

ADDITIONAL COMMENTS BY SENATOR MICHAEL FORSHAW AND SENATOR STEPHEN HUTCHINS

Introduction

1.1 This Bill should not be passed in its current form. It is flawed. It will not achieve its stated objects. If enacted, this Bill will produce disparities between the legislation governing each of the territories and with the Commonwealth and the States.

1.2 The Bill is short comprising only four clauses. The original Bill proposed by Senator Brown only related to the Australian Capital Territory. Amendments have since been proposed that would extend the Bill's operation to the Northern Territory and Norfolk Island.

1.3 It has been argued by those supporting the Bill that it is a simple amendment to the self government legislation applying to the territories that will remove the current power of the Governor General to disallow or amend any Act passed by the territory legislatures.

1.4 According to the Hon Paul Henderson, Chief Minister of the Northern Territory, '(t)his Bill is about restoring in part democracy to the Northern Territory through the elected Parliament' and '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'.¹

1.5 Similarly, Mr Stanhope, Chief Minister Australian Capital Territory stated that the Bill will 'remove an unnecessary constraint on the democratic rights of the people of the ACT' as they are '...not being accorded the same rights to the same extent and to the same level as other Australians'.²

1.6 However this is not a simple issue. This Bill will not simplify the current constitutional arrangements applicable to the territories. Nor will it achieve the claimed purposes referred to in the Chief Ministers' statements. Rather, it will produce anomalies between the territories as the consequences on each are not consistent.

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

2 *Committee Hansard*, 16 March 2011, pp 17 & 19.

The Bill

1.7 The Bill seeks to change the current constitutional arrangements that exist between the Commonwealth and the Territories which were the subject of detailed debate and consideration when self government was originally extended to the territories. Any such changes should therefore also be subject to proper consideration of all of the consequences.

1.8 In particular such changes should consider the relevance of, and the impact on, other sections of the legislation governing each territory. That has been a major failure in the drafting and promotion of this Bill and its subsequent consideration by the Committee.

Northern Territory

1.9 The Bill proposes to repeal Section 9 of the *Northern Territory (Self Government) Act 1978* (NT Act). Section 9 states:

9 Disallowance of enactments

(1) Subject to this section, the Governor-General may, within 6 months after the Administrator's assent to a proposed law, disallow the law or part of the law.

(2) The Governor-General may, within 6 months after the Administrator's assent to a proposed law, recommend to the Administrator any amendments of the laws of the Territory that the Governor-General considers to be desirable as a result of his or her consideration of the law.

(3) Where, as a result of his or her consideration of a law, the Governor-General so recommends any amendments of the laws of the Territory, the time within which the Governor-General may disallow the law, or a part of the law, is extended until the expiration of 6 months after the date of the Governor-General's recommendation.

(4) Upon publication of notice of the disallowance of a law, or part of a law, in the *Government Gazette* of the Territory, the disallowance has, subject to subsection (5), the same effect as a repeal of the law or part of the law.

(5) If a provision of a disallowed law, or a provision of a disallowed part of a law, amended or repealed a law in force immediately before the commencement of that provision, the disallowance revives the previous law from the date of publication of the notice of disallowance as if the disallowed provision had not been made.

1.10 What is significant however is that laws passed by the Northern Territory Assembly are subject to the assent of the Administrator of the NT or the Governor-General pursuant to the provisions of Section 6 (Legislative power) and Section 7 (Assent to proposed laws) and Section 8 (Signification of pleasure on proposed law reserved):

6 Legislative power

Subject to this Act, the Legislative Assembly has power, with the assent of the Administrator or the Governor-General, as provided by this Act, to make laws for the peace, order and good government of the Territory.

7 Assent to proposed laws

(1) Every proposed law passed by the Legislative Assembly shall be presented to the Administrator for assent.

(2) Upon the presentation of a proposed law to the Administrator for assent, the Administrator shall, subject to this section, declare:

- (a) in the case of a proposed law making provision only for or in relation to a matter specified under section 35:
 - (i) that he or she assents to the proposed law; or
 - (ii) that he or she withholds assent to the proposed law; or
- (b) in any other case:
 - (i) that he or she assents to the proposed law;
 - (ii) that he or she withholds assent to the proposed law; or
 - (iii) that he or she reserves the proposed law for the Governor-General's pleasure.

