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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

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

WEDNESDAY, 16 MARCH 2011

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Wednesday, 16 March 2011

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

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

Senators in attendance: Senators Barnett, Brandis, Bob Brown, Crossin, Forshaw, Humphries Pratt and Trood

Terms of reference for the inquiry:

To inquire into and report on:

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

WITNESSES

Committee met at 11.03 am

CHAIR (Senator Crossin)—I declare open this public hearing for the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010. The inquiry was referred by the Senate to this committee on 2 March 2011 for inquiry and report by 21 March 2011. The committee has received some 150 submissions for this inquiry. Most of these submissions have been authorised for publication and are available on the committee's website. The remainder are in the process of being made available on the website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to the committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. The committee prefers all evidence to be given in public but under the Senate's resolutions witnesses have the right to be heard in private session or in camera, and they will just need to request the committee to do that. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer then the witness may request that that answer be also given in camera.

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

[11.06 am]

HENDERSON, The Hon. Paul, Chief Minister of the Northern Territory

CHAIR—Welcome. We have a submission from the Northern Territory government. I invite you to make an opening statement to that submission and then we will go to questions.

Mr Henderson—Thank you. I would like to thank all senators for taking the time to hold this hearing today. The reason that I have chosen to appear in person is very simple really. 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 Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 proposed by Senator Bob Brown 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.

This bill is about restoring in part democracy to the Northern Territory through the elected parliament. The parliament in the Northern Territory, the government that I lead, is accountable to the people of the Northern Territory in an open and transparent way every day of the week. Certainly I think the accountability of governments in the Northern Territory and members of parliament in the Northern Territory is potentially—I will mount the argument—somewhat higher than the rest of Australia. The fact that we are 236,000 people and 25 members in the legislative assembly means that each and every one of us represents about 4,500 people. We know our constituents almost by their first name. People do approach us all the time, whether it is at the footy, out with our children for their sporting activity or in the supermarkets. We are held, I believe, to a higher level of account by the very fact that each and every member of parliament, particularly the executive government, is so much in the public eye every day. So the arguments around additional levels of accountability through the federal parliament do not, I believe, stack up.

My argument in regard to the bill that seeks to remove the ability of the Governor-General on advice of the Commonwealth executive to disallow any law made by the Northern Territory Legislative Assembly within six months of assent is that the current provision in the self-government act provides for a total lack of transparency and accountability to the people of the Northern Territory in that the federal Commonwealth executive is able to make a recommendation to the Governor-General to amend or disallow a law that has been passed through the democratically elected legislative assembly of the Northern Territory.

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.

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.

There is an argument that is put forward in some of the submissions that, because we do not have an upper house, we need this oversight from Canberra. I point out that Queensland does not have an upper house either, and they seem to be doing okay in terms of governing for the people of Queensland.

Senator Brandis interjecting—

Mr Henderson—I do not know, Senator Brandis, whether you are proposing that the Commonwealth power should be able to intervene and overturn laws in Queensland. If you wish to propose that argument and an amendment to the Constitution, that is something for you to take forward.

Senator BRANDIS—I am simply challenging your encomium to the government of Queensland.

CHAIR—I am sure the Chief Minister means all governments both now and in the past.

Mr Henderson—Absolutely. And I do believe, notwithstanding the lack of a submission from the opposition to this particular inquiry, that there is bipartisan support for this amendment bill that we are discussing today.

As I said at the beginning of my submission, this is a small step but an important step towards statehood for the Northern Territory. The people of the Northern Territory are once again embarking on a move towards statehood. In the last session of the Territory parliament, the Northern Territory Legislative Assembly Standing Committee on Legal and Constitutional Affairs—which I believe will be presenting next—reported to parliament and made recommendations on progression towards statehood. Those recommendations include a constitutional convention, to be held in November this year in Darwin, where the people of the Northern Territory will come together to look at the issues to be included in a proposed constitution to establish a new state of the Northern Territory and a process towards another vote for statehood. So there is a bipartisan process in the Northern Territory. Politicians really are trying to be at arm's length from the move towards statehood. I would urge this inquiry to look at that report—which I am sure colleagues from the Territory parliament will talk about later—to see that this is an important step in what we are trying to achieve in the Northern Territory.

In conclusion, I felt it was really important for me to be here today. I think that this is a very simple, common-sense bill that has been put forward by Senator Bob Brown, and I thank Senator Brown for putting the bill forward. All it seeks to do is to provide the same rights, responsibilities and accountabilities to the Territory parliament that all other parliaments have around Australia.

CHAIR—Thanks, Chief Minister. We are going to go to questions and, being a senator from the Territory and the chair of the committee, I am going to take the absolute liberty of asking questions first, which I do not normally do. You talked about the level of support for this legislation in the Northern Territory. Perhaps you might just expand on that for us. Does that mean across parties, with the Independents in the Territory, from feedback you have had from constituents or through newspaper or radio reports up there? What is happening on the ground?

Mr Henderson—Obviously, we have not polled on this issue lately but, certainly, all 25 members of the Territory parliament endorsed and supported the recommendations of the Standing Committee on Legal and Constitutional Affairs in terms of progression towards statehood. This bill was not included in those recommendations, it came afterwards but this is a logical step towards statehood. It is another step on the journey in providing for the same levels of accountability through the Territory parliament as other states. I am absolutely convinced that there is bipartisan support and also support through the two independent members of the parliament. With respect to the community in the Northern Territory, anecdotally, people really are outraged at the thought that the Commonwealth parliament, through the executive here, could essentially at a stroke of a pen, at a whim, make a recommendation to the Governor-General to amend or overturn a piece of legislation. I think people in the Northern Territory do get that their politicians—regardless of what they might think of them—have been elected by the people of the Northern Territory. Any reference to unknown, unnamed people in a non-transparent way in Canberra being able to amend or overturn the law of the Northern Territory is an insult to their intelligence, quite frankly. People in the Northern Territory, as I have been saying in media comment this week, pay the same taxes, obey the same laws and have the same responsibilities as all other Australians yet the Commonwealth still has this executive power, basically in a totally non-transparent way, to amend or overturn a law that is made by the democratically elected parliament in the Northern Territory. People see it as a bit of an insult to the intelligence.

Senator CROSSIN—I have one more question. This legislation still provides under the self-government act for the capacity for both houses of the federal parliament to overturn the Territory's legislation. I do not want to go into specific issues because I want to look at this broad framework of the self-government act, but what legislation has been introduced into the Territory parliament that could possibly be overturned if we just took the last four years as a snapshot?

Mr Henderson—I suppose the immediate one that comes to mind that has been very contentious with the industry campaign that was run against it was the cash for containers legislation that was passed in the Territory parliament in the last sitting. What we have had is a debate around Australia for the last 20 years about cash for containers, a national recycling scheme. For better or worse—much for the worse—that has not flown in regards to national commitment. What we saw in the Northern Territory was a very well-funded and quite misleading campaign from big business and industry running many untruths in regards to the effects of that type of scheme coming to the Northern Territory. Again, this was contentious and only South Australia had this legislation in place. Big multinational and national industry campaigns were run against this in the Northern Territory and there is nothing to stop the federal parliament through the executive of the day just recommending to the Governor-General that we should overturn the legislation in the Territory and wait for a national scheme to take place. I suppose that was something that was very contentious.

I do not want to go there but I will say that—given that you have given me the opportunity—we do have the issue at the moment with the Commonwealth nuclear waste repository system that has been proposed for the Northern Territory. We introduced legislation in the territory four or five years ago prohibiting the transportation of nuclear wastes from outside of the Northern Territory to the Northern Territory and the Commonwealth used its powers to overturn that legislation. That is a whole other debate.

From time to time there is such legislation that goes through the parliament. It is quite interesting that whoever is in government in Canberra uses the constitutional weakness of the Northern Territory to deal with a particularly tricky problem for the Commonwealth of Australia irregardless of the position of the Northern Territory parliament. If you take the politics out of this, certainly from a governance point of view at the national level it is quite useful for whoever is in government to have a constitutional weak link whereby tricky issues can be imposed on the Northern Territory because they cannot be imposed anywhere else in Australia. Again, it treats democratically elected parliaments of the Northern Territory and particularly the citizens of the Northern Territory as second-class citizens in terms of their constitutional rights.

Senator BOB BROWN—Thank you for your opening statement. Has the Cash for Containers legislation been enacted?

Mr Henderson—Yes, it has. Hopefully, it will be commenced towards the end of the year. The legislation was passed unanimously by the parliament in the last sittings.

Senator BOB BROWN—Back on the override of the Northern Territory's prohibition on the movement of nuclear material from outside the territory, that is, of course, an override that the federal government could not exercise, for example, in the case of South Australia were it to legislate in such a way. Have you got any list of the number of times that the override has been used in regard to the Northern Territory?

Mr Henderson—I do not have a list with me. I really did not want to go to specific issues, but I can do so because I think this is an issue about a point of principle in terms of the democratic rights of Territorians, as opposed to debating a series of issues. Certainly in terms of the proposed nuclear waste facility, there was a whole series of territory legislation—environmental legislation, heritage legislation and certainly the transportation bill that we put through around that—that was essentially just struck out at the stroke of a pen by the Commonwealth. I do appreciate it is a very tricky issue but I also pointed out in my submission to a Senate inquiry hearing in Darwin on this issue that the Commonwealth does have the constitutional powers to site the proposed nuclear waste repository where it should go based on the science—based on around 15 years worth of science that was gathered through processes here in Canberra—so for that particular facility to go to South Australia, where geologically and scientifically it should go. The Commonwealth, through governments of both persuasions, have chosen, purely for political reasons, not to pick that fight, given that there are more South Australian seats than Northern Territory seats in the federal parliament, and have determined to use the Northern Territory because constitutionally they can and it is easier to do—and it treats Territorians as second-class citizens in terms of being able to participate in that particular debate. So there was a whole raft of legislation that was overridden to provide the Commonwealth with the powers to do what they are currently proposing to do and that has the bipartisan support of the major parties here in Canberra.

Senator BOB BROWN—This might be an unfair question. Are you aware of any opposition to this bill in the territory?

Mr Henderson—I am on oath here. I have heard nobody in the Northern Territory—and I have done a fair bit of media in preparation for this presentation today—say that this particular bill should not be passed. I have heard no opposition.

Senator BOB BROWN—Thank you very much.

Senator BARNETT—Mr Henderson, I have two questions. The first relates to Senator Brown's bill, which was originally introduced in this form on 29 September last year whereby it would affect only the ACT. Amendments were subsequently introduced on 1 March. These extended its reach to the Northern Territory and, indeed, Norfolk Island. I am wondering if you can share with the committee your views on the different impacts that the bill might have on the three different territories—if you are able to; if not I understand that you are able to comment only on the impact on the Northern Territory.

Mr Henderson—Of course I have had discussions with my counterpart Jon Stanhope, the ACT Chief Minister. I have not had discussions with the Norfolk Island Chief Minister. The impacts constitutionally are the same: they are providing for the legislation assembly in each of those jurisdictions to be able to legislate in their own right without the Commonwealth executive being able to amend or overturn. Obviously the issues with regard to the good governance of the people of the Northern Territory are totally different to the issues faced by the ACT government and the Norfolk Island government. The fact is we have more than one million square kilometres, 236,000 people—33 per cent of them Indigenous with all of the Indigenous disadvantage we have in the Northern Territory—and so the difficulties in the provision of services to people in the Northern Territory are light years away from the provision of services in the ACT or Norfolk Island. So in respect of the executive government and the parliament in the Northern Territory, the issues that we wrestle and grapple with on a daily basis are, to a large extent, totally different to those issues of the ACT and Norfolk Island. But they are very similar, particularly on the Indigenous front, to issues that affect Western Australia, Queensland and South Australia predominantly. And certainly, with all of the disadvantage in the Northern Territory, it is ridiculous to believe that those disadvantages suddenly magically disappear when you cross the border to Western Australia or you cross the border to Queensland or you cross the border to South Australia and that Indigenous people there are living lives that are far improved and better than in the Northern Territory. Of course those issues absolutely are the same across those borders, but the fact is that in the Northern Territory 33 per cent of our population is Indigenous as opposed to four or five per cent of the population, which means service delivery and equity of service delivery are much more challenging. There are unique distinctions between the three legislatures. However, the principle of those legislatures being able to legislate without the executive of the Commonwealth to be able to recommend to amend or overturn the principle is the same.

Senator BARNETT—My next question covers a slightly different area. There are many people who have put the view that this bill is a ploy for a change to our marriage and euthanasia laws in Australia through one of the territories, whether it is NT or ACT or Norfolk Island. What do you say to that argument?

Mr Henderson—I said to the media yesterday I think it is a total red herring, quite honestly. The Marriage Act is an act of the Commonwealth parliament. As for the whole debate about how the territories would be using this to make inroads on that debate, I have not heard any discussion around those issues at all—certainly not in my government or our parliament.

With regard to the issue of euthanasia, which was legislated for in the Northern Territory 15 years ago—I was not in parliament 15 years ago, but I was certainly around and politically active at that time—the issues in the Territory are totally different today to what they were 15 years ago. Fifteen years ago in the Northern Territory we did not have a hospice. Fifteen years ago in the Northern Territory we did not have dedicated palliative care teams. Fifteen years ago in the Northern Territory pain management regimes were totally different to what they are today. The climate of that debate 15 years ago was different and I believe, if that debate was to be rerun today using the arguments for that legislation—it was all to do with the fact that at the time we did not have a hospice, that we did not have access to palliative care—then those things are very different now to that previous climate.

I have said that my government has absolutely no agenda with regard to either of those issues in the Northern Territory. This is very much a point of principle here—that is, that an unelected body through the Commonwealth parliament, with total lack of transparency and accountability to the people of the Northern Territory, can amend or overturn a piece of legislation that is passed through the Territory parliament. And like all parliaments in Australia, 90 per cent of legislation passed in the Territory is non-controversial; it is passed with bipartisan support. The reason I am here today is not to argue those issues, but to argue very much a point of principle—that is, the electors of the Northern Territory deserve the same rights and responsibilities as electors in Victoria and New South Wales who believe the parliament that they elect should govern until there is another election without interference from anywhere else.

