The Senate

Legal and Constitutional Affairs Legislation Committee

Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010, together with the amendments on sheet no. 7031, circulated by the Australian Greens

May 2011

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ABBREVIATIONS

ACT	Australian Capital Territory
ACT Act	*Australian Capital Territory (Self-Government) Act 1988* (Cth)
ACT Legislative Assembly	Legislative Assembly for the Australian Capital Territory
NI Act	*Norfolk Island Act 1979*
NT	Northern Territory
NT Act	*Northern Territory (Self-Government) Act 1978* (Cth)
NT Legislative Assembly	Legislative Assembly of the Northern Territory

RECOMMENDATIONS

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.

CHAPTER 1

INTRODUCTION

Background

1.1 On 2 March 2011, the Senate referred the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 (Bill)—together with proposed amendments applying to the Northern Territory (NT) and Norfolk Island—to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 21 March 2011.[1] On 21 March 2011, the Senate agreed to extend the reporting date until 28 March 2011.[2] On 25 March 2011, the Senate again extended the reporting date until 4 May 2011.[3]

1.2 The Bill was introduced into the Senate by Senator Bob Brown on 29 September 2010. The stated objects of the Bill are to:

- remove the Governor-General's power under the *Australian Capital Territory (Self-Government) Act 1988* to disallow or amend any Act of the Legislative Assembly for the Australian Capital Territory (ACT Legislative Assembly); and
- ensure that the ACT Legislative Assembly has exclusive legislative authority and responsibility for making laws for the Australian Capital Territory (ACT).[4]

1.3 Proposed amendments by Senator Brown were circulated on 1 March 2011. These amendments would make similar changes to the *Northern Territory (Self-Government) Act 1978* and the *Norfolk Island Act 1979*.

1.4 Senator Brown introduced a similar bill into Parliament in 2006, entitled the Australian Capital Territory (Self-Government) Amendment (Disallowance Power of the Commonwealth) Bill 2006.[5] That bill was a response to the Governor-General's disallowance of the *Civil Unions Act 2006* (ACT): it would have retained the Governor-General's power to recommend amendments of ACT laws, but would have repealed his or her power to disallow ACT laws. The bill was debated in the Senate on

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1 *Journals of the Senate*, 2 March 2011, p. 642.

2 *Journals of the Senate*, 21 March 2011, p. 699.

3 *Journals of the Senate*, 25 March 2011, p. 790.

4 Australian Capital Territory (Self Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010, clause 4.

5 *Journals of the Senate*, 19 June 2006, pp 2285–6.

14 September 2006,[6] but ultimately lapsed. Another similar bill, the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2009, was introduced by Senator Brown on 26 November 2009,[7] but lapsed in 2010.

Conduct of inquiry

1.5 Details of the inquiry, the Bill and associated documents were placed on the committee's website. The committee also wrote to 47 organisations and individuals inviting submissions. Submissions were invited by 10 March 2011, but continued to be accepted until the reporting date for the inquiry.

1.6 The committee received 209 submissions, which are listed at Appendix 1. Submissions were placed on the committee's website.

1.7 The committee held public hearings in Canberra on 16 and 21 March 2011. A list of witnesses who appeared at the hearing is at Appendix 2, and copies of the *Hansard* transcript are available online at http://www.aph.gov.au/hansard.

Acknowledgement

1.8 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

Note on references

1.9 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee *Hansard* are to proof *Hansard*: page numbers may vary between the proof and the official *Hansard* transcript.

6 *Senate Hansard*, 14 September 2006, pp 90–121.

7 *Journals of the Senate*, 26 November 2009, p. 2891.

CHAPTER 2

OVERVIEW OF THE BILL AND EXISTING TERRITORY POWERS

2.1 Chapter 2 provides an outline of the provisions of the Bill and the proposed amendments, as well as background information on the existing self-government legislation in the Northern Territory (passed in 1978), Norfolk Island (passed in 1979) and the Australian Capital Territory (passed in 1988).

Provisions of the Bill as proposed to be amended

2.2 As originally introduced on 29 September 2010, the Bill would have affected only the ACT. However, proposed amendments circulated on 1 March 2011 (but not yet introduced into the Senate) would change the title of the Bill to the Territories Legislation (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010, and would extend the operation of the Bill to the NT and Norfolk Island.

2.3 For the purposes of this report—given the wide public discussion of the Bill as affecting all three territories, and for convenience—the Bill is treated as if these amendments have already been incorporated.

Objects clause

2.4 The main part of the Bill contains an objects clause which states that the object of the Bill is to:

- remove the Governor-General's power to 'disallow or amend' any Act of the Legislative Assembly of each of the three territories; and
- ensure that the Legislative Assembly of each of the three territories has 'exclusive legislative authority and responsibility for making laws' for that territory.[1]

Repeals

2.5 Schedules 1, 2 and 3 of the Bill respectively would repeal one provision from the self-government Act for each of the three territories, namely:

- section 35 of the *Australian Capital Territory (Self-Government) Act 1988* (ACT Act);
- section 9 of the *Northern Territory (Self-Government) Act 1978* (NT Act); and
- section 23 of the *Norfolk Island Act 1979* (NI Act).

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1 Australian Capital Territory (Self Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010, clause 4, as if amended by the circulated amendments.

