislating in a number of areas in order to protect Commonwealth interests: *Committee Hansard*, 16 March 2011, p. 31.

> political representatives in the ACT Legislative Assembly, and the community at large.[30]

3.32 At the first public hearing, Mr Zed Seselja MLA, Leader of the Opposition in the ACT Legislative Assembly, reiterated the need for community consultation and deliberation, so that any changes occur after 'genuine consultation with the community' rather than 'one amendment at a time'.[31]

3.33 The Law Council also recommended an examination of the constitutional status of the ACT.[32]

3.34 Professor George Williams favoured the idea of a holistic approach to constitutional reform, but in the absence of any likely review process, advocated passage of the Bill as an appropriate option:

> Yes, it should be done holistically. I would simply say at the moment that there is no such holistic process on the books. Successive governments have neglected their responsibilities in these areas, as looking after matters of self-government for the ACT. If such a process were to begin, I think it would be appropriate to put this bill aside to let that process conclude. In the absence of that—and the absence of any likelihood of that, it would seem—this is the next best option; that is, to deal with the provisions, even on an individual basis, that clearly should not be on the statute book. It is better to do it that way than to achieve nothing…I would accept [a primary recommendation by the committee for a review of the ACT Act] as long as it was qualified by the fact that, should such a review not be agreed to as part of the government's response to your report, the legislation should be proceeded with. That would give an opportunity to consider that. But I would not like this change to be put off for a possibility that may never eventuate.[33]

3.35 The ACT Chief Minister informed the committee that he had frequently called for review of the ACT Act, without success. However, he argued that passage of the Bill should not be contingent upon any such review:

> We have been asking for 10 years for a full review of the self-government act. This is the first opportunity that I am aware of since self-government, not just in the last 10 years—I know it is the first opportunity in the last 10 years and I believe it is the first opportunity since self-government—where some change, a small change, might be made. So why would we wait? We also have the capacity to do more than one thing at a time. This parliament could dispose of this particular proposal, supported by the ACT government, supported I am sure by the vast majority of Canberrans. This is

30 *Submission 39*, pp 3-4.

31 *Committee Hansard*, 16 March 2011, p. 38.

32 *Submission 36*, p. 7.

33 *Committee Hansard*, 16 March 2011, p. 32.

> an issue of simple principle, and it can pass after a short debate in this place. So why would we not accept the first opportunity that has presented to amend and to improve the self-government act? Then we could proceed with a full inquiry into the continuing appropriateness of the self-government act.[34]

3.36 In this regard, the Department of Regional Australia, Regional Development and Local Government (Department) advised the committee that the Federal Government, while not supportive of a joint review of the ACT Act, 'does not object to the ACT Government undertaking a review of the Act' which is 'driven by the ACT and its residents'. The Department advised further that the Minister met with the ACT Chief Minister in November 2010, and 'agreed that the ACT Government would undertake a review of the Act and that the Australian Government would give serious consideration to the results of the review'.[35]

Objects clause

3.37 Some submitters and witnesses observed that the Bill's objects clause (clause 4) is inaccurate as it relates to the Bill's constitutional effect.

3.38 Professor George Williams pointed out that clause 4 makes further claims than are constitutionally possible, and argued that it should be amended:

> The repeal of section 35 will not remove the power of the Commonwealth to override any ACT law. Such a power is entrenched by section 122 of the Federal Constitution. This means that the object of the Bill in section 4(b) to 'ensure that the Legislative Assembly for the Australian Capital Territory has exclusive legislative authority and responsibility for making laws for the Australian Capital Territory' cannot be achieved by the Bill. This object should be deleted.[36]

3.39 Further:

> The original objects include a reference to exclusive legislative authority for the ACT and that is constitutionally not possible. Senator Brown's proposed amendment removes that with new objects but they also have one further problem in that they refer to the ability of the Governor-General not just to disallow but to amend territory legislation. That is not strictly correct. The Governor-General can disallow or request or recommend the amendment and that is a minor technical change which I think would also need to be made even to the revised objects for the purposes of accuracy.[37]

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34 *Committee Hansard*, 16 March 2011, p. 23.