Senator FORSHAW—Chief Minister, Senator Brown and you engaged in a discussion about the nuclear waste issue. I was not going to go to that—

Mr Henderson—I was trying not to.

Senator FORSHAW—For me it is a good example. I do not see this piece of legislation as some simple stroke of the pen removal of a particular section of an act. I think it has more significant ramifications. They go to the issues of the different levels of government within this country—federal, state, territory, local—and the powers of each and the way in which they interact and the way in which some legislatures, federal and state particularly, can override others. Now Senator Brown put to you the nuclear waste repository issue that what can be done in the Territory could not be done with regard to a state. I do not accept that at all. I live in the Sutherland shire, it has 215,000 people. I live five kilometres from the Lucas Heights reactor, where some people think the waste should be permanently stored. If the Sutherland Shire Council were to make a decision to ban the transport of waste on the council roads, whereas the New South Wales state government was to pass legislation to prohibit the passage transport of nuclear waste on state roads in and around that area, would you agree that the federal government or the minister could nevertheless override that decision?

Mr Henderson—It is a very good question. With regard to this particular issue, I presented to a Senate hearing in Darwin some 12 months ago legal advice that we have that the Commonwealth does have its constitutional powers through external affairs powers to determine where that facility should go. We are also signatory to international treaties and conventions for the decision-making processes that we have signed up to around international best practice, around the science and the community consultation that should occur before siting a nuclear waste repository. I believe the Commonwealth parliament for around 15 years went through an exemplary process with regard to scientifically and geologically identifying potential sites around Australia. My understanding is there were eight of those—

Senator FORSHAW—I am sorry, Chief Minister, we are limited for time. I do not wish to interrupt, but the issue I am asking is not about the location, it is about whether or not a Commonwealth government or a minister in that situation has the power now to override and make inoperative a decision of a local government area and/or a state government that might endeavour to make decisions, pass legislation that would prohibit the transport of the waste. It goes to the issue of this legislation, which is related to removing a provision in the ACT and other territories' self-government acts. But what I am putting is that there is power, and it has been used—it was used in the Traveston dam last year—where ministers of the federal government can make decisions to override decisions of state governments. It is used constantly by state governments to override decisions of democratically elected local government areas. That to me is very much a central point in this debate—not where the repository ends up.

Mr Henderson—My understanding, and I am not too a constitutional lawyer, is that if the Commonwealth uses its external affairs powers with regard to those issues, of course it has the constitutional right. But in the Northern Territory's case, it has not used those powers.

Senator FORSHAW—Okay, but the point I am getting to is that the argument that somehow the ACT, Norfolk Island and the Northern Territory are in a unique position relative to citizens in other parts of the country when it comes to the exercise by ministers of power, I do not believe the way it has been characterised is correct.

The other thing I want to ask you is this. We have the submission from the committee of the Northern Territory Legislative Assembly. Has there been any decision or motion carried by the assembly requesting the removal of section 35—I mean, the equivalent section in the territory legislation? I appreciate what you have said about a move to self-government.

Mr Henderson—Senator Brown's bill followed the last sittings of the Territory parliament, so this has come separate to that. I am very convinced that if we were to put a motion up in the next sittings of parliament to remove section 9 of the Northern Territory Self-Government Act it would be passed unanimously. So we have not had a separate specific debate but the whole principle of moving towards statehood and having the same rights and responsibilities as all of the other state jurisdictions has bipartisan support, which would include the removal of that particular section.

Senator HUMPHRIES—I assume that you were not a member of the Northern Territory parliament in the late 90s when the then government legislated for minimum mandatory sentencing of criminals. You might recall that at that time Senator Brown introduced a bill to override that legislation. What was the view of your party about that legislation at that time?

Mr Henderson—The view of the party at the time was that we did not support mandatory sentencing. My memory does not stretch back to the debate around Senator Brown's bill at that particular point in time but certainly it was always the position of the Labor Party in the Northern Territory not to support minimum mandatory sentencing legislation.

Senator HUMPHRIES—There were conflicting issues here, weren't there? There was the issue of not supporting minimum mandatory sentencing and the issue of supporting the right of the Territory to make its own decisions. Would you take on notice to let the committee know what the view of your party was about that legislation?

Mr Henderson—We can go back through press releases and Hansard at that time, so I am happy to take that on board. But I still support the principle, whatever the government of the day is, that it is a duly elected government in the Northern Territory that is accountable to the people and the people have a choice at the next election that if they do not like what the government is doing they can throw them out. It goes to the point of principle. But our position at the time was certainly not to support the minimum mandatory sentencing.

Senator BRANDIS—Let me say upfront that I support statehood for the Northern Territory. But it seems to me, I must say, that the argument you put to this committee would be better framed if the Northern Territory were a state. What you seem to me to be saying to us is, 'Well, the Commonwealth executive should not have an override power because citizens of the Northern Territory should be treated like all other Australians or in particular the Australians who live in states. Aren't you arguing against yourself? Isn't the fact that this power exists under the Northern Territory Self-Government Act a powerful argument for statehood?

Mr Henderson—Absolutely. I said at the beginning that I support this bill because it is 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. So it is a step along the way. I advocate very passionately for statehood but I see this as a step along the way in regards to the debate. It is a recognition that the executive of the Commonwealth government does have powers of override of the territories that it does not have of the states, and the 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. The reason I am here today is that I see that the 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.

Senator BRANDIS—Alternatively, it might be argued that the removal of section 9 of the Northern Territory (Self-Government) Act in fact removes the urgency of the Northern Territory becoming a state, because removing section 9 of the self-government act makes the position of Northern Territory citizens more closely equivalent to those of citizens of the states?

Mr Henderson—With due respect, we could spin this either way. I am here in good faith because I do believe that this would be a very significant sign from the Commonwealth parliament that the Territory is progressing towards statehood. It is certainly a recognition in debate. I am sure that, when the debate is had in the Commonwealth parliament, the territories are constitutionally at a disadvantage—Territorians, in terms of their rights through the parliament. I believe it is a step in the journey, whether you take a number of bites or one big bite, and what is being proposed here is a number of bites and I am prepared to support that.

Senator PRATT—What is the current population of the Northern Territory?

Mr Henderson—Around 237, 000, but do not hold me to a direct number.

Senator PRATT—That is certainly a larger number than, say, Tasmania or Western Australia at the point in time in which they achieved statehood, isn't it?

Mr Henderson—I believe so.

Senator PRATT—It is certainly possible that a minister or an executive could make a decision to overturn Territory law without there being a member of parliament or a minister from the Territory participating in that decision?

Mr Henderson—Very much so. That is why I am here. I think it is unconscionable that a federal minister could walk into cabinet with a proposal to amend or overturn a piece of legislation that has passed through the Territory's assembly without any reference back to the Territory's assembly, make that recommendation to the

Governor-General and the Governor-General signs it off. I think that treats Territorians with contempt, quite honestly.

Senator PRATT—Going to Senator Forshaw's point about the capacity of the Commonwealth to override local governments, state governments and territory governments, it is certainly my understanding that they can only do so if they do so on the basis that they are making a decision for all Australians. They cannot single out a state—one right for one state and not give that right to another. That is certainly my understanding of the way that works constitutionally.

Mr Henderson—That is my understanding. As I said, I am not a constitutional lawyer, but the Commonwealth, when it does use those powers, uses external affairs powers and other powers.

Senator PRATT—So you would agree with the statement of one of our submitters, who I think we will hear from later, who said:

This does not deny the proper role of the Commonwealth to govern for all Australians. Where issues arise in a Territory or a State there is often a legitimate role for the federal Parliament to intervene in the national interest. The problem arises when the federal Parliament—

or minister, or cabinet in this case—

singles out and undermines democratic rights in the Territories. Where the Commonwealth overrides State laws it does so by enacting a general law for Australia, and never by taking away the power of a State Parliament.

Mr Henderson—I think that is it in a nutshell.

CHAIR—That is George Williams' submission. We have him appearing this afternoon via teleconference.

Senator PRATT—This is certainly just a step towards statehood. It still does not give territories the same rights as states. What are your views about that in terms of the fact that this bill certainly retains the power of the Commonwealth parliament to pass laws that override territories?

Mr Henderson—As I have said, obviously the ultimate ambition is to achieve statehood for the people of the Northern Territory. The process that we are on at the moment is through the Senate Legal and Constitutional Affairs Legislation Committee of the parliament and through a previous statehood steering committee that have come up with recommendations to progress towards statehood. I take the view, as the Chief Minister, that the move towards statehood really needs to be driven from the community, not from government and politicians. To that effect, the committee has recommended to the parliament the holding of a constitutional convention in Darwin in November of this year. Citizens, not politicians, will be nominated or elected to the convention to debate the issues around a potential constitution for the Northern Territory. That will come back to the Territory parliament and then there will be a second constitutional convention to make decisions about a potential constitution that would ultimately go to a referendum. This has all been driven externally by the community, as opposed to being pushed by government, and there is certainly momentum behind that push.

As I have said, the reason I am supporting this here today is that I believe that if Senator Brown's bill is passed it will signal the Commonwealth parliament's intention to acknowledge that the Northern Territory in particular is moving towards statehood and recognise that the Territory's parliament, democratically elected by the people of the Northern Territory, should be free to legislate in its own right without this power. In regard to the power of the parliament to overturn legislation, of course I do not support that either, but this is a step along the way. 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 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—but of course I do not support that.

Senator PRATT—I just want to say that I agree with your points about the scrutiny of Indigenous issues in states versus territories.

Senator TROOD—Mr Henderson, your position seems to be inconsistent. On the one hand, you seem to be arguing that the movement for statehood must be a community act coming from the people of the Northern Territory, but on the other hand you are seeking to engage the Commonwealth in relation to this particular piece of legislation as a manifestation of the support for the Northern Territory's move towards statehood. It seems to me it is either one or the other. Do you want the sanction of the Commonwealth for your movement towards statehood, or do you want the approval of and the commitment by the people of the Northern Territory?

Mr Henderson—I do not think there is any inconsistency there at all, with due respect. As I have said, and as my colleagues who will be presenting later have said through the Legal and Constitutional Affairs Committee of the Northern Territory parliament, we have had a bipartisan approach towards statehood. There was a report that went to the Northern Territory parliament in the last sittings from the Statehood Steering Committee, a community based steering committee, that recommended a path towards statehood. Certainly all of that debate preceded the introduction of this bill by Senator Brown, but it is totally consistent with what the community has been saying through the Statehood Steering Committee, which has held hundreds of meetings around the Northern Territory and received hundreds of submissions supporting the progression towards statehood.

What is being proposed here today is a recognition of the inferior constitutional representation of the people of the Northern Territory—their inferiority in regard to the parliament of the Northern Territory being able to legislate unfettered by the Commonwealth parliament through the provision of section 9. So I think it is totally consistent. We have had a community debate. The steering committee has made recommendations about moving towards statehood. They have been endorsed by the Legal and Constitutional Affairs Committee of the Northern Territory parliament. It was reported to the parliament and all 25 members endorsed those positions. As I have said, Senator Brown's bill came in after that debate occurred, but I believe that this bill before us today is totally consistent with the Territory's aspirations towards statehood. It is just a step along the way.

Senator TROOD—Whatever your expectations might be were this bill to be passed, there still remains the burden of section 122 of the Constitution, which is a burden, if it is indeed a burden, for every state and territory in the Commonwealth. Isn't the reality of this situation precisely your point: that a territory—and your territory—stands in a different constitutional relationship with the Commonwealth than do the states and that the solution to your problem about autonomy, independence and sovereignty is not mucking around at the margins of your status but in fact proceeding as quickly as you can with statehood? Isn't that the solution to your problem?

Mr Henderson—Absolutely. Well said, Senator Trood. I look forward to your support for statehood. I am absolutely upfront in saying that, if we were debating today a bill that would grant statehood to the Northern Territory, I would be equally keen to be here. But we are not. What we have is a proposal that I believe does recognise the inferior constitutional status of citizens of the Northern Territory. It would be seen as a step along the way towards achieving statehood, which is the ultimate goal. But we are not here today with a bill before this parliament for the provision of statehood for the Northern Territory; what we are here with is recognition of the inferior constitutional status of citizens of the Northern Territory. I believe it is a step along the way and I support any step along the way to statehood.

Senator TROOD—I think we are at one. I support statehood for the Northern Territory—

Mr Henderson—Thank you.

Senator TROOD—but I think the reality of the Northern Territory's status at the moment is that it is in a different constitutional place, if you will, than the states and that is a burden that you have to bear until such time as you can complete your sovereignty. This bill will not solve your problems.

Mr Henderson—I agree that it does not solve the problem, but I think it does signal a willingness of the Commonwealth parliament to engage substantially in the constitutional deficit that Territorians have through not being a state. I believe it is a step along the way.

CHAIR—We are going to have to finish there. We are well over time—your colleagues in the Territory will be wondering what is happening. I thank you, Chief Minister, for making the effort to come to Canberra and present your evidence and your submission to us in person. We appreciate that and I want to put that appreciation and thanks on record on behalf of the committee.

Mr Henderson—Thank you, and I thank all senators for engaging in what I think has been a productive debate. I look forward to your deliberations and your decisions.

[11.54 am]

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

PURICK, Ms Kezia, MLA, Member for Goyder; Deputy Leader of the Opposition; and Member of the Northern Territory Legislative Assembly Standing Committee on Legal and Constitutional Affairs

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

CHAIR—Welcome. I guess you could say this is a legal and constitutional committees meeting. Is there anything you wish to add about the capacities in which you appear today?

Ms Purick—I am also the Deputy Leader of the Opposition.

CHAIR—Thank you very much. We have a submission that has been lodged by you, Hon. Jane Aagaard as the chair as well as in your capacity as speaker. I ask you if you want to make any amendments or changes to that.