Provisions to be repealed by the Bill

2.6 The three sections in each of the self-government Acts that would be repealed by the Bill provide as follows:

- the Governor-General may disallow a law or part of a law made by the relevant Legislative Assembly within six months after it is made;
- the Governor-General may recommend to the Administrator of the NT or Norfolk Island, or to the ACT Legislative Assembly, any amendments of a law (or of another law affected by that law) within six months of the passing of the first law;
- if amendments are recommended, the time within which the law may be disallowed is extended by six months from that date;
- once the disallowance is published on the Federal Register of Legislative Instruments,[2] the law is considered to be repealed, and any law that was amended or repealed by the disallowed law comes back into force.

2.7 The constitutional convention surrounding the power of the Governor-General to disallow territory laws is the same as applies to other exercises of power by the Governor-General: the assumption is that 'all executive acts will be performed by the Governor-General by and with the advice of the Federal Executive Council'. In other words:

> The functional relations between the institutions that comprise the executive government depend on the proposition that the formal repositories of executive powers, generally the Governor-General and the Executive Council, will carry out those functions under the de facto control of the current ministers. Ministers 'advise' the Governor-General, either collectively through the Cabinet or (on more routine and less sensitive matters) individually.[3]

2.8 The tabling and disallowance provisions of the *Legislative Instruments Act 2003* (Cth) provide that any instrument of disallowance by the Governor-General can be overturned by either House of the Federal Parliament within 15 days after the disallowance is made.[4]

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2 Although the three provisions to be removed by the Bill require a disallowance to be gazetted before it comes into force, section 56 of the *Legislative Instruments Act 2003* (Cth) makes registration on the Federal Register of Legislative Instruments sufficient to fulfil the gazettal requirements.

3 *Halsbury's Laws of Australia*, Title 90—Constitutional Law, IV The Executive Governments, (2) Federal Government, (C) Ministers, Cabinet and the Executive Council, [90-2445] Responsible government.

4 *Legislative Instruments Act 2003* (Cth), sections 38 and 42. The Legislative Instruments Act commenced on 1 January 2005.

Legislative and governmental structure in territories

2.9 Despite certain similarities, each of the three territories has a different legislative and governmental structure under its respective self-government Act. There are also a number of 'reserve powers' that the Commonwealth retains in each territory.

Australian Capital Territory

2.10 In the ACT, bills passed by the ACT Legislative Assembly are not subject to any assent procedure (as in most jurisdictions), but become law once they are passed by the Legislative Assembly and notified in the ACT Legislation Register.[5] This process applies because of the absence of an administrator (as is usual in territories), or a governor (as is usual in the states), and appears to be based on the ACT's status as the seat of government.[6]

2.11 The ACT Act imposes certain constraints on the powers of the ACT Legislative Assembly. For example:

- the number of members of the Legislative Assembly is set at 17 and can be changed if the Legislative Assembly passes a resolution to that effect, but any change must be done by way of associated Commonwealth regulations;[7]
- the Governor-General may dissolve the Legislative Assembly in certain circumstances;[8] and
- the Legislative Assembly does not have the power to pass laws in relation to certain matters, including euthanasia and matters relating to the protection of Commonwealth interests in the ACT.[9]

2.12 There is also a difference between the ACT, on the one hand, and the NT and Norfolk Island on the other, in that the Governor-General has power under Part V of

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5 ACT Act, section 25; and *Legislation Act 2001* (ACT), section 28.

6 A 1975 report on self-government in the ACT observed that 'The ultimate source of authority in the A.C.T. must remain the Australian Parliament and the Assembly will exercise a delegated power subject at all times to the supremacy of Parliament...Ordinances of the Assembly will not, therefore, require the assent of the Governor-General to become law once Parliament has delegated the power to make laws': Joint Committee on the Australian Capital Territory, *Self-government and public finance in the Australian Capital Territory*, March 1975, p. 42.

7 ACT Act, subsections 8(2) and (3).

8 ACT Act, section 16.

9 ACT Act, section 23. These matters include the provision by the Australian Federal Police of police services in relation to the ACT; the raising or maintaining of any naval, military or air force; the coining of money' and classification of materials for the purposes of censorship: subsection 23(1).

the *Seat of Government (Administration) Act 1910* (Cth) to directly make ordinances for the ACT which are relevant to its status as the seat of government.[10]

Northern Territory

2.13 Unlike the ACT, an administrator exists in the NT; and the NT Administrator has significant powers with respect to legislation.

2.14 Under subsection 7(1) of the NT Act, every proposed law passed by the Legislative Assembly of the Northern Territory (NT Legislative Assembly) must be presented to the Administrator for assent. Upon presentation of a proposed law and, in the case of a law making provision only for or in relation to a matter in respect of which NT Ministers have executive authority under section 35 of the NT Act,[11] the Administrator has the power to:

- assent to the proposed law;[12] or
- withhold assent to the proposed law.[13]

2.15 With respect to proposed laws relating to matters which fall outside section 35 of the NT Act, the Administrator has the power to:

- assent to the proposed law;[14]
- withhold assent to the proposed law;[15] or
- reserve the proposed law for the Governor-General's pleasure.[16]

2.16 Subsection 7(3) of the NT Act also allows the Administrator to return proposed laws to the NT Legislative Assembly with amendments that he or she recommends.

