



Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010

Diane Spooner
Law and Bills Digest Section

Contents

| | |
|---|---|
| Purpose | 2 |
| Background | 2 |
| Committee and others consideration..... | 3 |
| Background | 3 |
| Main Issues | 5 |
| Euthanasia..... | 5 |
| Marriage..... | 5 |
| Size of legislature | 6 |
| Key provisions | 6 |

Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010

Date introduced: 29 September 2010

House: Senate

Portfolio: Private Senator's Bill

Commencement: On Royal Assent

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

Purpose

To remove the ability of the executive to disallow or amend an enactment of the self-governing Territories. The Bill as introduced is limited in its operation to the Australian Capital Territory. Senator Brown will move amendments to his Bill to incorporate references to the other two self-governing Territories, namely the Northern Territory and Norfolk Island.

Background

In 2006 Senator Brown introduced a similar Bill into Parliament, called the Australian Capital Territory (Self-Government) Amendment (Disallowance Power of the Commonwealth) Bill 2006. It was debated in the Senate on 14 September 2006 and lapsed on the proroguing of Parliament. The Bill was supported by the ALP Senators, but not by Senator Humphries (Liberal Senator for the ACT) and other Coalition Senators. However, see further below in relation to Senator Humphries.

Speaking on the Bill Senator Brown said:

Senators will note that my bill refers only to the Australian Capital Territory, but it is my opinion that the same protection from the arrogant and high-handed intervention on their law-making process by a future executive here in Canberra should be given to the voters of the Northern Territory. The process ought to be that, if the national government of the day does not like a territory law, then it should refer it to the parliament. It should prepare a bill, and it should refer

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

it to the national parliament for passage through both houses of parliament. If it gets assent there, then the territory law will be overridden. This is not a complicated matter.¹

Two matters which were referenced by Senator Brown were the previous actions of the Commonwealth to override Territory laws. The first was in 1996 when a Private Members Bill sponsored by Liberal member Mr Kevin Andrews, inserted provisions into the self-governing Acts of the ACT, the NT and Norfolk Island to prevent the respective legislative assemblies from making laws in relation to euthanasia. The second instance was when the ACT's civil unions legislation was disallowed by way of executive action, namely by the Governor-General using a legislative instrument pursuant to section 35 of the *Australian Capital Territory (Self-Government) Act 1988*.

In essence, section 35 allows the Governor-General by legislative instrument to disallow a law of the ACT within 6 months of its making. This legislative instrument is disallowable by either House of Parliament. The Governor-General, under subsection 35(2) can also recommend amendments to an ACT law. The Northern Territory has a similar provision in its *Northern Territory (Self-Government Act 1978*, section 9, and Norfolk Island has such a provision in the *Norfolk Island Act 1979*, section 23.

Senator Brown's current Bill, as proposed to be amended, will repeal these three provisions.

Committee and others consideration

It is reported in *The Australian* on 2 March 2011 that a spokesman for Mr Abbott said the coalition intended to refer Senator Brown's proposals to a Senate committee for further consideration. The same report states:

The Coalition was examining the bill and was expecting ACT Liberal senator Gary Humphries and possibly his NT Country Liberal party colleague Nigel Scullion would cross the floor to back the bill to support territory rights.²

Background

Some issues that may be relevant in considering this Bill are outlined.

Section 122, Constitution

Under section 122 of the Commonwealth Constitution, the Commonwealth has the power to make laws for the government of any territory. This is a plenary power, unlimited by subject matter.

-
1. B Brown 'Second reading speech: Australian Capital Territory (Self-Government) Amendment (Disallowance Power of the Commonwealth) Bill 2006' Senate, *Debates*, 14 September 2006, p. 90, viewed 2 March 2011, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F2006-09-14%2F0174%22>
 2. M Franklin and J Massola, 'Greens' gay marriage victory', *The Australian*, 2 March 2011, p. 4.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.

In their Annotated Commonwealth Constitution, Lumb & Moens write:

Under this head of power [section 122], the Commonwealth has a general power of legislating for a Territory. It may do so by means of paramount legislation passed by the Commonwealth Parliament, or by setting up a Territorial legislature with its own legislative power, although these will always be subject to the overriding authority of the Commonwealth Parliament.³

Apart from section 122, there is also judicial authority for the view that if there is a conflict between a Commonwealth law and a Territory law, then the Commonwealth law will prevail. The overriding force of Commonwealth law in such a case is not based on section 109 of the Constitution - section 109 refers to the States, not to the Territories.⁴ The view that a Commonwealth law will prevail over an inconsistent law is based on the view that the Territory law is the law of a subordinate legislature and must give way to an inconsistent law passed by a paramount legislature (the Commonwealth Parliament). This was the view of Lockhart J in *Attorney-General (Northern Territory) v. Hand* (1989) 90 ALR 59.

Australian Capital Territory

Subject to Parts IV and VA of the *Australian Capital Territory (Self-Government) Act 1988*, the ACT Legislative Assembly can make laws for the peace, order and good government of the Territory. Section 23(1) of the Act withdraws from the Assembly the power to make laws on certain matters. These include the power to acquire property on other than just terms and the power to enact laws on matters of corporate law. Section 28 of the Act provides that a Territory law will be inoperative to the extent that it is inconsistent with federal law.