Mrs Aagaard—No.

CHAIR—Then we ask you to make a short opening statement to provide us with some background to that submission. Then we will go to questions.

Mrs Aagaard—Thank you very much for giving us the opportunity to provide evidence today. I am very pleased to be here today with my parliamentary colleagues the Deputy Leader of the Opposition and the shadow minister for education. I think this highlights that the support for this bill in the Northern Territory is bipartisan. I recognise that this bill relates to both Norfolk Island and the ACT as well, but my comments really only relate to the Northern Territory. The Northern Territory Legislative Assembly Standing Committee on Legal and Constitutional Affairs strongly supports Senator Brown's bill. The Northern Territory has been working concertedly towards statehood for the past five years. The proposed amendment to remove section 9 of the Northern Territory (Self-Government) Act 1978 means this bill, if passed, will be a significant 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.

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.

The advice we have received from the Solicitor-General for the Northern Territory, Mr Michael Grant QC, is that there would remain three overarching controls on the Territory's legislative power. Firstly, the self-government act is a piece of Commonwealth legislation which can be amended by the Commonwealth at will, including by restricting legislative authority, as was done in relation to euthanasia. Secondly, where a territory law does not deal with one of the matters set out in regulation 4 of the self-government regulations, the administrator is constitutionally required to reserve the law for the Governor-General's pleasure. The Governor-General would act on the advice of the Federal Executive Council in relation to assent. Thirdly, the Commonwealth can pass legislation which has the effect of overriding inconsistent or repugnant territory legislation.

I would like to pick up on a comment which was made by one of the senators from New South Wales in relation to states versus territories. I have asked the Solicitor-General, who is present here today, whether that does actually relate to states, but in fact that power of the executive to overturn laws only relates to territories. All other laws, from a state position, have to be over-ridden by the federal parliament.

While this bill is a positive move on the road to statehood, the Northern Territory is seeking to become the seventh state, and our committee would welcome an opportunity to engage in further inquiry with the Commonwealth parliament on the terms and conditions of the Northern Territory becoming a seventh state. I have recently written to the Speaker of the House and the President of the Senate to canvass opportunities for interparliamentary work that might be undertaken to progress statehood. I conclude my comments today by stating that it is the view of the Northern Territory standing committee that the Australian parliament should support and pass Senator Brown's bill to remove section 9 of the Northern Territory (Self-Government) Act. Thank you, Senator.

CHAIR—Thank you. Ms Purick and Mr Chandler, do you want to add anything to that?

Ms Purick—Yes. First off, I think it should be very clear from the Standing Committee on Legal and Constitutional Affairs here in the Northern Territory that the support for the bill is centred on improving the rights of Northern Territory people, particularly when it comes to their constitutional standing. It is a point of principle that we do not share and enjoy similar rights to other Australians, and this bill is a step—as has been pointed out previously—to rectify that position and to put us on the same playing field as all other Australians when it comes to constitutional positioning.

I was around at the time of the previous movement—in fact, there have been a couple of movements—with regard to gaining statehood and state rights, and we have learnt from those experiences. Some of them were not entirely pleasant, notably the referendum, which did not get up. The work that we have been doing over the last five years—if not a little bit more—has been very community based, involving a wide cross-section of community groups, industry groups and land councils, and that is the report that the Chief Minister referenced previously, which was tabled in our parliament recently and will be discussed and debated further, not only by parliamentarians here in the Northern Territory but also by community people. In conclusion, the support for Senator Brown's bill is very clearly, from this committee, centred on improving and complementing Northern Territory people's rights.

Mr Chandler—With the indulgence of the committee today, I will tell a short story. I arrived in Darwin in 1985 as a member of the Royal Australian Air Force. I did not know at the time, when I was posted to Darwin, that by all accounts, according to the Constitution, my role here in the Australian community was second class. I do not think that anybody in our Defence Force today, whether they are posted to any state or in fact here in the Northern Territory, should be treated any differently. Why our party supports this and why this has bipartisan support in relation to both this proposed legislation and of course our duty to statehood goes without saying: we deserve the right to be equal right across this country, no matter where we reside. Thank you.

CHAIR—Thank you. We will go to questions. Senator Barnett.

Senator BARNETT—Thanks again for your submission and your evidence today; it is most appreciated. I wanted to make an observation to start with that the bill that we are currently looking at was initially introduced in September last year and it only related to the ACT. It has now been amended and applies to the three territories—ACT, Northern Territory and Norfolk Island, and their self-government acts are different. In my view it would change or treat each territory slightly differently. This is on the back of a long history from Senator Brown and the Greens in terms of promoting gay marriage, voluntary euthanasia and other causes, which of course is Senator Brown's and their democratic right, and it has been consistently promoted in the federal parliament and indeed other parts of Australia. So my question is: do you think that this bill is actually a ploy for introducing and changing Australia's laws, whether in relation to marriage, euthanasia or perhaps other social causes? We have seen the ACT already instigate initiatives in that area over the last many years. I am interested in your views on that and the different impact of this bill on the three territories. So it is a two-part question.

Mrs Aagaard—I guess that we were speaking on behalf of the Northern Territory. I am aware that the Australian Capital Territory (Self-Government) Act is quite different to ours. In our opening statement, I indicated that there were three things which the Commonwealth still have powers over in terms of the Northern Territory being a territory, but I understand there are only two steps in relation to the ACT. If it is a ploy, I would have to say that in the Northern Territory there is no move for the introduction of bills relating to euthanasia or to same-sex marriage that I am aware of, but I will ask my colleagues. I think this is more a matter of principle. Given that we are on a road towards becoming the seventh state, we see this as a small step on that journey. It is really about the people of the Northern Territory and the transparency of having our laws, which have been validly passed, being overturned by the Commonwealth executive. We just believe that that is not something which should be happening in 2011.

Senator BARNETT—Thank you.

Senator FORSHAW—Thank you, ladies and gentlemen. Reference was made in your opening remarks to 'the senator from New South Wales'. I assume that is me, because I think I am the only one here. I invite you to go back and read the *Hansard*. In my questions I actually deliberately referred to laws and decisions made by local government entities or state governments. I was not just talking about laws. Very often those decisions made by state governments or local governments have the same effect as laws. For instance, we were discussing the issue about the transport of nuclear waste, where one entity, say, endeavours to try and prevent that waste being transported on its territory, and the Commonwealth minister intervenes to make that, in effect, a nullity. That could be done, in my view, irrespective of whether it were a law carried by the state or some decision of a local government body—because the minister could issue directions or could take steps to render such a law inoperative, as we know. That has happened in regard to export licences and so on for woodchipping.

I know George Williams has indicated there should be a change to the objects of this bill, but it does refer to this proposal that, by removing the relevant section, it would ensure that the territory has exclusive legislative authority and responsibility for making laws for the ACT—or now, under the amendment, other territories. Is it your view or the committee's view that that would be the result—that exclusive authority would then reside within the territory and that it would only be by parliamentary decision of the federal parliament that it could be overridden?

Mrs Aagaard—I would just refer you to my opening statement, where I said that the Commonwealth would still have three opportunities to override Territory laws under the self-government act.

Senator FORSHAW—That was the legal advice.

Mrs Aagaard—Yes. So I guess our interest is that this is just one minor step on the way to our interest of being a state. In relation to your comments about overriding state legislation, I have once again confirmed with the Solicitor-General for the Northern Territory that state laws can only be overridden by the federal parliament, not by the executive of the Commonwealth.

Senator FORSHAW—We could argue this constitutional issue at length. The point I am making is that a federal minister could make a decision that could render a state law which was contradictory to his decision inoperative. We know that. I will come back to the first question I asked you. In your introduction, you did refer to those three situations. I suppose the question that can be then asked is: if the current provision in the legislation is removed, what does it achieve if the options are still there, including ministerial discretion or federal ministerial power?

Mrs Aagaard—It means that it is a transparent process. 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.

Senator FORSHAW—So the phrase in the objects 'exclusive legislative authority' really is a bit more than what would actually end up being the case. There currently also is a provision that allows for a disallowance motion to be moved in the federal parliament, and indeed it is my recollection that this was the position that was adopted when Prime Minister Howard used the power in the ACT. Is that not sufficient in your view? In other words, there is still a measure under the current act that enables the federal parliament to exercise power over a federal minister's decision.

Ms Aagaard—We accept that we are a territory. We know we are a territory. We want to become a state. What we are saying to you is that this is a single step along the way.

Senator FORSHAW—I appreciate that, but we are dealing here with legislation that was never put forward as somehow a step along the road to statehood. I understand all of those arguments and I support them. Do not misunderstand me, what I am doing here is endeavouring to focus on the legislation that is before us and the powers that currently exist and how they compare to states and territories. I hear all the arguments about people living in the territories not having democratic rights compared to the rest of the country. I hear that constantly as well when I hear that decisions of local councils are overturned by planning ministers. Everybody can run that argument. I understand it is a step towards statehood for you, but that is not the basis upon which it is put forward to this parliament.

Mrs Aagaard—Section 9 has actually never been used in the 34 years of self-government and, therefore, is probably not going to be used. When the Commonwealth has in fact intervened in the Northern Territory it has always been by way of the parliament. It has happened on three occasions in recent years—euthanasia; the Commonwealth's intervention into Aboriginal lands, which affected a large number of Northern Territory laws; and the radioactive waste disposal bill, which was overturned as well. So the Commonwealth certainly has the power to do that, and I am sure will continue to do it if they feel they need to.

CHAIR—I want to clarify something. It is true that this bill has not been put forward to assist the movement to statehood by the Northern Territory, but now that we have it before us you are putting to us that one of the arguments is that a minister in the executive cannot overrule any state legislation that needs to be overturned or varied. It must be done by the federal parliament; therefore, if we remove this element of the self government act it simply puts the Northern Territory on the same level footing as other states in terms of powers that the Commonwealth has to overturn legislation.

Mrs Aagaard—No, it does not because it is quite different being a state. The Western Australian senator—I am sorry I do not remember your name, Senator—talked about how the Commonwealth can override laws of the states but it had to be in the best interests of all Australians. Being a territory is quite a different situation, because we are not—I was going to say 'at the same standard', but I am not sure I would like to say that about the territory—constitutionally the same as a state so the Commonwealth under the self-government act does have this capacity to overturn our laws. We accept that and understand that, but we are saying that we want to be a state. We are very happy to engage with the federal parliament, which is what we have been trying to do over the last few years as well.

This bill has come up, and we are saying to you that we support this bill. We would not have put it up ourselves or asked the government or the parliament to put this bill up. But, given that it has been put up, we are strongly supporting it because we say it is a step on the way to what we are hoping to achieve over the next few years.

Senator BOB BROWN—Thank you, Mrs Aagaard, Ms Purick and Mr Chandler. Firstly, following Senator Barnett's question about the ploy, let me reassure you that there is no ploy in this. I do support the matters that he was talking about, but this is a question of the democratic rights of people who live in the territories, including the Northern Territory. I feel very strongly about that. I was, much earlier, a supporter of maximum democracy then came to consider the other issues. Let me put your minds at rest about that.

I thank you for your submission. I might add personally to what other senators have said that I am fully in support of you in your path towards statehood for the Northern Territory, which, when it is achieved, will make this matter somewhat irrelevant. But this is a step in empowering the Territory Legislative Assembly, elected by the people of the Territory. As the Chief Minister said, with a constituency of 4,500 or so electors for each of you, you could claim a stronger mandate than most other elected representatives in states around the Commonwealth.

I am interested in the penultimate paragraph in your submission, which says:

> We also encourage the Senate Committee to give consideration to the wider constitutional issue of Statehood for the Northern Territory and invite direct discussion with the Committee in this regard.

We are Commonwealth senators here and I would be one of those who do not want to take that matter for granted. It is very, very important. I assure you that I would support a discussion between this committee and indeed the whole parliament with you as you progress towards statehood. I will take up with the committee that recommendation of yours. It is a matter of principle and I thank you for your support. My question is the same as the one to the Chief Minister: are you aware of opposition to this legislation within the Territory?

Mrs Aagaard—I personally am not aware of any opposition to it.

Ms Purick—In the greater rural area of the Northern Territory, an area that I represent, there has not been a lot of dialogue with regard to this legislation, which is not surprising. I believe that there is some interest in the legislation and the implications of the legislation not only for the Northern Territory but elsewhere, but no opposition has been put forward by our party here in the Territory or through the media or generally in the community. That may be because they are not fully conversant with what is involved. What we have been doing in the short while since you introduced it is getting people to understand that our priority is about the part of the legislation that seeks to improve the rights of Territorians—that is, they elect their people into the Northern Territory parliament, they pass the laws and it is not right for a Commonwealth minister and the

executive then to nullify those laws for whatever reason. Once you explain it to people in that way, because that is what our priority is, then they accept the legislation.

Mrs Aagaard—I have to say too, Senator Brown, that very few Australians, whether they live in the Northern Territory or elsewhere, know very much about constitutional law. I would be very surprised if they knew what section 9 of the Northern Territory (Self-Government) Act actually was. But if you say to them, 'As a citizen of the Northern Territory you have lesser rights than someone else,' they quite naturally get upset. They want to have the same rights as other Australians.

Senator BOB BROWN—I think you are right. I think there are very few Australians who understand that section 59 of the Constitution allows Her Majesty to override any law made by this parliament. Thank you very much.

Senator HUMPHRIES—I want to take you back to the period—I am not sure whether any of you were in the Northern Territory parliament—when Senator Brown had a somewhat different view of the Northern Territory's right to legislate. He introduced a bill that would override the Northern Territory's mandatory sentencing laws. I address this question to you, Madam Speaker, in your capacity as a member of the Labor Party. Would you not concede that there could be circumstances where the particular piece of legislation—in this case, for example, minimum mandatory laws that were sending children to jail, as I understand was the case—was, in the view of your party and perhaps yourself, so obnoxious that notwithstanding it being passed by the Northern Territory parliament intervention by the Commonwealth, whether using section 9 of the Northern Territory (Self-Government) Act or through legislation, would be appropriate?