35 Department of Regional Australia, Regional Development and Local Government, answers to questions on notice, p. 1, received 29 March 2011.

36 *Submission 1*, p. 1.

37 *Committee Hansard*, 16 March 2011, p. 35.

3.40 Professor Geoffrey Lindell from the University of Adelaide also commented on the inaccuracy of the objects clause:

> The most that can be said about the objective of the Bill is that it seeks to enhance the powers of self-government by freeing legislation passed by the ACT (and other Territory) legislation from disallowance by the Federal Government. Or,…it seeks to ensure that citizens in the ACT (and the other Territories mentioned in the Bill) should, "wherever possible, enjoy the same rights as other citizens in Australia to be free from Ministerial (or Executive) interference in the enactment of legislation passed by their elected representatives."[38]

3.41 Similarly, Mr Michael Moore remarked on the constitutional overreach in clause 4:

> The legislation will not provide exclusive legislative power to the ACT. The fundamental difference between the States and a Territory is the source of power. As a Territory source of power originates from the Federal Parliament[,] without changes to the Constitution the power to make legislation will always remain subject to the decisions of the Federal Parliament.[39]

Euthanasia and same-sex marriage

3.42 Certain legal experts provided comment on whether the Bill would enable the territories to more easily legislate in the areas of euthanasia and same-sex marriage, and were clear that the Bill would have no direct or relevant effect in that regard.[40]

3.43 As Professor George Williams explained:

> [I]t needs to be stated for the record that this bill will not allow any laws to be made about euthanasia by the ACT Legislative Assembly, and of course this bill does not in any way deal with section 23 of the self-government act that precludes that. Secondly, this bill will not affect the current power of the territory assembly to make laws on the topic of same-sex marriage should they so wish. That is a current power that the assembly has. It is not prevented by section 51 of the Constitution, which provides for concurrent powers with the states and territories. That is a power that could be exercised, of course subject to disallowance or inconsistency or the like, by the territories or the states if they wished to do so. This bill would not alter that.[41]

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38 *Submission 65, Supplementary Submission*, p. 1.

39 *Submission 3*, p. 2.

40 Professor George Williams, *Committee Hansard*, 16 March 2011, p. 31; Law Council of Australia, *Submission 36*, p. 6 (in relation to euthanasia); Castan Centre for Human Rights Law, *Submission 45*, p. 1; Professor John Williams, *Submission 52*, pp 2-4.

41 *Committee Hansard*, 16 March 2011, p. 31.

3.44 Professor John Williams from the University of Adelaide also argued that the Bill would not impact on the ability of the territories to legislate in relation to euthanasia and same-sex marriage:

> The capacity of the self-governing territories to pass legislation on euthanasia is limited by previous amendments to their self-government acts.
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> …
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> Senator Brown's [Bill] does not deal directly, or by implication, with the Commonwealth *Marriage Act 1961*. The legislative capacity of the Territory and State parliaments to legislate on marriage remains the same and is subject to the operation of the current Commonwealth legislation on the topic.
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> …
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> Whatever the fate of the…Bill it remains the case that the Commonwealth Parliament will retain control over Territorian legislative initiatives that may be seen to impact adversely upon the Australian community. Arguably this is where such authority should solely be placed and…the repeal [of] section 35 of the *Australian Capital Territory (Self-Government) Act 1988* and its equivalents is in keeping with the developments in parliamentary accountability.[42]

3.45 In relation to the issue of same-sex marriage in the ACT, the Castan Centre of Human Rights Law submitted:

> [T]he Bill would facilitate the passage of such legislation in the ACT if the ACT legislature wished to pass it, as such legislation would be shielded from federal ministerial override (though it would not be shielded from federal legislative override). We submit however that this concern is irrelevant. The fact is that passage of the Bill will shield *all* ACT legislation from executive overrides. If the ACT was to 'abuse' that power and 'go mad' (to paraphrase A.V. Dicey), the federal legislature could override resulting legislation unless one of its houses also 'went mad'.[43]

Committee view

Overriding support for the Bill

3.46 The committee notes that many submitters and witnesses expressed their ardent support for the Bill (as proposed to be amended) and its broad objectives. The committee shares the view that the Bill represents a positive enhancement of the democratic rights of citizens in the self-governing territories.