As with the Northern Territory, the Governor-General may disallow an ACT enactment within six months of its being made. The Governor-General can also recommend changes to the law.

Norfolk Island

The *Norfolk Island Act 1913* (Cth) declared Norfolk Island to be a Territory under the authority of the Commonwealth. The *Norfolk Island Act 1979* (Cth) establishes a Legislative Assembly to make laws for the peace, order and good government of the Island. Like the other self-governing territories, there are certain limitations on the power of the Assembly - for example, in relation to making laws about the acquisition of property on other than just terms. Once again, the Governor-General may disallow a law or part of a law within 6 months of the Administrator's assent, or recommend changes to the law.

3. RD Lumb and GA Moens, *The Constitution of the Commonwealth of Australia annotated*, fifth edn, Butterworths, Sydney, 1995.

4. Section 109 provides that where a State law is inconsistent with a Commonwealth law, the Commonwealth law shall prevail to the extent of the inconsistency and the State law shall be invalid to the extent of the inconsistency.

Main Issues

Euthanasia

The successful amendments made by the Andrews Bill to the self-governing Acts of the ACT, the NT and Norfolk Island will not be affected by the proposals in this Bill. In brief, a provision was inserted that prevents those jurisdictions from passing laws with respect to euthanasia.⁵ These provisions will stay on the statute books as they have not been repealed by the Commonwealth. The Territories therefore still have no capacity to make laws in relation to euthanasia, as such a law would be inconsistent with the Commonwealth law, and as outlined above, would be invalid.

Senator Brown has a Bill on this before Parliament, Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2010, and the Bills Digest to this Bill can be found [here](#).

Marriage

In the case of same-sex marriage there may be room for the argument that the Territories would be in the same position as the States to legislate for same-sex marriage. In an article in the Sydney Morning Herald, Professor George Williams stated:

Just as the Commonwealth can legislate for marriage, so too can the states. But in the case of the States, they are not limited by the possibility of a narrow meaning of marriage. A state can pass any law in the area that it wishes, and undoubtedly has the power to provide for both heterosexual or same –sex marriage.

...

The only possible impediment to a state same-sex marriage law is that it may be overridden by an inconsistent federal law under section 109 of the constitution. But if it turns out that federal Parliament cannot pass laws for same-sex marriage, it could not override state laws on the topic.⁶

As Professor Williams explains in the same article, an unintended consequence of the 2004 amendments to the Marriage Act to define ‘marriage’ as a union between a man and a woman, means that the laws applies exclusively to a man and a woman and this opens up the field of same-sex marriage to the States.

However much would depend on the exact nature and terms of such a proposed law and whether the actual expression ‘marriage’ is used. A rather comprehensive discussion on this issue can be

5. Subsection 23 (1A) of the ACT Self-Government Act, section 50A of the NT Self-Government Act and paragraph 19 (2)(d) of the Norfolk Island Act.

6. G Williams, ‘States could legalise same-sex marriage’, *The Sydney Morning Herald*, National Times, 28 September 2010.

found in an article by Professor Lindell, 'State legislative power to enact same-sex marriage legislation, and the effect of the *Marriage Act 1961* (Cth) as amended by the *Marriage Amendment Act 2004* (Cth).'⁷

Size of legislature

The ACT will still not be able to independently determine the size of its legislature. Section 8 of the ACT Self-Government Act provides that the Assembly shall consist of 17 members, but Commonwealth regulations can fix a different number of members if the Assembly makes a resolution to that effect. There is a similar provision for Norfolk Island, but the Northern Territory is free to determine its own size.⁸

Key provisions

Schedules 1, 2 and 3, item 1, repeal sections 35, 9 and 23 of the ACT, NT and Norfolk Island's self-government legislation respectively.

7. G Lindell, 'State legislative power to enact same-sex marriage legislation, and the effect of the *Marriage Act 1961* (Cth) as amended by the *Marriage Amendment Act 2004* (Cth)', *Constitutional Law and Policy Review*, vol. 9, no. 2, 2006, p. 25.

8. *Northern Territory (Self-Government) Act 1978*, subsection 13(2).

© Commonwealth of Australia 2011

This work is copyright. Except to the extent of uses permitted by the Copyright Act 1968, no person may reproduce or transmit any part of this work by any process without the prior written consent of the Parliamentary Librarian. This requirement does not apply to members of the Parliament of Australia acting in the course of their official duties.

Disclaimer: Bills Digests are prepared to support the work of the Australian Parliament. They are produced under time and resource constraints and aim to be available in time for debate in the Chambers. The views expressed in Bills Digests do not reflect an official position of the Australian Parliamentary Library, nor do they constitute professional legal opinion. Bills Digests reflect the relevant legislation as introduced and do not canvass subsequent amendments or developments. Other sources should be consulted to determine the official status of the Bill.

Feedback is welcome and may be provided to: web.library@aph.gov.au. Any concerns or complaints should be directed to the Parliamentary Librarian. Parliamentary Library staff are available to discuss the contents of publications with Senators and Members and their staff. To access this service, clients may contact the author or the Library's Central Enquiry Point for referral.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2526.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.