Mrs Aagaard—First of all, I am still opposed to mandatory sentencing of juveniles and was part of a public campaign against that. In relation to state and territory laws, however, I still do not think that it is the place of an executive to overturn laws of a place—of the Northern Territory. I just do not think that is right, unless it is through the parliament, where it is a transparent process. I also suggest to you that if laws such as that are repugnant to the Australian government of the time then they should be making laws for the whole of Australia to prevent that happening rather than just making laws for one particular place.

Senator HUMPHRIES—So if that situation that occurred a few years ago were to recur today—I am not suggesting that it is going to—you would welcome or at least accept, Commonwealth legislation to override the Northern Territory's legislation to that effect.

Mrs Aagaard—I do not think 'welcome' is quite the word. We are working towards a situation where we are equal to other parts of Australia—as the seventh state of Australia—so we would be looking to having the same rights, in terms of our laws, as the states. The Commonwealth can, of course, overturn state laws under certain conditions but it does not do it very often. Because the Northern Territory is a territory even if this is removed there are still three ways in which the Commonwealth, if it wishes to, can override those laws that will remain.

Senator HUMPHRIES—I understand that but let's come to the specific circumstances. If the same situation arises today that arose some years ago—Senator Brown moves the same bill he moved some years ago to override the Northern Territory's legislation—would you, speaking to other Australians about this legislation, say, 'Yes, the federal parliament should support that legislation,' or would you say that it should oppose the legislation based on its power to override the Northern Territory's parliament?

Mrs Aagaard—I think that is a straight political question: am I opposed to mandatory sentencing of juveniles? The answer is: yes.

Senator HUMPHRIES—No, that is not the question.

Mrs Aagaard—However, should the federal parliament, as it stands, be able to overturn our laws? The whole federal parliament can do that.

Senator HUMPHRIES—The question is: should it do so in those circumstances? Should it be able to? Would you support it doing so in those circumstances?

Mrs Aagaard—I think you would have to take it on a case-by-case basis. For example, I am personally opposed to euthanasia. That was a transparent process across the federal parliament. If we became a state the people of the Northern Territory should still have the right to make decisions on things which every other part of Australia can make decisions on.

Senator HUMPHRIES—In the case of euthanasia legislation the Northern Territory parliament unanimously opposed the exercise of that power irrespective, presumably, of the members' individual views

about euthanasia. That was a clear unanimous position by all the members of the Northern Territory parliament at that time. Are you saying to me that that would or would not be the case if there was a replication of that situation which arose a few years ago? Were legislation on minimum mandatory sentencing to be overridden by the Commonwealth bill would you see that as being supportable by the parliament and by members of the parliament?

Mrs Aagaard—I just feel I cannot. Apart from anything else, I am also the speaker. I really do not think I can make a comment on that which would be helpful to this inquiry.

Senator BRANDIS—With respect, I would like to pursue that. It seems to me from your earlier remarks that the basis of your objection to the current Commonwealth law is an objection to the way in which section 9 of the self-government act operates. Specifically, your objection is to the executive government overruling a law of the Northern Territory parliament. I can understand why you say that, but what Senator Humphries wants to know, and I think it is fair enough that we pursue you on this, is whether you go further and say that you have an objection to the Commonwealth parliament overruling a territory law in circumstances where the Commonwealth parliament would not have the constitutional power to overrule an act of a state parliament.

Mrs Aagaard—I think the answer to that is that we are in fact a territory and so we accept that that can happen.

Senator BRANDIS—Are you content that that can happen under section 122 of the Constitution?

Mrs Aagaard—We accept that that can happen, but I note once again that we are trying to become a state. It would be quite a different situation if we were a state.

Senator BRANDIS—I understand that, Mrs Aagaard. But at the time that the parliament deliberates on Senator Brown's bill, which will be sometime this year, you will not be a state. So I think it is important for us to know what your position is at the moment in your pre-statehood constitutional status. You can say that section 9 and analogous provisions in the ACT self-government act are an anomaly because there is something wrong about a minister—or the executive government at one level—by decree, in effect, striking down the law of a territory parliament. I fully understand that argument. Or you could say that there is something wrong with the Commonwealth striking down the law of a territory parliament, by whatever means—whether an executive decree or a legislative act of the Commonwealth parliament. Or you could say both. Do you say both or do you confine your objection to the operation of section 9?

Mrs Aagaard—We are confining our objection to the operation of section 9, which is what this bill is about.

Senator BRANDIS—Therefore, you have no problems now with section 50A of the self-government act, which is the euthanasia prohibition?

Mrs Aagaard—Euthanasia as it stands cannot be debated and passed in the Northern Territory. We accept that.

Senator BRANDIS—So it is no part of your submission to this committee to address section 50A of the Northern Territory self-government act?

Mrs Aagaard—It is out of power for the Northern Territory to legislate on that—

Senator BRANDIS—I understand that, but given that we are addressing potential changes to the Northern Territory self-government act, I am just inviting you to comment on section 50A of the Northern Territory self-government act. Or, if you do not have anything to say about it, if you are happy with it and you accept that it should be left alone, can you please tell us.

Ms Purick—In preparing this submission and addressing this committee, we are well aware that there are those key issues, one of them being euthanasia—or the rights of the terminally ill, as I like to call it. That is not what we as the committee are here to put forward to the committee. Our prime concern and our principal point is that if a law is passed between now and when we become a state, it will be a territory law and cannot be overridden by one minister or executive council. If there is a path where they do want to override a law that we make in the future, and I do not know what it could be, that the process to do that will be through the parliament and be far more open and transparent than what it is currently.

Senator PRATT—You seem to have been questioned about some of your individual views, but I want to clarify: you are appearing as a committee today, aren't you?

Mrs Aagaard—Yes.

Senator PRATT—That demonstrates, I suppose, the way that you have framed your evidence. Is that correct?

Mrs Aagaard—That is correct.

Senator PRATT—I just wanted to clarify that. I will give you a hypothetical—people are debating other very hypothetical questions. If the federal executive objected to something like, for instance, the banning of paintball and a state could ban it but a territory could not, that would be fairly inequitable, wouldn't it?

Mrs Aagaard—Yes.

Senator PRATT—I want to go to Senator Forshaw's point. We have had a discussion about federal ministers making laws inoperable for a range of regulatory reasons. You have outlined the ways in which federal governments and federal parliaments will retain the capacity to override territory laws, one of which is by passing laws through parliament. But, if there are indeed regulatory decisions through the environmental protection act or planning regulations, I suppose the key point is that that would retain equity with other states. There are not any special disadvantages for the Northern Territory versus other states in those scenarios, are there?

Mrs Aagaard—We believe that is true, yes.

CHAIR—I thank you for your submission and also for making yourselves available today for our committee's deliberations into this legislation.

Mrs Aagaard—Thank you very much.

Proceedings suspended from 12.32 pm to 1.07 pm

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

CHAIR—I reconvene this public hearing of the Senate Standing Committee on Legal and Constitutional Affairs Legislation Committee's inquiry into the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010. I formally welcome the Chief Minister of the ACT, Mr Stanhope. The Australian Capital Territory government has lodged a submission with us—which is No. 20 on the website. I invite you to make a short opening statement and then we will go to questioning.

Mr Stanhope—Thank you for the opportunity to attend today. I will speak briefly to the submission. The ACT government supports the bill under inquiry by the committee. It is the submission of the ACT government that the disallowance power at the heart of the bill—the proposal to remove section 35 of the ACT Self-Government Act, which, depending on one's viewpoint, at the commencement of self-government in the ACT, which occurred in 1989, seemed necessary or appropriate—no longer reflects the growth and maturity of governance that has been achieved in the ACT since self-government. We submit that the existence of section 35, and the fact that it has in the past been utilised, constrains the mandate imparted on the elected representatives of the ACT to govern the territory responsibly, accountably and democratically. Our submission is quite simple: section 35 is an unnecessary constraint on the democratic rights of the people of the ACT.

CHAIR—Thanks very much for that. We will now go to questions.

Senator HUMPHRIES—Thank you, Chief Minister, for your appearance here today. Can I start with the objects of the bill. The objects of the bill, as stated, are to:

(a) 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 …

That has obviously now been widened to include the assembly of the Northern Territory, and Norfolk Island as well. And, the objects go on:

(b) ensure that the Legislative Assembly for the Australian Capital Territory has exclusive legislative authority and responsibility for making laws for the Australian Capital Territory.

Would you agree with me that that is something of an overstatement of what this bill can actually do, given the limitations of section 122 of the federal Constitution?

Mr Stanhope—On the provision and perhaps the objects, I take the point that you make: section 122 of the Constitution exists and it invests plenary powers within this parliament—the Commonwealth parliament—in relation to most particularly the territories, just as it does in relation to a whole range of other specified matters but most particularly the territories. The submission which the ACT government makes acknowledges that the power of the federal parliament to override, to render null or void any ACT government enactment exists. We believe the fact that it does of course strengthens the case for support for the removal of section 35.

The proponent of the bill, Senator Brown, would be better able to respond to a question around the stated objects of the bill, but certainly I acknowledge, we all acknowledge and we know that section 122 is embedded within the federal Constitution and that it provides plenary powers that at any time could be utilised, were it the will of this parliament, to override an enactment of the ACT Legislative Assembly. I think, and the ACT government submission goes to the point, that the very existence of section 122 strengthens the case for the removal of section 35 of the self-government act as simply unnecessary, inappropriate and a provision which does render the democratic rights of the people of the ACT less than those enjoyed by the states in relation to matters which we all acknowledge, and which the federal parliament acknowledges, are within the purview and constitutional remit of the ACT.

Senator HUMPHRIES—You would agree with me, however, given that that is the desirable outcome from your point of view, that the objects probably somewhat overstate the ambit of the legislation and should probably be amended to reflect what the bill actually can achieve?

Mr Stanhope—One might, I must say in a debating sense, Senator Humphries, suggest that, yes, the objects might have been otherwise worded to take account or to acknowledge the existence of section 122 of the Constitution. But the wording for the objects of the bill, whilst significant, of course is not determinative of the appropriateness or otherwise of the intent of the bill to remove section 35 from the self-government act.

Senator BOB BROWN—Can I say, just to aid the committee, that Senator Humphries is quite right here and that I will, with the leave of the Senate, seek to restate that objective so it is more consistent with the actual outcome of the bill, were it to be passed.

Senator HUMPHRIES—Chief Minister, you go on to say in your submission that section 35 of the self-government act is an outdated constraint on the democratic right of the citizens. You say:

… it is understandable that the then Australian Government—

that is the federal government—

considered the Executive disallowance power a necessary precaution to ensure stability and safeguard the national interest.

I read into those comments that there was a point in time when a section 35 precautionary measure ought to have been in place or could arguably have been in place but that time has now past. Is that a fair reading of what you are saying in the submission?

Mr Stanhope—Yes, though I understand some of the imperatives and some of the thinking that may have been in the minds of the drafters of the self-government act in 1988 in relation to the decision to accord self-governing rights to the people of the ACT and in relation to an override power. It was a position of some additional caution recognising, as we do, section 122 of the Constitution and the effect and impact that it has in any event. I have not studied the transcript of the debates around the self-government act in detail, or any of the other literature that may exist in relation to the thinking of the crafters of the self-government act, but of course there is a particular similarity between section 35 and section 59 of our national Constitution insofar as the Queen has invested in her the same sorts of powers that were invested in a minister—most particularly, probably, the minister for territories or the person occupying the position in relation to the territories.

It is perhaps worth dwelling on the fact that the Queen of Australia has the same rights to override enactments of this place, a power which she has never utilised and which, by convention, one imagines will never be utilised. It may be that some further consideration should be given to the existence of that particular power within our head of state to overturn an act or an enactment of this particular place. In the context around the meaning of the continued existence of section 35 for the people of the ACT, whom I represent, and for the representatives within the Legislative Assembly elected democratically by the people of the ACT to represent them, one might pose rhetorically the question: what would any member of this place think or conclude were the head of state of Australia to exercise the powers vested in her under section 59 of the Constitution and what submissions would be made in relation to the potential exercise of that power? It is a question worth posing at least rhetorically in relation to the attitude of my government and of the people of the ACT to the potential exercise of a power vested, which of course vests in the executive, the Governor-General—the same powers, by extension, that the Constitution of Australia vests in the Queen.

Senator BRANDIS—Of course, Mr Stanhope, the debating point you make completely disregards the effect of the Statute of Westminster and the provisions of the Australia Act. The power nominally vested in the sovereign under section 59 of the Constitution is governed not merely by convention but by those two acts, the first of them an act of the imperial parliament.

Mr Stanhope—However, it does not disregard the commitment, I would have thought, to us in Australia to democracy, basic first principles of democracy and responsible representation, and the rights of all people to exercise their democratic rights—and to exercise them unfettered by a concern that decisions made through the democratic processes within the ACT would be subject to being rendered null, void and of no effect by the exercise of an executive fiat on a representation by a minister not accountable to that particular electorate and not even required, essentially, to state a reason for interfering to overturn a decision or a law of a democratically elected parliament.

Senator BRANDIS—I do not want to pursue this. I merely point out that the analogy between this and section 59 of the Constitution is, without reference to the Statute of Westminster, in particular, not a very apt analogy.

Mr Stanhope—I disagree. The ACT government's representations go to a first and basic principle. That first and basic principle is that we, 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. It is a first and basic principle. We can debate and make analogies with the powers of the Queen vested in the national Constitution and we can make analogies or seek to defend the capacity of interference, but at the end of the day I and my government, and I believe the vast majority of the residents of the Australian Capital Territory, reduce this issue to first and basic principles. We, the 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. Respectfully, we do not need to debate, cogitate or agonise over motives, motivations or wording within the amending legislation. 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.

Senator BRANDIS—Mr Stanhope, if you were to pursue that argument to its logical conclusion, you would call for the repeal of section 122 of the Constitution. Do you do that?