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42 *Submission 52*, pp 2-4.

43 *Submission 45*, p. 1.

Australian Capital Territory and Northern Territory

3.47 The vast majority of evidence received during the course of the inquiry related to the circumstances of the ACT and the NT. The committee agrees with the sentiment of many submitters and witnesses that the legislative assemblies in those territories have demonstrated a high level of maturity and competence over many years.

3.48 The Bill's proposed removal of the anachronistic features in sections 35 and 9, respectively, of the ACT and NT self-government Acts would be a significant step forward in their constitutional history, demonstrating that the Commonwealth genuinely respects the delegation of lawmaking powers that it made when it granted self-government. At the same time, as long as the ACT and the NT continue to be territories—and the committee notes that there is little possibility that the ACT is able to become a state because it includes the seat of government[44]—the Commonwealth would continue to have overarching power over them pursuant to section 122 of the Constitution.

3.49 As a matter of basic principle, therefore, the committee considers that the power of the federal executive to override legislation in the ACT and the NT is inappropriate and unwarranted. The committee therefore strongly supports the Bill's objectives in removing that power in the ACT and the NT, and replacing it with a parliamentary process that is more in keeping with sound democratic practice.

Norfolk Island

3.50 In the case of Norfolk Island, however, the committee is reluctant to support any changes to the NI Act without further evidence demonstrating such a need. Only two substantive submissions specifically considered the situation on Norfolk Island, and each provided an opposing viewpoint.[45] Neither the Norfolk Island Chief Minister nor the Speaker of the Norfolk Island Legislative Assembly made submissions to the inquiry, despite being specifically invited by the committee to do so.

3.51 The committee is also of the view that Norfolk Island may be distinguished from the ACT and the NT in a number of ways. For example, Norfolk Island's population—of approximately 2100 people—is on a very different scale to that of the ACT and NT. The committee is also mindful of Norfolk Island's recent history of legislation, with six bills having been refused assent since 2003 by either the

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44 Professor George Williams advised the committee that 'it seems reasonably likely from High Court dicta that the ACT cannot become a state. It does not lie within the power of its population to petition the Commonwealth to achieve that status unless a federal referendum were held to allow that': *Committee Hansard*, 16 March 2011, p. 33.

45 Mr Peter Maywald, a former Secretary to the Norfolk Island Government (*Submission 31*) supported the Bill in relation to Norfolk Island; while former senator Dr Karin Sowada, on behalf of Anglican Deaconess Ministries Limited (*Submission 38*), opposed the Bill.

Governor-General or the Administrator,[46] coupled with apparent significant and ongoing Commonwealth involvement in legislative and assent processes.[47]

3.52 The committee also notes that the Federal Government's approach in the recent *Territories Law Reform Act 2010* was weighted towards greater Commonwealth control over affairs in Norfolk Island, and the committee considers that it would be counterintuitive for the Federal Parliament now to take a different course.

3.53 Finally, the current financial crisis facing the Norfolk Island Government indicates to the committee that the timing is inopportune for further amendment of the island's 'constitution' so soon after it has undergone the large-scale amendments made by the *Territories Law Reform Act 2010*. The committee therefore concludes, on the basis of the evidence before it in relation to Norfolk Island, that any changes to the *Norfolk Island Act 1979* should not be supported at this time.

Comprehensive constitutional review

3.54 As a general principle, and despite its expression of strong support for the Bill's objectives in relation to the ACT and the NT, the committee does not consider that piecemeal amendments represent good legislative practice. There may be certain flow-on effects arising from such amendments which have not been given due consideration, or which are not yet known; and these may result in legislative and practical inconsistencies that are not desirable. A more thorough approach would have ensured that no unintended consequences arise from implementation of the Bill, and that any necessary consequential amendments could be made.