(3) The Administrator may return the proposed law to the Legislative Assembly with amendments that he or she recommends.

(4) The Legislative Assembly shall consider the amendments recommended by the Administrator and the proposed law, with those or any other amendments or without amendments, may be again presented to the Administrator for assent, and subsection (2) applies accordingly.

8 Signification of pleasure on proposed law reserved

(1) Where the Administrator reserves a proposed law for the Governor-General's pleasure, the Governor-General shall, subject to this section, declare:

- (a) that he or she assents to the proposed law;
- (b) that he or she withholds assent to the proposed law; or
- (c) that he or she withholds assent to part of the proposed law and assents to the remainder of the proposed law.

(2) The Governor-General may return the proposed law to the Administrator with amendments that he or she recommends.

(3) The Legislative Assembly shall consider the amendments recommended by the Governor-General and the proposed law, with those or any other amendments or without amendments, may be again presented to the Administrator for assent, and subsection 7(2) applies accordingly.

(4) Where the Governor-General makes a declaration in respect of a proposed law in accordance with subsection (1), the Administrator shall, as

soon as practicable after the declaration is made, cause to be published in the *Government Gazette* of the Territory a notice of the declaration.

(5) The assent of the Governor-General to a proposed law or part of a proposed law is of no effect until notification of the Governor-General's declaration in respect of the proposed law is published in the *Government Gazette* of the Territory.

1.11 These sections are **not** repealed by this Bill.

1.12 Hence the current powers of the Administrator and the Governor-General to withhold assent to, or to recommend changes to, a proposed law of the Northern Territory will remain even if this Bill is passed.

1.13 It follows that the argument in support of the Bill, and as defined in the proposed Objects of the Bill, namely that it will remove the Governor-General's power to disallow or amend any enactment of the Legislative Assembly of the Northern Territory is clearly wrong. That power will remain as provided in Sections 6, 7 and 8.

1.14 Senator Forshaw raised this anomaly with the departmental witnesses during the Inquiry:

Senator FORSHAW—...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 of 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.³

3 *Committee Hansard*, 21 March 2011, p. 6.

Australian Capital Territory

1.15 The Bill proposes to repeal Section 35 of the *Australian Capital Territory (Self Government) Act 1978* (ACT Act). Section 35 states:

35 Disallowance of enactments

(1) In this section:

enactment includes a part of an enactment.

(2) Subject to this section, the Governor-General may, by legislative instrument, disallow an enactment within 6 months after it is made.

(4) The Governor-General may, within 6 months after an enactment is made, recommend to the Assembly any amendments of the enactment, or of any other enactment, that the Governor-General considers to be desirable as a result of considering the enactment.

(5) Where the Governor-General so recommends any amendments, the time within which the Governor-General may disallow the enactment is extended for 6 months after the date of the recommendation.

(6) Upon publication in the *Commonwealth Gazette* of notice of the disallowance of an enactment, the disallowance has, subject to subsection (7), the same effect as a repeal of the enactment.

(7) If a provision of a disallowed enactment amended or repealed an enactment that was in force immediately before the commencement of that provision, the disallowance revives the previous enactment from the date of publication of the notice of disallowance as if the disallowed provision had not been made.

(8) For the purposes of this section, an enactment shall be taken to be made when it is notified in the *Territory Gazette* under this Part.

1.16 Unlike the Northern Territory (and also the Commonwealth and the States) bills passed by the ACT are not subject to a process of executive or royal assent. Rather they become law following notification in the ACT Legislation Register.

1.17 If passed this Bill will remove the power of disallowance by the Governor-General for laws made by the ACT Legislative Assembly.

1.18 This will produce the illogical, and unintended, situation where the Governor-General will continue to have the power to disallow proposed laws of the Northern Territory but no longer of the Australian Capital Territory.

Norfolk Island

1.19 The Bill proposes to repeal Section 23 of the *Norfolk Island Act 1979* (NI Act). That section is virtually identical to Clause 9 in the NT Act.