Mr Stanhope—I think it is worthy of consideration, but that is a debate for another day. We, the ACT government, acknowledge and respect the role of the Commonwealth in relation to the national capital of Australia. Indeed, I am currently arguing for the Commonwealth to accept a little more strongly its interest in its national capital through the current of review of the National Capital Authority. The ACT government's submission to that particular inquiry will be that we would welcome a far higher or closer level of interest by the Commonwealth government in relation to those aspects of the national capital that are of importance to the Commonwealth government of Australia on behalf of all the people of Australia.

We do not for one minute deny the legitimate and appropriate right of the Commonwealth of Australia, through this parliament, to legislate in relation to those aspects of the management and governance of the Australian Capital Territory that are relevant to the Commonwealth government's interest in Canberra or the Australian Capital Territory as the national capital of Australia. In a full review of the self-government act—a position that I am sure the Australian Capital Territory government would put in any such review, is the need for us, through the self-government act, to acknowledge the role of the Commonwealth—indeed, accepting that section 122 will not, I believe, in my lifetime, be subject to a national referendum to determine whether or not it might be deleted from our Constitution. But that is a debate that I believe, as a proud Canberran, Territorian and Chief Minister, is appropriate in terms of the capacity that there is for a convention to develop, just as we have conventions underpinned by legislative provisions in relation to section 59 of the Constitution. I believe that there should be an accepted convention in relation to the circumstances in which a Commonwealth parliament would utilise section 122. It is in that context that I do not believe section 35 is at all necessary.

I do not believe there is a cogent, sustainable argument that justifies the continued existence of section 35. One can mount a cogent argument in relation to the continued existence of section 122 of the Constitution. At least it is arguable. If one were to take the position that section 122 should be retained, I believe it should be in the context of a set of conventions around the circumstances in which that particular power would be utilised. I do not believe it is appropriate that section 122 be utilised to override legislation of the ACT Legislative Assembly—which reflects the will of the people of the Australian Capital Territory through their elected representatives, through the ballot box, through mandates that they have achieved through a democratic process—unless that assembly sought in some way to subvert a Commonwealth law or sought in some way to impinge on the Commonwealth's responsibilities and roles within the Australian Capital Territory. In the two most recent instances, in the first instance the use of section 122 in relation to a law of the Northern Territory and in the context of section 35 and its use in relation to a law of the Australian Capital Territory, neither of those issues went to matters of federal constitutional specific interests.

Senator BOB BROWN—I wonder if you can see the parallel between Senator Brandis's argument and indeed this legislation, which is to reduce a power invested in the executive which is not strictly there in the Constitution and bring it back to what section 122 of the Constitution literally means, which is that the parliament has an override of the territories. But there is no mention there of that power being passed on to an executive. That has been taken by legislation in past years establishing the territories.

Mr Stanhope—I must say I think any conversation around section 35—its removal and the reasons for its existence—needs to be undertaken in the context that section 122 of the Constitution exists, is there and there is very little prospect of it being removed. So it is an extension by this legislature of an overarching power to an individual member or minister who can exercise it by executive fiat, essentially through the Executive Council by request to the Governor-General. I am loath to argue for section 122 because I believe that one level, in the way it has been utilised—and potentially will be utilised in the vast—is anachronistic, has been used antidemocratically and inappropriately though I accept that it was utilised legally and constitutionally—

but that is another conversation for another day. But I do believe this: let us not go down some rabbit hole thinking that this is some accretion of power to the Australian Capital Territory or this is an enhancement of the rights and powers and privileges of the people of the ACT represented in the removal of section 35. It does not enhance our powers. It is not an accretion. It is not an enhancement. It simply seeks to take us one step closer to having the same self-governing rights as the people of the states, our cousins across the border.

Senator BOB BROWN—I will not dwell long on the next couple of questions. The *Australian* newspaper, though it has not made a submission to this committee, holds a very strong point of view which I see is shared by nine per cent of Australians in an opinion poll released the day before yesterday. An editorial on the 10th of this month says the ACT's:

... constitutionally inferior status is enshrined for good reason."

… … …

... Canberra should not cede power to the territories.

Have you got any comment on that point of view?

Mr Stanhope—I do have strong views on the point of view at a number of levels. To suggest that the ACT is not competent and does not deserve the same democratic rights as those of residents of states is to argue a principle which I reject absolutely. I am surprised that any thinking person or any thinking Australian would stand up and fly a flag for a position of removal or weakening or nonrecognition of the democratic rights of some of us. That is what it does. There are 360,000 people in the Australian Capital Territory and we have major institutions, a major newspaper and others arguing that the 360,000 of us are in some way inferior to all other Australians.

Senator BRANDIS—And you're saying they're not thinking Australians.

Mr Stanhope—People that are saying that we are inferior are not thinking Australians. Anybody that thinks about this particular issue and thinks about the base principle, the principle of democratic right and equality of all Australians, and is prepared to maintain an argument that we Canberrans are less worthy of the democratic rights enjoyed by all other Australians are, as far as I am concerned, not thinking about the obvious conclusion of what it is that they are saying. And to be blunt, the *Australian* in its editorials on this particular issue not just patronises but offends all Canberrans by its labelling of us as a people that cannot be trusted to govern ourselves.

Senator BOB BROWN—It says in the same editorial that the good statistics on post-school qualifications, higher average income and lower unemployment in the ACT are no excuse for 'the wave of self-righteous fury' on this issue. Then it says:

It's a bit rich for the Greens to blithely argue now that a legislature of just 17 people should be allowed to adjudicate on a contentious ... issue—

it is referring there to same-sex marriage—

that demands a broad consensus.

Do you understand, Chief Minister, that editorial is actually saying that the legislature in the ACT should be subject to some broader consensus before it enacts laws? Do you understand possibly what that editorial means?

Mr Stanhope—I do. It is the point I make, that somehow we cannot be trusted, that we—the people of Canberra—cannot be trusted to legislate or to regulate ourselves, that apparently we need this parliament to determine for us the sorts of issues that other governments around Australia—the government of New South Wales or the government of Tasmania or the government of Queensland—determine on behalf of the people of those places. It belies the level and quality of government that has been delivered in the Australian Capital Territory since self-government. It would seem to be somewhat self-serving but I would be prepared to rank outcomes in relation to every area of government service delivery in the Australian Capital Territory with those in any place in Australia on any objective criteria. We govern well, we govern responsibly, we govern within budget, we deliver outstanding services to the people of the Australian Capital Territory as compared to all other jurisdictions in Australia. This is a well-governed, stable, successful community and economy and place on all indicators and against all measures. We govern well here in the Australian Capital Territory. We govern as well as anywhere in Australia, and all of the indicators will confirm that. One can be a little cynical or sceptical, and I do not want to go down roads in relation to the rights or wrongs of same-sex marriage or civil unions however described. Today I do not want to debate euthanasia. What I want to say, and this is the

point I want to make, is that if we, the people of the Australian Capital Territory, seek to address albeit controversial issues reflecting the will of we people of the Australian Capital Territory what basis do others—those in other places who have the same rights to legislate in relation to those areas if they wish to pursue them but choose not to—have to say, 'Well, we think you're wrong about these issues'?

I will just go to the issue of civil unions. My government, my party, the Australian Labor Party, I say this proudly, campaigned at successive elections on a platform involving the removal of all legislated and legislative discrimination against gays and lesbians within this community. We were elected, we campaigned again and we were elected again. We have a mandate from the people of the Australian Capital Territory. We have been elected at three successive elections. There is not a single voter in the ACT who does not understand my commitment and the commitment of my government to remove all legislative discrimination against gays and lesbians. This is the base principle. I am happy to talk about the base principle but for the sake of a broader understanding of some of the issues here we did not seek to slip these issues in under the radar. We did not simply determine that we had a policy position on this issue after an election. We campaigned on the issue and we have been elected three successive times on this platform.

I do not want this to be a debate about same-sex marriage, civil unions or euthanasia—for the people of the ACT it is not. It is about our democratic rights. It is about our right to be accorded, at the same level of respect, the same democratic rights. I cannot understand that anybody could possibly argue against that or gainsay it but we Australians above all else will always stand up for democracy and, at the end of the day, that is what this inquiry is about: is the federal parliament, the Commonwealth government, prepared, in passing a simple provision to remove section 35 of the ACT (Self-Government) Act, to stand up again for democracy? I think it is a simple issue. We do not need to conflate or confect it or to seek to divert attention from a basic principle about democracy with an argument about same-sex marriage, civil unions or euthanasia. I think it is important to understand in relation to this place's and my government's decision to pursue the removal. We said we will remove all legislative discrimination against gays and lesbians within the Australian Capital Territory. We began a law reform process, provision by provision—stunningly we found hundreds of provisions across every enactment in the Australian Capital Territory—and one by one we removed them. We also committed to according functional equality to gays and lesbians in their relationships and this of course is the one issue that aroused the interest of this place.

CHAIR—Mr Stanhope, I have a number of senators who still want to ask questions. I am going to go back to Senator Humphries at some stage and we are running a bit short of time now.

Senator FORSHAW—Thank you, Chief Minister, for your submission. It is well argued and I was impressed with the logic. That does not mean I agree with it all. I want to put a couple of points to you. Firstly, what is your view about section 23 of the ACT (Self-Government) Act which specifically provides that there are certain areas—property, policing—that the ACT cannot legislate about? Would you run the same argument that somehow that is a denial of democratic equality with the states because they have those powers?

Mr Stanhope—The ACT government do not have a concluded position on some of those provisions but we have been arguing ever since I have been chief minister, which is nearly 10 years, for the self-government act to be fully reviewed. In my time as chief minister which is now over nine years, coming up to 10 years, I have made repeated requests of the Commonwealth government to review the self-government act. It may be that my predecessor, Senator Humphries—he might be able to assist there—did the same. Certainly, over the last 10 years we have sought repeatedly to have the self-government act reviewed and we have in our representations to the Commonwealth over that time raised our interest in seeing whether or not all of the provisions of the self government act, most particularly and specifically the provision which did reserve some powers to the Commonwealth in areas where they are not reserved in the states, could be reviewed.

Police is an interesting example because our police force, of course, is the Australian Federal Police. It is a service provided on contract by the Australian Federal Police to the ACT government. We are more than happy with the contractual arrangement and with the service that the Australian Federal Police provide. But, accepting that it is a service that is delivered on contract, I think it is time for a discussion around whether or not we should nevertheless have the right and the capacity to legislate in relation to policing. We do not have a conclusive view but, as a matter of principle, yes, we would like those provisions reviewed and we would like an opportunity to have those particular reservations visited.

Senator FORSHAW—I have one other quick point and then a question. One of the things that I am struggling with in this argument is that there is so much said about a comparison of democratic rights and about people being second-class citizens, because as I have pointed out there are myriad areas where

Commonwealth ministers can take action to nullify or override decisions, even laws, stopping them from having effect at state level. The Traveston dam is one. Maybe some people in the Queensland government believe that that was a denial of democratic rights for decisions that they wanted to make.

But the question I wanted to ask you is this. It is now said that the government is more mature and so on and therefore section 35 is no longer needed. If we look back, the one time in which it has been utilised in respect of the ACT was the Howard government's decision, and I understand there were suggestions that it may be used again under the Labor government. Has there been any decision or motion carried by the ACT assembly requesting the federal parliament to remove section 35, as distinct from a position of support for Senator Brown's bill?

Mr Stanhope—I would just make one quick comment. The Commonwealth exercise of powers to nullify laws within a state are only ever exercised under a federal or constitutional head of power—as in the Traveston dam.

Senator FORSHAW—Yes, but there can be conflicting—

Mr Stanhope—There can be.

Senator FORSHAW—There could be a decision to approve a uranium mine, as distinct from a decision on—

Mr Stanhope—Certainly, we all have opinions on a raft of issues, and decisions are often made on our behalf by governments with which we do not agree—but they are made constitutionally through a particular process that renders us all equal. Section 122 of the Constitution and section 35 of the ACT (Self-Government) Act respectively overlay an additional power or capacity—a non-specified power or capacity. When the Commonwealth exercised its power in relation to the Traveston dam, or indeed in relation to a range of other things that were controversial or where there were a range of views, it was acting consistent with an express constitutional power.

Senator FORSHAW—That is correct.

Mr Stanhope—In relation to section 35 it is not, other than section 122, which is overarching.

Senator FORSHAW—But that is a specific constitutional power.

Mr Stanhope—Well, it is, but, to go back to Senator Brandis's analogy, it then needs the exercise of section 122—the express constitutional power through which the self-government act was developed in the first instance. It rendered to the people of the ACT a self-governing status. The self-government act invested responsibility in the people of the ACT. It is our constitution. The self-government act is our constitution, and under it we were invested with power to make laws for the peace, order and good government of the ACT in the same way as the states, except for those couple of points that you have gone to where the Commonwealth reserved some powers to itself. The later decision to interfere, to add, 'Yes, you do have the same rights as the states, except when we decide you don't,' is not consistent with the overarching constitutional provision that was made through the self-government act, and that is the point. It is utilised unilaterally in relation to an issue where there is a strength of view or where there is some controversy, where politics becomes involved. An individual minister making a decision based on a political position or a personal decision of opposition to an enactment arrived at democratically is, as a principle, wrong.

Senator FORSHAW—That may be fair enough, Chief Minister, but the federal Constitution is a creature of the establishment of the Federation by the states and the conceding of powers to a national parliament. The establishment of territory self-government is a creature of the federal parliament. There is a constitutional distinction and I may agree with all of the other things—

Mr Stanhope—That is right and we accept that. Of course, the ACT did not exist—

CHAIR—We are going to move on. Other senators want to ask questions, Senator Forshaw.

Senator FORSHAW—You should have allowed more time.

Senator BRANDIS—We are very happy for you to be allowed to continue, Senator Forshaw, if I may speak on behalf of the opposition.

Senator FORSHAW—Your answer to the other question about whether the ACT assembly has made—

Mr Stanhope—Yes, we have made specific representations to the federal government in relation to section 35.