2.17 In relation to proposed laws which have been reserved by the NT Administrator for the Governor-General's pleasure, the Governor-General has the power to assent to the law, to withhold assent to the law, or to withhold assent to part

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10 The Governor-General can make ordinances for the ACT in relation to matters such as the ACT Supreme Court, censorship, national land, and companies. Current ordinances include the National Land Ordinance 1989 (ACT), the National Memorials Ordinance 1928 (ACT), and the Reserved Laws (Administration) Ordinance 1989 (ACT). However, very few ordinances have been made for the ACT by the Governor-General since self-government began in 1989.

11 Matters in respect of which NT Ministers have executive authority under section 35 of the NT Act are specified in regulation 4 of the Northern Territory (Self-Government) Regulations 1978. Such matters include, for example: taxation (including stamp duty); police; legal aid; civil liberties; tourism; industrial safety; environment protection and conservation; water resources; public works; public health; education; and censorship.

12 NT Act, subparagraph 7(2)(a)(i).

13 NT Act, subparagraph 7(2)(a)(ii).

14 NT Act, subparagraph 7(2)(b)(i).

15 NT Act, subparagraph 7(2)(b)(ii).

16 NT Act, subparagraph 7(2)(b)(iii).

of the law while assenting to its remainder.[17] The Governor-General may also return the proposed law to the Administrator with recommended amendments.[18]

2.18 Under section 10 of the NT Act, where assent is withheld by the Administrator or the Governor-General, or where a law is disallowed by the Governor-General, the Administrator must advise the NT Legislative Assembly of that action within six sitting days after the date on which the assent was withheld or the date of the disallowance.

2.19 Similarly to the ACT, the NT is specifically prevented from making laws in relation to certain forms of euthanasia.[19]

Norfolk Island

2.20 The situation on Norfolk Island—the smallest jurisdiction in terms of population and area, but with a self-government Act twice as long as those of the ACT and the NT—appears to be more complex than in either of the other two territories.

2.21 The complex governance of Norfolk Island, through the NI Act, was summarised in 2010 in a Parliamentary Library Bills Digest as follows (prior to further significant amendments being made to the NI Act by the *Territories Law Reform Act 2010* (Cth)):

> The legislative power of the Assembly is plenary (with four defined exceptions), but the conditions attaching to assent as well as other forms of overriding legislative authority mean that the Commonwealth retains a significant influence over the laws enacted to apply in Norfolk Island. Laws about matters listed in Schedule 2 are at the heart of Norfolk Island self-government, because the Administrator assents or not to such laws on the advice of the Executive Council (the NI Government). Schedule 3 to the NI Act lists a smaller range of topics which in 1979 the Commonwealth Minister described as 'matters of particular sensitivity or national importance'. Regarding assent to Schedule 3 laws, the Administrator appears again to act on the advice of the Executive Council, but importantly is subject to over-riding instructions from the Commonwealth Minister. Where a law relates to a matter in neither Schedule 2 nor 3, the Administrator reserves the law for the attention of the Governor-General (who will act on the advice of the Commonwealth Government). The Governor-General also has the power to make ordinances for the Island and to introduce legislation into the Assembly, although apparently this power has not been exercised since 1979. Finally the Commonwealth Parliament has the power to make laws which apply in Norfolk Island, but only if a Commonwealth Act expressly says so.[20]

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17 NT Act, subsection 8(1).

18 NT Act, subsection 8(2).

19 NT Act, section 50A.

20 MA Neilsen, *Territories Law Reform Bill 2010*, Bills Digest, no. 20, 2010–11, Parliamentary Library, Canberra, 19 October 2010, p. 5, http://www.aph.gov.au/library/pubs/bd/2010-11/11bd020.pdf (footnotes omitted).

Background on existing provisions

2.22 The following section of this chapter examines the background relating to the existing provisions which are proposed to be removed by the Bill.

Australian Capital Territory (Self-Government) Act 1988

2.23 When the Australian Capital Territory (Self-Government) Bill was introduced in 1988, the then Minister stated:

> The Assembly will have the power to make laws for the peace, order and good government of the Territory. Most Ordinance law in place in the Territory will become Assembly law on commencing day. The Governor-General will, as occurs in the Northern Territory, have the power to disallow any Assembly law within six months of the law being made. Commonwealth law will prevail over Assembly law.
>
> Protections such as these are essential in the national capital. They are, of course, instruments of last resort and it is the Government's intention to resolve any potential conflict with the A.C.T. by consultation and negotiation.[21]

2.24 The Australian Democrats proposed an (unsuccessful) amendment to remove what is now section 35 of the ACT Act, in order to 'protect the rights of communities which vote to have matters determined by the people they vote for'.[22]

2.25 However, the Minister justified the disallowance power:

> The right of disallowance that is maintained here is the same right—no more and no less—as that retained in the Northern Territory. Yet here in the Australian Capital Territory there is obviously a greater imperative to keep it because…it is here that we have the ultimate constitutional responsibility. It is worth noting that this power has never been used in the Northern Territory and here, where we have an even stronger right, I would imagine that we would almost always be able to deal with these matters by consultation and negotiation. I think it is a reasonable power to retain given our constitutional responsibility.[23]

2.26 As first introduced, section 35 gave the Federal Parliament no explicit role in reviewing a disallowance by the Governor-General. However, Independent Senator Brian Harradine moved amendments so that any disallowance by the executive would be subject to further review, and potential disallowance, by either House of the Parliament:

> These amendments would enable either House of Parliament in effect to reverse the decision of the Executive Government, which then would

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21 Senator the Hon. Graham Richardson, Minister for the Arts, Sport, the Environment, Tourism and Territories, *Senate Hansard*, 7 November 1988, p. 2126.