3.55 Further, an approach which fails to look at the broad range of issues affecting the autonomy of the ACT and the NT may not be the most appropriate way of addressing outstanding self-determination matters in those territories, and may not ultimately represent the most considered solution. The committee believes that a systematic and holistic review of self-government arrangements in the ACT and the NT holds merit, and would help to address some of the specific issues raised during this inquiry.

Australian Capital Territory

3.56 The prospects for wide-ranging review of the ACT Act, in particular, were discussed at length during the committee's inquiry. The ACT Chief Minister expressed his desire for a review of self-government arrangements in the ACT to examine

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46 By way of contrast, and as noted in Chapter 2, the Administrator of the NT has similar powers to withhold assent from bills or recommend amendments (under section 7 of the NT Act), or to reserve bills for the Governor-General's pleasure (section 8) but it does not appear that these powers have ever been used.

47 See Department of Regional Australia, Regional Development and Local Government, answers to questions on notice, received 29 March 2011.

broader issues than those encapsulated by the Bill. For example, he called for an amendment to section 8 of the ACT Act to permit the ACT Legislative Assembly to determine the number of its members.[48] The Canberra Liberals also strongly supported a process of consultation and review.

3.57 In this context, the committee notes that there have already been two joint Commonwealth-ACT reviews of the ACT Act—in 1993 and in 1997-1998. The 1993 review led to the introduction of the Arts, Environment and Territories Legislation Amendment Bill 1993 by the then Labor Government. That bill proposed, among other things, to provide the ACT Legislative Assembly with the power to decide the number of its MLAs. However, the committee understands that provision was omitted during consideration by the Senate.

3.58 A second Commonwealth-ACT review—the Pettit Review—was conducted from November 1997 until April 1998.[49] It led to a four-year process in the ACT Legislative Assembly, which included the setting up of a select committee. In 1999, that select committee recommended a detailed review of the ACT Act.[50] In December 2001, the ACT Legislative Assembly Standing Committee on Legal Affairs began a further inquiry into the number of ACT MLAs, and reported in June 2002.[51]

3.59 During the current inquiry, a departmental officer informed the committee that the Federal Government has advised the ACT Government that a review of the ACT Act could be undertaken by the ACT Government of its own volition. The Department provided information to the committee which suggests that the Department and, indeed, the Minister would welcome any advice relating to the results of a review undertaken by the ACT Government. The committee understands that such results would be given due consideration.[52] Noting the strong desire for a comprehensive review in the ACT and the agreement between the ACT Chief

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48 *Committee Hansard*, 16 March 2011, p. 23. However, the committee notes in this regard that, while the Commonwealth may change the number of members of the ACT Legislative Assembly, this can only occur if a motion to that effect has been passed by the Legislative Assembly itself: ACT Act, subsection 8(3). It does not appear that this provision has ever been triggered. A notice of motion was given by the ACT Chief Minister, Mr Stanhope, on 25 September 2002 for the number of members to be increased to 25, but the motion was not moved, and lapsed at the calling of the following ACT election.

49 P. Pettit, T. Keady and B. Blick, *Review of the Governance of the Australian Capital Territory* [Pettit Review], Chief Minister's Department, Canberra, April 1998.

50 Legislative Assembly for the Australian Capital Territory, *Report of the Select Committee on the Report of the Review of the Governance*, June 1999, p. 7.

51 For a summary of the various review processes that have taken place in the ACT, see Mark McRae, ed., *Companion to the Standing Orders of the Legislative Assembly for the Australian Capital Territory*, ACT Legislative Assembly, Canberra, 2009, pp 47-48.

52 *Committee Hansard*, 21 March 2011, p. 4; see also Department of Regional Australia, Regional Development and Local Government, answers to questions on notice, received 29 March 2011.