Senator PRATT—Mr Stanhope, how well do you think Australians understand the difference between the entitlements one has in a state versus a territory? For example, it would strike me that, from some of the national debates where there has been discussion of the Commonwealth overturning the ACT, Western Australians would probably be quite unaware to a large extent that their state government has the right to legislate on those very same questions.

Mr Stanhope—I would agree with that. There is a very poor level of understanding within the states about the constitutional arrangements which apply within the Australian Capital Territory. I think it is fair to say, in relation to the debate that has ensued around Australia over the last month or so on this particular proposal, that it has been about civil unions, gay marriage and euthanasia. It has not been a debate about whether we should give people of the ACT a fair go. I am sure if the question were framed in Hobart, Perth, Sydney or Melbourne, 'Do you believe that Australians who live in the Australian Capital Territory should enjoy the same democratic rights you enjoy?' I think the people of Australia would give a resounding yes; but if they were asked, 'Do you believe that the Australian Capital Territory should allow euthanasia or gay marriage?' there would be a very different answer.

We all know that the nature of the debate has confused the issue. It has been a debate about euthanasia and gay marriage; it has not been a debate about democracy. This is about the democratic rights of the people who elect me, all the peoples of the ACT. It is about their right, through their elected representatives, to have pursued on their behalf laws which that parliament makes and, if they do not like that law or they do not like the government, to vote it out of office and to have another group of elected representatives repeal the law. That is how it works in this place, it is how it works in New South Wales, it is how it works in Tasmania and it should be how it works here. From time to time we face this undemocratic prospect of laws which everybody in this place who has some capacity to amend the self-government act essentially thinks—

Senator PRATT—What you are saying is that we have had some national debates which have largely cut to the substantive questions without really having a national debate about the fact that those very same questions sit quite actively before state parliaments—

Mr Stanhope—Yes.

Senator PRATT—and that those questions are, in fact, currently actively being debated there.

Mr Stanhope—Absolutely. There have been debates in three state parliaments over the last six or seven months in relation to euthanasia which the people of those states thought appropriate and reasonable. There was, of course, no capacity or interest by the federal parliament to seek to interfere or intervene in those debates. At the end of the day, that is the point. If a state chose to legislate for euthanasia, if a state chose to legislate for gay marriage, which they are all constitutionally enabled to do—

Senator BRANDIS—No they are not. That is completely wrong. No state can legislate for same-sex marriage.

Mr Stanhope—That depends. That is a semantic—

Senator PRATT—The Commonwealth could legislate on some of those questions but it would have to legislate on behalf of all Australians in order to do that.

Mr Stanhope—Absolutely, of course, and that is the point. If a state legislated for civil union or gay marriage, however described, or euthanasia, there would not even be a debate in this place.

Senator BRANDIS—I am astonished that a Chief Minister could be so ignorant of the Constitution. The power to make laws in relation to marriage in this country is reserved to the Commonwealth parliament under section 51 of the Constitution.

Mr Stanhope—I accept that absolutely. But the states and territories have constitutional power to regulate all non-marriage relationships.

Senator BRANDIS—You said same-sex marriage.

Mr Stanhope—Marriage is defined within the Marriage Act—

Senator BRANDIS—So no state could legislate for same-sex marriage in violation of the Commonwealth marriage Act.

Senator BOB BROWN—There are three states looking at legislation at the moment.

Mr Stanhope—I accept that absolutely, Senator Brandis.

Senator TROOD—I make the observation in relation to that matter that the Marriage Act is a Commonwealth act.

Mr Stanhope—Absolutely.

Senator TROOD—You support the bill and your submission makes the point that there are other matters which are of concern to you which you think also ought to be amended in relation to the arrangements for territory government. You mentioned the size of the legislative assembly and in relation to Indigenous traditional ownership. In some of the submissions we have received, Professor Williams, for example, makes an observation in relation to the Governor-General's power to dissolve the legislative assembly. Why wouldn't it be a good idea, rather than pass this piece of legislation as it is now, to investigate more comprehensively the constitutional and self-governing powers of the Australian Capital Territory?

Mr Stanhope—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 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.

Senator TROOD—The answer to that question is, I think, that, as you have said, the act is essentially the Australian Capital Territory's constitution and constitutional reform is better made comprehensively rather than on a piecemeal fashion.

Mr Stanhope—That would have been our preference and it is a preference that we have been arguing for 10 years. Yes, we have in this submission foreshadowed two other issues, essentially by way of example as much as anything. The first is in relation to the size of the assembly and the capacity for the parliament of the Australian Capital Territory, the ACT legislative assembly, to determine for itself how many members it should have. I would have thought that is another very simple issue of principle. It is quite remarkable when one thinks on it that we, the people of the ACT, cannot decide for ourselves how many elected representatives we should have. In that respect we are different from both the Northern Territory and Norfolk Island. It is absolutely remarkable that the people of the ACT have not been entrusted to decide for themselves how many elected representatives they should have. I would like to see an amendment to Senator Brown's bill removing that particular constraint. I think it would be a simple matter, one line.

Senator BOB BROWN—I must say I would welcome such an amendment.

Mr Stanhope—And in relation to our capacity, there has been a lively debate; indeed, the Prime Minister has recently indicated that she is prepared to sponsor a national conversation around the recognition of Indigenous Australians in the national constitution. We, the people of the ACT, are the only people, along with the Northern Territory and Norfolk Island, who do not have the capacity to accord the same level of recognition and respect to the Indigenous people of the Australian Capital Territory. I would have thought that was unremarkable and appropriate that we have those powers. So we simply indicate that there are other areas where we believe reform is overdue.

CHAIR—Senator Humphries, I will go to you for just a couple of questions and then we need to finish.

Senator HUMPHRIES—I note your reference in your submission, Chief Minister, to the unhappy birth of ACT self-government. You say:

... self government in the ACT was met with ambivalence, and occasional hostility, by the community.

That is probably understating the situation somewhat, if I might say. Do you think that some of the opposition to this legislation is actually powered by some of the residual hostility towards self-government in the ACT? And if you think that, is there anything empirical that you could point to that would demonstrate that that hostility has in fact receded since those early days of self-government?

Mr Stanhope—There might be some that still hark back to the non-self governing days with some affection but I do not believe that is relevant at all in relation to the debate or feelings about this particular bill. I have to say that my impression is that the opposition that has been garnered against this very simple amendment on a matter of principle is that it has been inflated to be a referendum on euthanasia and gay and lesbian relationships. It has been conflated into a referendum on euthanasia and a referendum on civil unions/gay

marriage. If that were not the case then I would have expected and would still hope that it would have been an amendment that would receive unanimous support within the Commonwealth of Australia's parliament. I do not think it has anything to do with self-government or people's residual feelings. It is essentially that the opposition is around the fact that it has been conflated and represented as a referendum on two divisive, controversial issues.

CHAIR—Senator Humphries, have you finished with your questions?

Senator HUMPHRIES—Yes.

CHAIR—Senator Brandis is the last one and then we will finish with this witness.

Senator BRANDIS—Mr Stanhope, I want to give you the opportunity to clarify some of your earlier evidence, because I understood you to say a little while ago that state parliaments could legislate for civil unions and same-sex marriage. I must say that you seem—to use the word that you have just been using—to conflate the two. But when I challenged you on that, you did seem to accept what I put to you—that is, that under section 51 of the Constitution only the Commonwealth parliament can legislate in relation to marriage. What is your position, Mr Stanhope? Do you say that the ACT assembly should have the power to legislate in respect of same-sex marriage, or don't you say that?

Mr Stanhope—I accept absolutely the Commonwealth's powers in relation to marriage and the Commonwealth's responsibility to the Marriage Act. But what I would say in response is that the states and the territories have vested in them through their constitutions and their self-governing arrangements constitutional responsibility or legislative responsibility for relationships other than those that are legislated for in the Marriage Act. Hence, the states and territories have constitutional authority and responsibility for legislating for relationships other than marriage as defined and constituted under the Marriage Act. The ACT government in seeking to pursue its rights and responsibilities in relation to regulating relationships of gays and lesbians has been thwarted through the use of section 35. We can have a debate around the term we use—

Senator BRANDIS—It would not have taken section 35 to do it, by the way.

Mr Stanhope—No. This would be, in the context of our nation and the hierarchy of legislative responsibility between the three tiers of government in Australia—our national government, the states and territories, and local government—

Senator BRANDIS—Sorry, you are equating the states and territories there. They are constitutionally different, so I cannot let you get away with that.

CHAIR—He is talking about the three tiers of government, so just let him finish.

Mr Stanhope—We can argue about that, but in relation to the issue we have the same constitutional powers, rights and responsibilities. We can legislate through our democratic processes, as we sought to do, quite appropriately, in relation to gay and lesbian relationships. I think that, in an ideal world, if the Commonwealth parliament had concerns about legislation that may be passed by a state or territory in relation to gay and lesbian relationships, it would preferable if they would be pursued through the High Court. Let the High Court decide whether or not—

Senator BRANDIS—That is kind of an abdication of what we are here to do and what you are here to do, and that is to devise a consistent set of laws. Let me finish on this fairly central issue. You seemed—earlier on, at least—to be conflating civil unions and same-sex marriage as if they were the same thing. Now you seem to be saying the opposite and saying the states can legislate in relation to non-marriage-like relationships but not in relation to marriage. What is your position? Should there be an ACT law allowing for same-sex marriage? If that is your position then you would be claiming a right for the ACT which the state parliaments do not enjoy.

Mr Stanhope—I am doing no such thing—despite your best efforts at verballing me. I am recognising absolutely, unambiguously and unequivocally the Commonwealth's constitutional powers in relation to marriage. The ACT government has no intention of contravening the constitution in relation to any legislation that it might or might not wish to introduce or seek to pass in relation to gay and lesbian relationships.

Senator BRANDIS—Why did you use the word 'marriage'? You keep weaselling around it; why don't you just use the word 'marriage'?

CHAIR—I think it would be in your and everyone's best interest if we let the Chief Minister finish his answers.

Mr Stanhope—Those that oppose Senator Brown's bill and the removal of section 35, Senator Brandis, have done and are doing precisely what you are now doing, which is basically suggesting that this is about gay marriage.

Senator BRANDIS—You are the one who raised the issue. Nobody was talking about this before you raised it in your introductory remarks.

CHAIR—Senator Brandis, I have to insist that you let the Chief Minister finish his answer.

Mr Stanhope—It is the tactic that has been employed by national newspapers, by national opponents and by commentators in relation to this entire issue. This is a simple issue of principle about democratic rights. The ACT government has no intention whatsoever of passing or introducing legislation that would be in breach of the national constitution. We can have another debate—which I think is the debate that you would seek to pursue, Senator—around gay marriage, your particular view on gay marriage as opposed to other views within the community, the fact that it is a divisive issue and how it is a convenient hook on which to hang opposition—

Senator BRANDIS—I am merely asking about your understanding of the Constitution.

CHAIR—Chief Minister, I think I am going to have to ask you to wind up now, because we need to move on.

Mr Stanhope—It is unfortunate that this has descended into punch and counterpunch on the controversial issues that have been used to detract attention from the fact that this is an issue of simple, basic principle—a principle that I would have thought was dear to the hearts of every Australian. This is one of the proudest and strongest democracies in the world—a proud, strong democracy that is in its national parliament debating, agonising, cogitating over whether or not that principle extends to Canberrans. I cannot understand the need for the debate. This is not about civil unions. It is not about gays and lesbians. It is not about euthanasia. It is about the democratic rights of the people of Canberra—the right for us to be treated with respect by our national parliament and to be treated in the way that all other Australians are treated in relation to our capacity to legislate by, for and on behalf of the people of the Australian Capital Territory those issues that are of genuine concern, in ways consistent with the self-government act and consistent with our national constitution, that we have the capacity, right and responsibility to legislate for.

Senator BRANDIS—Mr Stanhope, if this is not about same-sex marriage and euthanasia, why did you raise it?

Mr Stanhope—I did not raise it, Senator Brandis. I was responding to questions.

CHAIR—We need to conclude here, Senator Brandis. Thank you, Chief Minister, for your submission, your time today and your evidence for this committee.

Mr Stanhope—It is a great pleasure. I will look forward to the fruits of your deliberations.

CHAIR—Thank you.

[2.06 pm]

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

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

CHAIR—Welcome. We have a submission from you, which we have numbered 29 for our purposes. I assume there are no amendments or alterations and I invite you to make a short opening statement before we go to questions.

Mr Rattenbury—I will speak briefly to just a couple of the key points in our submission. I believe the bill represents a straightforward legislative proposal to confer upon the ACT the right to legislate for the affairs of ACT citizens without interference from the federal executive. I believe the bill in its most simple essence moves the disallowance of ACT law from being a veto by the federal executive to being a vote of the federal parliament. There is of course an absolute recognition that the Commonwealth parliament will always have a role to play in matters associated with the seat of government in the ACT, and I do not think that that is disputed within the territory. The passage of this bill will do nothing to that role of the Commonwealth with regard to the seat of government. However, I do believe the federal executive currently has an excessive power to override properly enacted laws of the ACT Legislative Assembly as provided for under the self-government act.

Speaking briefly to the history of the Australian Capital Territory (Self-Government) Act, in the debate in the House of Representatives in 1988, during the second reading speech, the then minister for territories, Clyde Holding, explained in no uncertain terms that the bill would allow for the people of the ACT to have the same democratic rights and social responsibilities as their fellow Australians. I believe the intent conveyed by the minister is clearly undermined by the continued retention of section 35 in the self-government act. At the time, Mr Holding said that section 35 would be used as a matter of last resort. It is quite clear from the recent history that it has not been a matter of last resort, and the power has been used or has been threatened to be used against a number of ACT laws. I think that that has been done not in an issue where the interests of the Commonwealth were adversely affected but rather where there was a simple policy disagreement. I am concerned that the disallowance provisions under section 35 can also have chilling effect and leave ACT MLAs potentially subject to two masters, where we must be responsive and accountable to our own electorates whilst having an eye to what might fall foul of a federal executive of the day.