22 Senator Jean Jenkins, *Senate Hansard*, 23 November 1988, pp 2600–01; 24 November 1988, p. 2807.

23 Senator the Hon. Graham Richardson, Minister for the Arts, Sport, the Environment, Tourism and Territories, *Senate Hansard*, 24 November 1988, p. 2807.

> enable the enactment of the Australian Capital Territory legislature to remain intact. At present, as honourable senators know, the Federal Parliament has the power to disallow ordinances made by the Executive Government in respect of the ACT. Under the provisions of the Bill the Parliament is taken out of the legislation altogether, it has no role in respect of the laws governing the Australian Capital Territory other than those listed in schedule 4 of the Bill. It is interesting that the Parliament would still retain some power of veto in respect of the matters that are contained in schedule 4. I understand that the amendment has the support of all honourable senators…[24]

2.27 This amendment was accepted by the government and the opposition as 'a safeguard for a safeguard', and it was also considered prudent to 'be more cautious than disappointed'.[25]

Northern Territory (Self-Government) Act 1978

2.28 During the parliamentary debate in 1978, the opposition moved (ultimately unsuccessful) amendments to enable parliamentary oversight of any disallowance by the Governor-General:

> As it stands, clause 9 would allow the Governor-General to disallow any law of the Northern Territory Legislative Assembly within six months without any appeal to this Parliament. Any law could be negatived. It could be completely blocked by the Governor-General without recourse to any other opinion. We have already suggested that the Administrator should refer anything he disagrees with to the Northern Territory Legislative Assembly. We believe equally that if the Governor-General intends to override a law of the elected Legislative Assembly of the Northern Territory he should have to get the concurrence of this Parliament or at least have his decision laid before the Parliament so that there is another opportunity for the Legislative Assembly to have its law approved through debate in the Houses of Parliament. It should not be left to an executive decision.[26]

2.29 The failure of the opposition's amendment meant that (until commencement of the Legislative Instruments Act in 2005), any disallowance of an NT law by the Governor-General would not have been able to be overturned by the Federal Parliament.

2.30 The power contained in section 9 of the NT Act appears never to have been used, but there were two major controversies about NT laws in the mid to late 1990s: first in relation to euthanasia (1995–97); and second about mandatory sentencing (1996–2001).

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24 Senator Brian Harradine, *Senate Hansard*, 24 November 1988, p. 2810.

25 Senator Robert Hill, also supported by Senator Bob McMullan, *Senate Hansard*, 24 November 1988, p. 2810.

26 Dr Douglas Everingham MP, *House of Representatives Hansard*, 2 June 1978, p. 3049.

NT euthanasia law

2.31 The NT Legislative Assembly passed a euthanasia law—the *Rights of the Terminally Ill Act 1995* (NT)—on 24 May 1995, and it received assent on 16 June 1995. In late 1995, the President of the NT branch of the Australian Medical Association, Dr Chris Wake, appealed to the Prime Minister to disallow the law. In February 1996, a letter outlining the Keating Government's attitude to this issue was released by the NT Voluntary Euthanasia Society. The letter, from a 'senior prime ministerial adviser', stated that health and social welfare issues fell outside the four specific areas retained for the Commonwealth under the NT Act, and that the Federal Government believed the law was 'a valid law of the NT'. Further, 'it [was] up to the people of the NT to express their views on that legislation, rather than the Commonwealth'.[27]

2.32 The time-limit for Commonwealth disallowance of the euthanasia law expired on 16 December 1995, and the law therefore commenced on 1 July 1996 without federal intervention.[28]

2.33 However, following a change of government after the 1996 election, the Federal Parliament passed the Euthanasia Laws Bill 1996 (introduced as a private member's bill by Mr Kevin Andrews MP), amending the self-government Acts of the NT, ACT and Norfolk Island to prevent their legislatures from passing euthanasia laws.[29]

2.34 On 10 October 1996, the NT Legislative Assembly unanimously voted for a Remonstrance[30] to be presented to the Federal Parliament, opposing the passage of the Andrews Bill.[31]

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27 Letter from Ms Clare Nairn, Senior Adviser, Office of the Prime Minister, to Ms Lynda Cracknell, President, Voluntary Euthanasia Society, as reported in 'Federal Govt out of death bill row', *Northern Territory News*, 15 February 1996. At this time—given the failure of the ALP amendments in 1979—the Federal Parliament had no role in reviewing any disallowance of Northern Territory laws.

28 The *Rights of the Terminally Ill Act 1995* was amended in March 1996 by the *Rights of the Terminally Ill Amendment Act 1996* (NT), before the 1995 Act commenced.

29 *Euthanasia Laws Act 1997*. This Act arose from a private member's bill that was introduced into the House of Representatives by Mr Kevin Andrews MP on 9 September 1996, and agreed to with amendments on 9 December 1996. The bill was passed by the Senate on 25 March 1997.