Minister and the Minister in November 2010, the committee strongly encourages the ACT Government to commence such a review.

Northern Territory

3.60 In the Northern Territory, the move towards statehood and, in particular, the proposed Constitutional Convention to be held later this year, make the process of review somewhat different than for the ACT. As was noted during this inquiry, the population of the NT is now greater than that of some of the original states in 1901[53] and, given that the NT also constitutes some 10 per cent of the land mass of continental Australia, the committee considers that a move towards statehood makes good sense. Of course, statehood would ultimately remove the NT from the purview of section 122 of the Constitution.

3.61 The committee places on record its strong support for statehood in the NT, and encourages the NT Government and the NT Legislative Assembly to pursue initiatives for progression towards statehood as soon as practicable. The committee would also welcome any opportunity to work cooperatively with the NT Legislative Assembly Standing Committee on Legal and Constitutional Affairs towards achieving that goal.

Amendments to the Bill

3.62 Notwithstanding its support for the Bill's objectives in relation to the ACT and the NT, the committee considers that some amendments are necessary to address certain concerns it has with respect to the Bill as currently drafted.

Objects clause

3.63 Specifically, the committee notes evidence suggesting that clause 4 of the Bill, as well as the proposed amendments to clause 4, contain a significant misstatement of the law in providing that one of the objects of the Bill is to ensure that the legislative assemblies of the territories have 'exclusive legislative authority and responsibility for making laws' for their respective territory.

3.64 Although the objects clause does not have any impact on the actual amendments to be effected by the Bill, the committee is of the view that it should be as accurate as possible. By virtue of section 122 of the Constitution, the

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53 Professor George Williams, *Committee Hansard*, 16 March 2011, pp 32-33. In September 2010, the population of the NT was estimated to be 230,200; in 1901, Western Australia and Tasmania had populations of 184,124 and 172,475 respectively (Australian Bureau of Statistics, *3101.0 Australian Demographic Statistics*, September 2010, http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0; *00 1901 Australian Snapshot. Table 1. 1901 Population Counts for States*, 2001, http://www.abs.gov.au/websitedbs/D3110124.NSF/24e5997b9bf2ef35ca2567fb00299c59/c4abd1fac53e3df5ca256bd8001883ec!OpenDocument#Table%201.%201901%20Population%20Counts%20f.

Commonwealth has overriding responsibility for the territories, and the Bill will not change this situation. The committee believes that amendments are necessary to remove any statement about legislative authority from clause 4, and to ensure that the objects clause simply refers—accurately—to the effect of the amendments it is making. The committee notes in this context that Senator Brown has signalled his intention to amend the objects clause.[54]

3.65 Clause 4 as currently drafted (and as proposed to be amended) also suggests that the Governor-General can amend any enactment of the territory legislatures, in addition to his or her power to disallow an enactment. In fact, the current provisions give the Governor-General a power to *recommend* amendments, either to the Legislative Assembly for the ACT or to the administrator for the NT (and Norfolk Island). Again, the committee recommends that this inaccuracy be addressed prior to the Bill proceeding.

Recommendation 1

3.66 Notwithstanding the view expressed in paragraph 3.55 of this report, the committee recommends that the Senate pass the Bill (as proposed to be amended), as it pertains to the *Australian Capital Territory (Self-Government) Act 1988* and the *Northern Territory (Self-Government) Act* 1978, subject to:

- **removal of references in clause 4 to providing the relevant territory legislatures with 'exclusive legislative authority and responsibility for making laws'; and**
- **amendment of clause 4 to more accurately reflect the current power of the Governor-General to recommend amendments to territory laws.**

Recommendation 2

3.67 The committee recommends that the proposed amendments to the *Norfolk Island Act 1979* with respect to removing the Governor-General's power to disallow Norfolk Island legislation should not proceed until further evidence is provided that clearly supports a need for change.

Senator Trish Crossin

Chair

54 *Committee Hansard*, 16 March 2011, p. 17.