I would also like to briefly highlight the Latimer House principles on the three branches of government. These were adopted in 2003 by the Commonwealth heads of government, including then Prime Minister John Howard. In essence these principles set out the best practices for democracy as identified by the nation-states of the Commonwealth. I consider the use of section 35 by the federal executive does not live up to these principles, particularly those regarding executive accountability, transparency and responsibility in the conduct of public business. I would be happy to elaborate on that point further.

CHAIR—Thanks, Mr Rattenbury. Mr Duncan, do you have anything you want to add?

Mr Duncan—No.

CHAIR—Senator Brown, I might start with your questions.

Senator BOB BROWN—On the Latimer House rules that you have been talking about, I guess you are getting to the point that the debate in the federal parliament dealing with a regulation which is a disallowable instrument is a much truncated process. For example, there is not the same opportunity for reference to a Senate inquiry as we have here today. A debate on an act or a legislative instrument used by the Commonwealth parliament involves a full debate in both houses, references to committees and so on. I just wonder if you would comment on the fact that the executive override does not facilitate the parliamentary overview, including committee investigation, that section 122 of the Constitution implies should be had.

Mr Rattenbury—Yes. I think, Senator Brown, that the comments that you have just made encapsulate the essence of the submission I have made, which is about the movement from a veto power—with very little scrutiny and the lack of the transparency that the Latimer House principles identify—to a parliamentary process. It is clear that the scope of the bill does retain Commonwealth powers, particularly under section 122—as the committee has already discussed this afternoon—to make laws with regard to the ACT. But I

believe the Latimer House Principles spell out that that should be done in a way which allows opportunity for public debate and which gives the federal representatives of the ACT the opportunity to participate in that debate. I believe there is an integrity, in seeking to override an ACT law, if that is done by an act of parliament rather than through an executive fiat.

Senator FORSHAW—I have two questions. You made a comment—I think it was said earlier and it may have been in your submission—with regard to Minister Holding's comments when the bill went through the parliament in 1988 that section 35 would only be used as a matter of last resort. Could I put this proposition to you? It has only been used once in all that time—and I think it is generally accepted that there was a potential for it to be used again—on an issue which was contentious. Certainly the view of the government of the day—and of Prime Minister Howard and, I think, the Rudd government—was that what was being attempted in the ACT parliament was akin to marriage. I know that is a debatable issue but that was the basis upon which the power was invoked. Wouldn't that suggest that it has only been used as a matter of last resort? If not, what else should have transpired before section 35 was invoked. My recollection is that there was a fair amount of discussion, to and fro, between the attorneys of both parliaments. If there was a vote of the parliament to precede section 35, rather than the other way around, which is what happens at the moment albeit by disallowance—

Mr Rattenbury—I think in some ways the answer to your question sits in what one considers to be 'last resort'. The argument that I made in my submission is that I do not believe that the matters where the power has been invoked have been matters of last resort. Without wanting to step into the contentious policy issues around those, I think they can be characterised as areas of policy disagreement. My view is that the appropriate role for the Commonwealth in the territory is with regard to Commonwealth interests—acknowledging the ACT or Canberra as the seat of government. Therefore I would argue that, given the territory under the self-government act has been delegated to make laws for the peace, order and good government of the territory, that the territory should be left to deal with those matters and the Commonwealth should limit its intervention to those matters that directly bear on the Commonwealth's needs as the seat of government.

Senator FORSHAW—Are you saying that it should not intervene in an area where, for instance—and I do not want to open up the whole debate about civil unions and gay marriage, but clearly it is there—

Mr Rattenbury—Yes, certainly.

Senator FORSHAW—because, let us be frank, this section was used to prevent the ACT assembly from passing a certain law, or from making it operative. And then this bill appeared. It has never appeared before. It was never introduced by any previous government. It was never put forward as a specific request by any territory assembly: how about getting rid of the relevant sections? It has all emanated from that point. I suppose what I am getting at is that that was a situation where there was a real dispute between the two governments—that is, territory and federal—about whether this legislation was going to be, effectively, beyond power or conflict with the Marriage Act. In that sense, to me—whether I agree with it or not—it would seem to be the last-resort option.

Mr Rattenbury—I guess this also comes down to the capacity in which I appear, as Speaker and as the first officer of the ACT parliament. The discussions to which you refer take place between the respective executives, and the roles of the respective parliaments are subjugated to a large extent. Certainly, members of the ACT assembly who are not members of the executive have very little opportunity to engage in those sorts of discussions. I think you have spoken of the back and forth between the Attorney and perhaps the Chief Minister or our Attorney, but that is not a matter for the parliament, and I think that is the concern that I have as the Speaker—that the capacities and the voice of the ACT parliament are being subjugated.

Senator FORSHAW—But we have a system of parliamentary democracy in this country where the executive is within the parliament. This is not the US, where the committees of congress have substantial powers to fetter or override decisions by the executive. At the end of the day—most of the time; it is a bit different now—the government of the day has the majority in any event.

Mr Rattenbury—Yes, of course.

Senator FORSHAW—But you have answered the question. Thank you.

CHAIR—Senator Pratt.

Senator PRATT—Thank you, Chair. Surely the question is about whether the ACT and other territories, in having self-government, have the right to legislate on the same issues that states are able to legislate on. It is not an issue of last resort. In that instance, I imagine the last resort would be the courts, frankly, as to the

definition, so that each territory or state is treated equally. It is a matter of whether or not those issues are in your jurisdiction as a state or territory, if you are to be treated equally.

Mr Rattenbury—Yes. As I said earlier, the self-government act sets out for the assembly to govern 'for the peace, order and good government of the territory'. My view is that, when that act gained assent in 1988, the territory government were given a set of powers and we should be able to go about exercising those, subject to, obviously, the numbers in the assembly and the like.

Just picking up on the last of Senator Forshaw's comments, we of course have had a history of minority government in the ACT. In the entire 21 years of self-government, we have had only four years of majority government. That also opens up some other questions around the role of the executive versus the parliament in that perhaps it is more common in the ACT, where we have seen private member's bills passed. So there is, perhaps more than we have seen historically in the federal parliament, a distinction between the executive and the legislature in the capacities that they have.

Senator PRATT—Thank you.

Senator FORSHAW—I might just say I did not use the word or coin the phrase 'last resort'; you referred to it as that, Mr Rattenbury—

Mr Rattenbury—Yes, yes.

Senator FORSHAW—and you cited what the minister in this parliament said—

Mr Rattenbury—Yes, I did.

Senator FORSHAW—at the time the legislation was put through. So it is relevant.

Mr Rattenbury—Certainly.

CHAIR—Senator Humphries.

Senator HUMPHRIES—Thanks, Chair. Mr Rattenbury, I want to clarify the status of your submission and the capacity in which you are appearing today. In your submission, you say:

… I am making this submission in my capacity as Speaker of the Legislative Assembly for the ACT ...

But you also say:

… I have not had the opportunity to canvass the points I make with all my Assembly colleagues …

You would be aware that earlier today the Speaker of the Northern Territory legislature appeared by teleconference and put the views of the entire legislative assembly of the Northern Territory to us, and she in fact had two other members of the assembly beside her giving evidence. Which members of the assembly have you canvassed about the views in this submission? For whom do you speak when you make this submission?

Mr Rattenbury—As I indicated earlier, as the Speaker and therefore the first officer of the parliament, I believe I have a role to represent the legislature. I have sought to make a submission on the basis that that legislature has had and has been threatened with having some of its laws struck down. Perhaps in contrast to the Northern Territory, where clearly they have a committee that is examining such matters—they are in the middle of a debate around potential statehood, as I believe they canvassed this morning—we do not have such a mechanism, so I have not had the opportunity to go to a particular committee.

You will be aware, of course, that the assembly has debated this matter explicitly. I think I could most accurately characterise that debate by saying my sense is that all groupings within the assembly have at times expressed concern about section 35 of the self-government act and perhaps expressed a wish to see it removed. I think it is fair to say that at this time there is a tactical disagreement about whether that should be done as a stand-alone move or as part of a broader review. You also note that I included, in attachment A of our submission, a motion passed by the last assembly, in 2006, at the time that section 35 was exercised, which was a unanimous motion of the assembly.

Senator HUMPHRIES—I take that point. But in terms of this parliament you have indicated, I think, that you do not speak for the opposition on this occasion. Do you speak for the government members in this submission?

Mr Rattenbury—No, I am simply seeking to speak as the Speaker. I am aware that the government, the opposition and the Greens have all made submissions, so I have sought to make a submission from the point of view of the first officer of the parliament.

Senator HUMPHRIES—In your submission you touched briefly on what you call matters 'outside the scope of the inquiry' but which have been very much within the scope of today's discussions. I accept that, if one argues for the right of the territory parliaments to make these laws in an equivalent way to the states, where they have powers equivalent to the states, then it is inappropriate to have Commonwealth intervention in those territories. But there have been a number of Commonwealth interventions in recent years. As we know, there was the move to overturn civil unions legislation in 2006 and the euthanasia legislation in 1996. There was also a move in the early noughties to disallow territory moves with respect to the design and location of the Gungahlin drive expressway. On different occasions your party, the Greens party, have taken different positions on some of these issues. Can I be clear today that—whether as Speaker, as a frontbencher for the ACT Greens, in some other capacity or just as Shane Rattenbury MLA—you advocate the view, consistent with the philosophy you have exhibited in this submission, that intervention of any kind in the territory's laws, in areas where the territory has the same lawmaking power as the states, is reprehensible.

Mr Rattenbury—What I have sought to argue in my submission is that the capacity to override a territory law should be done in a transparent way and an accountable way through a specific initiative of the federal parliament. The power I am specifically arguing against is the power of the federal executive to ask the Governor-General to strike down an ACT law. I believe that lacks transparency and is undemocratic. If the federal parliament has a debate and proactively seeks to move legislation, that is a far more transparent manoeuvre. I think it is more consistent with the Latimer House principles and I think that it has a greater level of integrity.

Senator HUMPHRIES—Okay. I have a question for Mr Duncan. Mr Duncan, you, I am sure, have been very diligent and have read other submissions to the inquiry, including the one by Mr Mark McRae. Have you done so?

Mr Duncan—Yes, I have.

Senator HUMPHRIES—Mr McRae was your predecessor as the Clerk of the Legislative Assembly. My recollection of the advice that I received from time to time as a member of the assembly was that you and Mr McRae were inseparable in the level of advice you would give to the assembly. Mr McRae now argues in his submission:

> The Commonwealth must retain its powers under both sections 16 and 35 of the Self-Government Act and to dilute these by repealing Section 35 would be a retrograde step.
>
> … … …
>
> The issue is not so much about the scope of the Territory's law making power—It is about the responsibilities of the Commonwealth in administering the Seat of Government.

How is it that after years of diligent agreement you could be so out of kilter with what Mr McRae has to say on this occasion?

Mr Duncan—Can I just say that I am here as the Clerk of the Legislative Assembly. I do not have a particular policy view on the matter before the committee. I am here as an adviser to the Speaker. The Speaker was asked by this committee to lodge a submission. I assisted the Speaker in lodging that submission. It is true that I am an officer of the parliament. My general view, which will come as no surprise to you, is that in a clash between the rights of a parliament and the rights of an executive I would side with the rights of a parliament—be it the federal executive or the Territory executive. I cannot speak on behalf of my predecessor. He is no longer an officer of the parliament. He has come to a different view and I accept that he has come to a different view. I am not here to argue the case one way or another. I am here principally to advise the Speaker in relation to the submission that he has been asked to lodge by this committee in relation to the rights of the parliament versus the federal executive. I hope that clarifies the answer.

Senator HUMPHRIES—I am satisfied. Thank you.

CHAIR—We do not have any more questions, Mr Rattenbury and Mr Duncan. Thank you very much for your time today and for your submission and for assisting us with this inquiry.

Proceedings suspended from 2.27 pm to 2.38 pm

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

Evidence was taken via teleconference—

CHAIR—I welcome Professor Williams. We have your submission, which is actually No. 1 on the website. It is there for people to access and look at. I invite you to make a short opening statement about your submission and then we will go to questions.

Prof. Williams—Thank you, Chair. I would like to make a short statement, in part because I have now had a chance to look at a number of the other submissions that have been made to this inquiry and I am concerned that some myths and false thinking have grown up around what this bill would achieve. In particular, it 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 state 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.

Thirdly, this bill would not leave the ACT free of federal oversight. It would still be subject to a far more stringent level of federal oversight than is the case for any state jurisdiction in Australia. That is because of a combination of section 122 of the Constitution, which of course is entrenched against legislation of this kind, and the fact that the self-government act has a number of specific provisions relating to the federal police and other matters that are designed to curtail legislative power at the territory level so as to protect Commonwealth interests.

Putting those things to one side, this bill alters the process by which the Commonwealth can override ACT enactments. It would prevent that occurring unilaterally by way of Commonwealth override through executive—subject, of course, to disallowance by parliament—and instead would say that that would need to occur through legislation passed by both houses. It would not therefore affect that in either way—the current way by veto or simply legislation; there would be a role for a Senate in that, a vote through disallowance or a vote through legislation. It just alters the mechanics and, in my view, in a desirable way.

I do think that this bill should be supported, because the bill seeks to remove a veto provision that has its origins in essentially colonial practice that goes back to the 19th century. We find this in section 59 of the Australian Constitution, but it was in the late 1920s that that provision was seen to be obsolete and no longer appropriate for self-governing jurisdictions. Apart from what you see in the ACT, Northern Territory and Norfolk Island, I am not otherwise aware of these provisions being used in this way in modern democratic systems.

Finally, I would say there are some good principled arguments for why this provision should be removed. I think it is no longer consistent with good governance and modern democratic practice. It is not consistent with what I would see as good principles of representative government at the local level and certainly not with the development of a long-term healthy system of good governance at the territory level. I think also it is questionable as to whether this is consistent with the proper role between the executive and a parliamentary system in that the power is so open-ended that it goes against the development of constitutional history in seeking to have a more qualified form of executive involvement in these matters.