30 Remonstrance is a term traditionally used to signify a formal statement of grievances by a parliament to a sovereign or, in this case, by a legislative assembly to a 'superior' parliament.

31 NT Legislative Assembly, *Parliamentary Record*, No. 26, 10 October 1996. The ACT Legislative Assembly also passed a motion against the Andrews Bill, and the Norfolk Island Government 'resisted the notion' that the Federal Parliament might, on an ad-hoc basis, pass legislation which inhibited or suppressed the right of the territory governments (ACT Legislative Assembly, *Debates*, 25 September 1996, pp. 3406–17; Mr Mike King, Head of the Norfolk Island Government, in a letter cited in NT Legislative Assembly, *Parliamentary Record*, No. 26, 10 October 1996).

NT mandatory-sentencing law

2.35 In 1996, the NT Legislative Assembly passed mandatory sentencing laws which required detention of at least 28 days for juveniles aged 15 to 17 who had previously been convicted of a property offence.[32]

2.36 On 25 August 1999, Senator Bob Brown introduced the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 into the Senate. The bill explicitly referred to the external affairs power in subsection 51(xxix) of the Australian Constitution as the source of Commonwealth power to legislate in this area.[33] The bill provided:

> A law of the Commonwealth, or of a State or of a Territory must not require a court to sentence a person to imprisonment or detention for an offence committed as a child.[34]

2.37 The bill was co-sponsored by Senator the Hon. Nick Bolkus and Senator Brian Greig; and the bill, along with the broader issue of mandatory sentencing, were referred to the Senate Legal and Constitutional References Committee. That committee reported in March 2000 and concluded as follows:

> The Committee would prefer that the respective governments take action to *'put their own houses in order*' in accord with national objectives and obligations, but it is not convinced that this will occur.
>
> …
>
> The Committee does not believe that the Northern Territory and Western Australian Governments will act on their own volition to resolve the issue.
>
> The Committee therefore recommends that the Bill be passed by the Parliament.[35]

2.38 The Senate passed the bill on 15 March 2000,[36] but the bill was not passed by the House of Representatives. Senator Bob Brown introduced a similar bill on 6 September 2000.[37] On 8 February 2001, the Senate passed a motion by Senator

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32 *Juvenile Justice Act* (NT), sections 53AE–AG, as inserted by the *Juvenile Justice Amendment Act (No. 2) 1996* (NT), which received assent on 31 December 1996; other amendments at the same time inserted new sections 78A, 78B and Schedule 1 into the *Sentencing Act 1995* (NT).

33 This was on the basis that the Commonwealth is a signatory to the Convention on the Rights of the Child. The long title of the bill reads: 'A Bill for an Act to implement Australia's human rights obligations to children under Articles 37(b) and 40(4) of the Convention on the Rights of the Child'.

34 Clause 5.

35 Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, March 2000, pp 116–17.

36 The result of a division on the Second Reading was 34–30 in favour.

37 Human Rights (Mandatory Sentencing for Property Offences) Bill 2000. This bill, restored to the *Notice Paper* after the 2001 election, ultimately lapsed in 2004.

Brown calling on the Federal Government to override the NT's mandatory sentencing laws.[38]

2.39 The issue of mandatory sentencing abated after October 2001, when a newly elected NT Government passed legislation repealing mandatory sentencing of juveniles and adult property offenders.[39]

Norfolk Island Act 1979

2.40 When the Norfolk Island Bill 1979 was being debated, the then opposition—just as it had in the case of the NT—opposed the disallowance clause (ultimately unsuccessfully):

> Enshrined in [that clause] is the proposition that there is a necessity for real self-government for the people of Norfolk Island to be limited by this very extraordinary power of the Governor-General to disallow laws made by the Norfolk Island Legislative Assembly and approved by the Administrator. In a symbolic sense the Opposition finds that to be a most reprehensible provision. It is symbolic, in that it suggests a view of the type of government which should be applicable to Norfolk Island, totally different to that which the Opposition puts forward. Accordingly, in Amendment No. 1 which stands in the name of the Opposition, we urge the Senate to delete this clause.[40]

2.41 Section 23 of the *Norfolk Island Act 1979* is in identical terms to section 9 of the NT Act and, like that provision, it appears never to have been used. However, unlike the self-government Acts for the ACT and the NT, the NI Act has been subject to significant parliamentary review in recent years. This would appear to be a reflection of the serious financial and other challenges facing the Norfolk Island Government, and of the chequered progress of self-government in Norfolk Island.[41]

2.42 The *Territories Law Reform Act 2010* (Cth) (which received assent in December 2010), while not affecting section 23, provided the Commonwealth with additional powers under the NI Act, including a power for the Federal Minister to introduce legislation into the Norfolk Island Legislative Assembly, and for the Federal

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38 *Senate Hansard*, 8 February 2001, p. 21654.

39 *Juvenile Justice Amendment Act (No. 2) 2001* (NT) and *Sentencing Amendment Act (No. 3) 2001* (NT).