1.20 The Norfolk Island Act also provides for an Administrator in similar terms, and with similar disallowance powers, to the NT Act. In particular Section 21 (Presentation of proposed laws) and Section 22 (Signification of pleasure on proposed

law reserved) provide for the Administrator to withhold assent to a proposed law or refer it to the Governor-General.

1.21 These, and other relevant sections (eg Section 27 – Legislative powers of the Governor-General), are **not** repealed or amended by this Bill. The outcome therefore will be identical to that in the Northern Territory as detailed above.

1.22 We note that the majority report does **not** support, without further evidence, the proposed amendment in the Bill with respect to Norfolk Island.

Commonwealth and States

1.23 If the Bill is passed the situation becomes even more anomalous because bills passed by the Commonwealth Parliament require royal assent and, in accordance with the Australian Constitution, are subject to disallowance by the Governor General or the Queen.

1.24 Sections 58, 59 and 60 of the Australian Constitution state:

58 Royal assent to Bills

When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.

Recommendations by the Governor-General

The Governor-General may return to the house in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation.

59 Disallowance by the Queen

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.

60 Signification of Queen's pleasure on Bills reserved

A proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of the Parliament, or by Proclamation, that it has received the Queen's assent.

1.25 Whilst it is now accepted that the Queen, or her representative the Governor-General, would not refuse assent, or would not act to disallow a law, the provisions nevertheless continue to exist. They can only be removed by a successful referendum to amend the Constitution. They cannot be ignored when considering this Bill.

1.26 The situation in each of the States is similar where the State Governor exercises the executive powers.

1.27 If this Bill is passed then the ACT Legislative Assembly will not, unlike the Commonwealth, States and the other two territories, be subject to any legislated or constitutionally prescribed executive authority.

1.28 It is not surprising that this Bill is technically flawed. Both this bill, and a previous bill proposed by Senator Brown in 2006, originally applied only to the ACT. They are clearly a reaction to the Howard Government's decision to use Section 35 of the ACT Act to disallow the ACT Civil Union's Bill. The proposed amendments to include the NT and Norfolk Island appear to have been an afterthought without any consideration of the consequences detailed above.

1.29 We note the majority committee's comments at 3.54 and 3.55:

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.

1.30 We agree completely with these comments. We therefore find it disappointing that the majority report recommends that the Senate pass the Bill with respect to the ACT and the Northern Territory 'notwithstanding the view expressed in paragraph 3.55'. Such a conclusion is inconsistent.

1.31 We believe that any changes to the territories self-government legislation should be based on a 'systematic and holistic review of self-government arrangements in the ACT and the NT' as suggested in the majority report and supported by many witnesses during the inquiry.

1.32 The Bill should be either withdrawn or not passed by the Senate.

Other issues

1.33 A range of related issues were canvassed during the inquiry. We make the following brief comments.

Section 122 of the Constitution

1.34 It has been argued in support of the Bill that the repeal of the proposed sections will not affect the Federal Parliament's constitutional power pursuant to Section 122 of the Constitution to override Territory laws.

1.35 Whilst that is correct it should be noted that currently any decision by the Governor General to disallow a proposed law of a territory may be in turn be disallowed by the Federal Parliament.

Self-government for the territories

1.36 During the inquiry the NT Chief Minister expressed support for the Bill as it would be a '...small but significant step towards statehood.'⁴

1.37 This is not the expressed intention of the Bill. Any move toward statehood should be approached in a serious and considered manner not piecemeal nor as a reaction to a particular decision.

Do the citizens of the ACT and NT have less democratic rights than other Australians?

1.38 The territory Chief Ministers and other representatives argued that their citizens have less democratic rights than other Australians. We disagree. The differences between the powers of the respective legislatures and the executive are functions of our system of government.

1.39 The territories are not states. The ACT, as the seat of the national capital, can probably never become one.

1.40 It is not uncommon for the different levels of government, state, territory and local to complain that their decisions, and the views of their constituents, have been overridden by decisions of ministers. Indeed it is an inherent feature of the different levels of government within our democracy.

Recommendation

1.41 We recommend that the Bill not be passed.

Senator Michael Forshaw

Senator Stephen Hutchins