40 Senator John Button, *Senate Hansard*, 23 May 1979, p. 2027.

41 See, further, the 2005 report of the Joint Standing Committee on the National Capital and External Territories Inquiry into Governance on Norfolk Island, *Norfolk Island Financial Sustainability, The Challenge—Sink or Swim*, and the same inquiry's 2003 report, *Quis custodiet ipsos custodes?* The current financial crisis facing the Norfolk Island Government has been reported in articles such as: Mark Dodd, 'Labor revolt on Norfolk', *The Australian*, 3 November 2010, p. 7; Ean Higgins, 'Mutineer descendants opt for bounty', *The Australian*, 5 November 2010, p. 3; and Malcolm Brown, 'Down but not quite out in paradise', *Sydney Morning Herald*, 12 February 2011, p. 13.

Minister to give advice to the Administrator not to grant assent to a bill passed by the Legislative Assembly in relation to Schedule 2 matters.[42]

2.43 Assent to bills passed by the Norfolk Island Legislative Assembly has been withheld a number of times since 2003, including twice by the Governor-General and four times by the Administrator.[43]

2.44 Further, the Joint Standing Committee on the National Capital and External Territories made the following conclusion in its report on the Territories Law Reform Bill 2010:

> The committee is concerned about evidence received where over the past year there have been cases of bills dealing with schedule 3 and non schedule issues having been passed by the Legislative Assembly without consultation with the Commonwealth Government. In addition, there have been other cases where Commonwealth advice may have been received on proposed legislation, but not on future proposed amendments to legislation.
>
> …
>
> The committee believes that Commonwealth Government oversight of Norfolk Island legislation is necessary in ensuring that Norfolk Island legislation is consistent with Government policy, the national interest and complying with Australia's international obligations.[44]

2.45 The joint committee also observed that the items included in Schedule 2 of the NI Act have significantly grown since 1979, adding to the burden of responsibilities of the Norfolk Island Government.[45] The joint committee recommended that a review of the items contained in Schedules 2 and 3 of the NI Act should be undertaken by the

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42 *Norfolk Island Act 1979*, section 26A, and subsection 21(5) as amended in 2010.

43 The Governor-General has withheld assent in recent years for the Legislative Assembly Amendment Bill 2003 and Valuation of Land Bill 2009, while the Administrator has withheld assent for the Customs (Amendment) Bill 2005, Customs (Amendment No. 2) Bill 2005, Immigration (Amendment) Bill 2006 and Social Services (Amendment No. 2) Bill 2006 (*Norfolk Island Government Gazette*, 17 September 2004, p. 229; 28 May 2010, pp 99–100; 30 September 2005, p. 209; 6 January 2006, p. 1; 24 August 2007, pp 161–2). For a list showing ongoing Commonwealth involvement in assent processes for Norfolk Island legislation, see Answers to Questions on Notice provided by Department of Regional Australia, Regional Development and Local Government on 29 March 2011.

44 Joint Standing Committee on the National Capital and External Territories, *An advisory report on the Territories Law Reform Bill 2010*, May 2010, p. 29.

45 Schedule 2 of the NI Act lists matters over which the Norfolk Island Government has both legislative and executive authority. (Schedule 3 lists matters in respect of which the Norfolk Island Government has executive authority, but legislative authority is subject to Commonwealth veto.)

Federal Government;[46] and the Federal Government has accepted this recommendation.[47]

Commonwealth's plenary power under section 122 of the Constitution

2.46 By virtue of section 122 of the Constitution, the Federal Parliament retains the ability to override territory laws and restrict the powers of the legislative assemblies in the self-governing territories.

2.47 Section 122 of the Constitution provides:

> The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

2.48 The power in section 122 is a plenary power which is unlimited by subject matter, and it is the basis for continuing Commonwealth responsibility for the territories. The overarching Commonwealth power in section 122 cannot be changed except by way of a constitutional referendum, and is not affected by the Bill.

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46 Joint Standing Committee on the National Capital and External Territories, *An advisory report on the Territories Law Reform Bill 2010*, May 2010, pp 30–31.

47 The Hon. Simon Crean MP, Minister for Regional Australia, Regional Development and Local Government, *House of Representatives Hansard*, 16 November 2010, p. 2563.

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.
>
> 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.
>
> 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.
>
> 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.
>
> 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.
>
> 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.
>
> 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.
>
> 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.
>
> 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.
>
> …
>
> 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.
>
> …
>
> 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.

DISSENTING REPORT BY LIBERAL SENATORS

1.1 Liberal Senators express their strong concerns about both the Bill and the further proposed amendments circulated by Senator Bob Brown. Liberal Senators note that Senator Brown has shown, by his legislative track record, an equal capacity to both champion and override territory rights. We note, for example, that he has been happy to defend the right of the Northern Territory to legislate for euthanasia but equally willing to quash its right to legislate for minimum mandatory sentences. It is hard to resist the conclusion that Senator Brown and the Australian Greens see legislation of this kind primarily as a vehicle to promote pet policies such as euthanasia and same-sex marriage, rather than a genuine effort to enhance the democratic rights of Australia's self-governing territories.

1.2 In particular, Liberal Senators note previous bills introduced in 2006 and 2009 by Senator Brown which related to the Governor-General's power to disallow laws in the Australian Capital Territory. Those bills did not have general application to all the self-governing territories; and, in the view of Liberal Senators, they were deliberately designed to advance the Greens' agenda in the ACT rather than coherently improve the legislative powers of the territory parliaments.

1.3 Liberal Senators also note that the current Bill, as originally drafted, would have had application only to the ACT. The omission of the other self-governing territories from the original Bill serves to evidence the point even further: the circumstances of the Northern Territory and Norfolk Island appear to have been considered merely as an after-thought. Liberal Senators believe that it is highly inappropriate to make changes to existing legislation for purely political purposes.

1.4 In particular, Liberal Senators are of the view that piecemeal amendments do not in any way represent good legislative practice. As the majority report points out, there may well be serious flow-on effects arising from a patchwork approach to legislative change. In the case of the Bill and the proposed circulated amendments, Liberal Senators note that the objects clause is inaccurate as drafted and demonstrably requires amendment. There were several problematic aspects of the various self-government enactments to which attention was drawn during this inquiry, issues which this Bill does nothing to address.

1.5 The process by which the Australian territories move towards greater legislative independence, consistent with the overall framework of the Australian Federation, should continue, but Liberal Senators consider that a more systematic and comprehensive approach is to be preferred. To this effect, Liberal Senators consider that the committee should follow its own recommendation and urge the Senate to commend a systematic and holistic review of self-government arrangements in the ACT and the NT. This would ensure that all relevant constitutional and self-determination issues in the territories are given proper and thorough consideration before any legislative proposals are brought forward.

Senator Guy Barnett
Deputy Chair

Senator Stephen Parry

Senator the Hon George Brandis SC

Senator Gary Humphries

Senator Russell Trood

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.

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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**

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

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Professor George Williams
2	Mr Sean Parnell
3	Mr Michael Moore
4	The Hon Jane Aagaard MLA
5	Mr Malcolm Mackerras AO
6	Mrs Chris Knight
7	Mr Greg Cornwell AM
8	Dr Charlie Carter
9	Mr Peter Phillips
10	Ms Rita Joseph
11	Associate Professor Thomas Faunce
12	Ms Saan Ecker
13	Mr Matthew Christie
14	Mr Peter Rose
15	Mr Matthew Clarke
16	Mr Stephen Bates
17	Ms Anne-Maree Althaus
18	Mr Stephen Brown
19	Ms Linda Steadman
20	Mr Jon Stanhope MLA
21	The Hon Paul Henderson MLA
22	Mr Marshall Perron
23	Mr Mark McRae
24	Australian Christian Lobby
25	Civil Liberties Australia
26	Australian Marriage Equality
27	Mr Jamie Allen
28	Mr Stuart Baanstra
29	Mr Shane Rattenbury MLA
30	FamilyVoice Australia
31	Mr Peter Maywald
32	Mr Raymond Montalban
33	Ms Penelope Webb
34	Mr Anthony Batchelder
35	Ms Kathleen Woolf
36	Law Council of Australia
37	Law Society of the Northern Territory
38	Anglican Deaconess Ministries Limited
39	Canberra Liberals

40	Mr Peter Dolan
41	Social Issues Executive
42	Mr Geoffrey Mongan
43	Australian Family Association (SA Branch)
44	Mr Peter Gately
45	Castan Centre for Human Rights Law
46	Ms Cheryl Saunders AO
47	ACT Greens
48	Ms Anne Cahill Lambert
49	Ethical Rights
50	Equal Love Canberra
51	Mr Gerard Calilhanna
52	Professor John Williams
53	Mrs June Henderson
54	Ms Ursula Bennett
55	Mrs Precious Tomayo
56	Ms Gai Brodtmann MP and Dr Andrew Leigh MP
58	Ms Nicole Power
59	Australian Federation for the Family
60	Ms Tara McInnes
61	Ms Jody Matich
62	Mr Mark Parham
63	Mr Joe Lopez
64	Mr Craig Freeman
65	Professor Geoffrey Lindell
66	Fr Michael Grace
67	Mr Edward 'tHart
68	Mrs Clair Freeman
69	Mr Brandon Appleton
70	Mr Jason Lee
71	Ms Stephanie Mitchell
72	Mr Kevin Sargeant
73	Ms Julie Seeto
74	Mr Frank Leong
75	Family Council of Victoria
76	Ms Gian Sechi
77	Canberra Business Council
78	Mr Barry Steffens
79	Mr Peter Allard
80	Ms Mandy Chapman
81	Ms Kellie Derham
82	Mr John RL Neil
83	Mr Kevin Seaman
84	Mr Colin Stollery
85	Mr Gary Pesavento
86	Mr and Mrs John and Jane Gresser

87	Ms Donna Harrison
88	Mr Ian Gowland
89	Ms Linda Pienaar
90	Mr Bernard Richards
91	Ms Amy Metcalfe
92	Ms Dalrene Pompeus
93	Mr JD O'Reilly
94	Ms Loyola McKinlay
95	Mr and Mrs Allen and Dolores Fredericks
96	Ms Mary Haddow
97	Mr Peter Stokes, Salt Shakers Inc
98	Ms Jessica Brown
99	Mr Brett Murray
100	Dr Ray W Robinson
101	Mr Roger Latham
102	Mr Darryl Stewart
103	Mr Matt Grocott
104	Mr Frank Burgess
105	Ms Geraldine Roelink
106	Mr Peter Nathan
107	Ms Aurea Mendoza-Martin
108	Mr David Olsen
109	Ms Anita Montagna Quiddington
110	Ms Norlie Dooma
111	Mrs Patricia A Steffens
112	Mrs Jennifer Kellaway
113	Mr Michael Casanova
114	Mrs Karlie Rice
115	Ms Anne Cameron
116	Ms Suzanne Zelenak
117	Miss Elena Batchelder
118	Miss Sally Guest
119	Mr Graham Jones
120	Name Withheld
121	Ms Gail Musch
122	Name Withheld
123	Name Withheld
124	Mr Peter Kentley
125	Name Withheld
126	Name Withheld
127	Name Withheld
128	Name Withheld
129	Name Withheld
130	Name Withheld
131	Name Withheld
132	Name Withheld

133	Name Withheld
134	Name Withheld
135	Name Withheld
136	Name Withheld
137	Name Withheld
138	Name Withheld
139	National Association of Catholic Families
140	Fatherhood Foundation
141	Mr Peter Allard
142	Ms Coral Belrost
143	Ms Cynthia Taylor
144	Mr Ross Stewart
145	Ms Carolyn Parker
146	HOPE: preventing euthanasia and assisted suicide
147	Ms Delphine Hattingh
148	Ms Karen Evans
149	Mr Darijo Cakarun
150	Mr David McDonald
151	Ms Gillian Tierney
152	Mr Patrick Neville
153	Ms Sarah Wheeley
154	Mr Philip Cosgrove
155	Ms Vicki Cosgrove
156	Mr John Von Dinklage
157	Ms Anne Kirkwood
158	Mr James Pryor
159	Ms Michelle King
160	Mr Johan Hattingh
161	Mr Michael Tome
162	Mr Bill Fraser
163	Mr Alexander Robertson
164	Ms Helen Gordon
165	Ms Elin Thomson
166	Ms Catherine Sullivan
167	Mr Andrew Gwynne
168	Confidential
169	Australian Family Association (Victorian Branch)
170	Mr David Cahill
171	Mr David and Mrs Carmel Haire
172	Name Withheld
173	Ms Caroline Batchelder
174	Ms Penelope Sechi
175	Mr and Mrs Les and Marie Gapps
176	Mr Wayne Roberts
177	Ms Sylvia Pons
178	Mrs Roslyn Owens

179	Mr Alan Lucas
180	Mr and Mrs Anthony and Olga Deppe
181	Ms Marguerite Feeney
182	Mr Rob Feeney
183	Mr Callum Rae
184	Ms Kelly Small
185	Name Withheld
186	Name Withheld
187	Name Withheld
188	Name Withheld
189	Name Withheld
190	Name Withheld
191	Name Withheld
192	Name Withheld
193	Name Withheld
194	Ms Joanne Sam
195	Ms Steff Dirkis
196	Mr Angus O'Meara, Ms Maddie Fraser and Ms Lauren Hogarth
197	Ms Imogen Dadswell, Mr Joshua Beer, and Mr William O'Neill
198	Ms Anne Hansen
199	Ms Tahlia Makunde
200	Ms Micaela Ferrington and Ms Kayla Smurthwaite
201	Mr Jasper Bell
202	Mr Jordan Rodgers
203	Mr Markus Otting
204	Mr Thomas Downes
205	Ms Dawn Williams
206	Streetlaw
207	Weston Creek Sub-Branch, Australian Labor Party, ACT Branch
208	Mr and Mrs Hugo and Nell Vandenbos
209	Australian Family Association, ACT Branch

ADDITIONAL INFORMATION RECEIVED

1 Answer to Question on Notice provided by Mr Zed Seselja, Leader of the Opposition in the Australian Capital Territory, on 17 March 2011

2 Additional Information provided by the Hon Jane Aagaard MLA, Speaker of the Legislative Assembly of the Northern Territory, on 17 March 2011

3 Letter from President of the Senate tabled by Senator Crossin, Chair of the Legal and Constitutional Affairs Legislation Committee, at public hearing on 21 March 2011

4 Answers to Questions on Notice, provided by Department of Regional Australia, Regional Development and Local Government, on 29 March 2011

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, 16 March 2011

AAGAARD, the Hon. Jane MLA, Speaker of the Northern Territory Legislative Assembly; Chair of the Northern Territory Legislative Assembly Standing Committee on Legal and Constitutional Affairs

CHANDLER, Mr Peter, MLA, Member for Brennan, Northern Territory Legislative Assembly Standing Committee on Legal and Constitutional Affairs

DUNCAN, Mr Tom, Clerk of the Legislative Assembly, Australian Capital Territory Legislative Assembly

HENDERSON, The Hon. Paul, MLA, Chief Minister for the Northern Territory

PURICK, Ms Kezia, MLA, Member for Goyder, Northern Territory Legislative Assembly Standing Committee on Legal and Constitutional Affairs

RATTENBURY, Mr Shane, Speaker of the Legislative Assembly, Australian Capital Territory Legislative Assembly

SESELJA, Mr Zed MLA, Leader, Canberra Liberals

STANHOPE, Mr Jon, MLA, Chief Minister of the Australian Capital Territory

WILLIAMS, Professor George, Professor of Law, Gilbert + Tobin Centre of Public Law, University of New South Wales

Canberra, 21 March 2011

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

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