I raise those principles not in any way to neglect the role of the Commonwealth to pass overarching national laws. It should do so, it has that role, I simply think the mechanism in section 35 is no longer appropriate. I would also say that I have looked at the submissions of the other constitutional law professors—Professor Saunders, Professor Lindell and Professor John Williams—and note that they are in agreement on the same points and we are essentially unanimous on the conclusion that this is a provision that should not any longer be on the statute books.

CHAIR—Thank you, Professor Williams. Senator Humphries, do you have questions?

Senator HUMPHRIES—Professor Williams, you make the point early in your submission about the other areas in which ACT self-government at least could be said to be imperfect or deficient. You make reference to the inability of the assembly to make laws about its own size and the power of the Governor-General under

section 16 of the self-government act to unilaterally dissolve the assembly. There is a need, you say, for some kind of inquiry into the status and effectiveness of self-government, at least in the ACT.

Is there not the danger that, by passing this piece of legislation—which, with respect, is one of a number of pieces of substantive and subordinate legislation over a number of years which have variously sought to affirm territory government or parliament decisions or deny those decisions—that we are adding to a pattern of adhockery about all of this? Are we in fact better off deferring such issues until there is a comprehensive opportunity to review what the self-government act at least of the ACT, if not the other territories, ought to say and comprehensively recast, if necessary, the way in which those laws work?

Prof. Williams—I certainly agree that it would be better to deal with these matters comprehensively in that there are a number of other matters that also speak to what I regard as some serious flaws within the system of self-government, and they do of course go back decades and also have their origins in the way the ACT achieved a system of self-government despite a referendum against that prospect. The problems are worse in the ACT example than even Norfolk Island or the Northern Territory. The fact that the ACT cannot set the numbers of its own parliament is, as far as I am aware, unique. I am not aware of any parliament in the world that lacks that power, except the ACT. It is odd and inappropriate that it should be still there.

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.

Senator HUMPHRIES—Should the primary recommendation of this committee to the Senate be that the ACT self-government act be reviewed urgently and that this be the basis for considering this and other changes to the law?

Prof. Williams—I would accept that as a primary recommendation 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.

Senator HUMPHRIES—I mentioned that there had been a pattern of legislating in recent years—some affirming and some denying—the self-governing rights of the territories. In principle, what do you make of the legislation about 10 years ago from Senator Bob Brown which, if it had passed, would have had the effect of disallowing the Northern Territory's right to make laws with respect to mandatory sentencing of criminals? That is clearly a matter within the power of the Northern Territory parliament—indeed, of every state and territory parliament—but the proposal then was to override that power. Would you say that it was more important that that exercise of the power be overridden or that the right of the Territory to legislation should have been supreme?

Prof. Williams—I think in each case it is appropriate to say that the Commonwealth has a role in making national laws and they should be consistent. I am concerned, whatever the policy area, about a federal veto that can be exercised essentially for political, unreviewable criteria—and obviously opportunistically if it is thought necessary or useful to do that. It does not make a difference to me as to the subject matter. Whether it be gay marriage or mandatory sentencing, I would not agree with any attempt to use a veto power. I think that instead it should go through parliament. I note that in that case it was different in that it was a parliamentary attempt rather than an executive attempt. But, even given such an attempt, I would only support it where it does not unilaterally withdraw power but simply seeks to pass a law that operates consistently across the nation. That is something that has to be the case for the states, and I think it would be good practice for that to be applied to the territories as well.

Senator HUMPHRIES—None of these laws we are talking about have in fact applied across the nation; they have all been specifically directed at the territories.

Prof. Williams—They have—and, of course, the Northern Territory intervention is another example. There are many that you can look at from all political viewpoints. I would say that it is appropriate that our system of governance approach a level of maturity in this area that recognises that the territories are now self-governing jurisdictions and they deserve credit for that. In fact, they have larger populations than some of the states that

achieved state status in 1901 and have better, more mature functioning systems of self-government. We should recognise that and they should be treated accordingly.

CHAIR—Senator Trood or Senator Forshaw, do you have questions?

Senator TROOD—To apply the constitutional principle, Senator Humphries has covered my field.

Prof. Williams—I hope there is no inconsistency!

Senator FORSHAW—In earlier evidence today, the representative, the Chief Minister from the Northern Territory, and committee representatives from that parliament indicated that it should be supported because it is one step on the road to statehood. The position of the ACT government does not go that far. This is a common theme throughout a lot of the submissions: in the case of the territories, people have fewer democratic rights than the states because of the operation of, particularly, the veto power. Do you think that the objective should be to effectively give the territory governments the power that the states have, vis-a-vis the Commonwealth, albeit that they are territories and are not likely to be states for some time, or do you accept that there is a distinction between the status of a territory government and that of a state government vis-a-vis the federal government and the federal parliament?

Prof. Williams—In answering that question, I think you need to distinguish between the Northern Territory and the ACT. I think the Northern Territory is rightly pursuing its own statehood process. I should acknowledge that I am giving some advice in a constitutional convention that looks like it will be held in the Northern Territory later this year on that point. The way that that territory ought to deal with these matters is to achieve agreement amongst its own citizens with a view to achieving statehood. Of course, these types of changes can be seen as a logical part of that progression.

When it comes to the ACT different considerations apply, firstly because 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. Also, you do have to recognise that there are particular Commonwealth interests involved in the ACT with regard to the seat of government that mean that a level of control over some of those matters will need to be exercised to the higher level. I think they most appropriately can occur through, for example, section 23 of the self-government act, which lists a number of things lying solely within Commonwealth control. Beyond those considerations, I would start from the principle that, as much as possible—and you cannot completely achieve this, given the different status of the states and the territories within the Constitution—every Australian citizen should be entitled to equivalent democratic rights. For example, I think it is very unfortunate that if you live in a territory you have a lesser value ascribed to your vote when it comes to federal referendums. I do not think that should be regarded as appropriate anymore. You effectively get half the vote. Also, when it comes to these matters, I do not think it is a matter of good practice and policy that you can justify an executive veto over ACT, Northern Territory or Norfolk Island laws when such a thing would not be achievable with regard to the states. In this particular area, given the status of self-government in those territories—at least the internal, larger self-governing territories—the veto cannot be justified any further as a matter of principle.

Senator FORSHAW—In your view, why is the disallowance power that exists—that had been attempted to be used following the decision by the Howard government in 2006—not a sufficient remedy, if you like, or protection in terms of what might be said to be capricious or inappropriate use by a minister of the federal government under section 35?

Prof. Williams—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 have that depending upon, initially at least, an executive decision. It just gets the separation of functions wrong.

Senator FORSHAW—What you have just said was put by Mr Stanhope as well. He mentioned some of the limitations that might surround the use of disallowance measures in the Senate and the lack of referral to a committee and so on. But, at the same time, it could be put that disallowance motions are actually not uncommon. They are subject to a full debate within the chamber and they are subject to votes of the

parliament. So, at the end of the day, you end up in the same position, don't you? It is an effective measure that can be used. Of course, not all legislation that comes before the federal parliament is referred to Senate committees or House of Reps committees.

Prof. Williams—I agree, in large part, with what you are saying. It does also illustrate how much of a wrong turning this debate has taken. 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 an inappropriate, given the way it operates, even though I would agree with your statement that there is an important level of parliamentary control nonetheless.

Senator FORSHAW—I think that was evident in 2006 when the result of the Senate vote was that the disallowance failed by two votes.

Prof. Williams—I would agree with that. I recognise the role played by senators, including those in this committee, as part of that debate.

Senator FORSHAW—Thank you, Professor.

Senator BOB BROWN—Professor Williams, going back to your earlier preference for there to be a comprehensive look at the shortcomings as they have evolved in the self-government act, were you referring there to the ACT or to the three territories? If it is the second case, how would you coordinate that?

Prof. Williams—It is a difficult logistical question. I would primarily focus on the ACT and the Northern Territory. I recognise there has already been significant parliamentary and policy work performed with regard to Norfolk Island. There are quite different questions of self-governance there. I personally would separate the two territories. If nothing else, the Northern Territory is undergoing a different process in its lead-up to attempting to become a state. I think there is a different level of urgency now involved in the ACT with regard to this bill, even though I note your proposed amendments to the bill. If it were me, I would say that this process should have been started roughly a decade ago. There should have been a joint community based process involving the Commonwealth and ACT governments and a separate one involving the Northern Territory government. The people of those jurisdictions ought to have had a say on what they would see as the appropriate long-term model for their self-governance. As I said in my earlier comment, that is the most desirable way, but that should have been done some time ago. Unless there is any indication that that would occur now in a reasonable time frame then I think this is an important, necessary change and it should be proceeded with.

Senator BOB BROWN—What do you think a reasonable time frame is?

Prof. Williams—I hope, given this bill, that you would require an announcement of the respective governments that such a process would start in the coming months. You would not want anything put off longer than that. I think a process of this kind would typically take 12 months to proceed. Then you would also be expecting a level of commitment from the government to proceed with recommendations that amount to a reasonable implementation for a good and viable long-term system of self-government for those territories.

Senator BOB BROWN—Do you recollect any effort at federal parliament level to undertake such a review in the 20-plus years that the ACT assembly has been in operation?

Prof. Williams—No, I have not. I have myself on a number of occasions made the argument that was necessary going back to the 1990s and indeed the first decade anniversary of ACT self-government. It is just one of the running sores in our constitutional system that any constitutional lawyer is aware of because of how inappropriate it is. I am sceptical about whether it might emerge. I would be delighted if it did and that is why I would say, in the absence of anything changing quickly, that this bill ought to be proceeded with.

Senator BOB BROWN—Thank you.

Senator PRATT—Prof.Williams, I endorse many of your remarks about the outstanding issues which have not been dealt with by this bill. Notwithstanding that, you would not see the fact that they have not been included at this stage to be a reason not to support the bill, would you?

Prof. Williams—No, that is right. I see the primary object of the bill as being desirable and it should be supported. Those other things would improve the legislation but they are not necessary for the package. This

particular veto does stand alone. The only amendment I would see as necessary at this stage relates to the objects. As I say in my submission, the original objects include a reference to exclusive legislative authority for the ACT and that is constitutionally not possible. I note that 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 d isallow 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.

Senator PRATT—There has been some discussion in evidence today about the fact that the Commonwealth does override state laws but does so only when it has a single law which governs all states under its powers. Is that correct?

Prof. Williams—Unless of course it is passing a law for a territory. Then it can operate specifically. Otherwise the normal principle is that the Commonwealth passes national laws. Of course sometimes those national laws have a specific operation. For instance, you might pass a national environmental law which might have a specific operation with regard to dam in Tasmania but you could not pass a law fixing just upon that—it does not work that way. That is because the High Court has developed a state immunity from federal laws that discriminate or pick out particular states. That is not permissible. It does need to be for a national purpose, even if it has a specific operation.

Senator FORSHAW—In relation to the last discussion with Senator Pratt, I do not disagree with what has just been said but is it not the case that the end result in those sorts of situations where, say, a minister relies upon powers under, say, a federal act—the conservation and biodiversity act is of particular relevance in this sense or all the export powers with respect to permits for woodchipping or uranium—that the minister, without any recourse to the federal parliament, can nullify or frustrate or in effect override and wishes of a state government.

Prof. Williams—That is correct. You can certainly have cases where it operates via section 109 of the Constitution to act inconsistently. The difference with those provisions which are now well accepted is that they are specific, they operate in a context where it is clear what the intention is. They are used, for example, to protect the building of a third runway at Sydney airport, or a range of matters and that is a specific operation which is of a different kind to an at-large veto power.

Can I finish with one point, because I did catch a little bit of the earlier evidence: people should not be mistaken about the powers of the states to enact laws on same-sex marriage. The federal power over marriage in section 51 of the Constitution is concurrent. The states also have powers to pass laws on that topic. In fact, marriage laws were state laws until 1961. The only issue is whether there is inconsistency between the federal Marriage Act and any potential state law on same-sex marriage. My own view is that there would not be inconsistencies so long as the state law was drafted correctly. I mention that simply because if the interest in this issue of same-sex marriage is really to focus just on the territories is to miss the larger point, and that is that bills in Tasmania and elsewhere in state parliaments have been dealing with this issue.

Senator PRATT—Does that mean whether you are a state or a territory, the nature of the jurisdiction you are should not affect whether you do or do not have a right to legislate on that question?

Prof. Williams—On whatever topic. That is exactly right. If the Commonwealth wants to pass a law on that topic it should do so; but it should not do so in a way that discriminates or picks out particular jurisdictions, because that has the effect of denying what I would say should be the equal democratic rights of the people of that particular jurisdiction to a viable form of self-government.

Senator BRANDIS—Just on that last point, Professor Williams: I think you acknowledged the view that you have expressed about states passing such laws is not uncontroversial among scholars. Let me put to you this proposition, though. As you would be aware, section 5 of the Marriage Act defines 'marriage' as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'. It is not in controversy that the Marriage Act is an act made under the power conferred on the Commonwealth parliament by section 51(xxi) of the Constitution. You would not dispute, would you, that if a state parliament passed a law saying that a marriage includes the union of a man and a man or a marriage includes the union of a man and a woman that that would be inconsistent with the definition in section 5 of the Commonwealth Marriage Act and would to that extent be struck down by section 109.

Prof. Williams—I will make two quick comments, because I know you are running behind time. Firstly, there is no doubt amongst the constitutional law community that the states and territories have power to pass

laws on same-sex marriage, but you are absolutely correct that there is disagreement about whether the federal Marriage Act would act to override those by virtue of the inconsistency you talked about. Professor Lindell references that in one of the footnotes in his submission. There is a division of opinion that could only be resolved by the High Court. I would also say there is a division of opinion as to whether the Commonwealth itself could pass a law on same-sex marriage. That is something that even High Court judges have differed on to this point. The Commonwealth could not override a state law in any event; it would only be a state that could do it, and that is something that would have to wait for an appropriate case.

My own view is that it is likely the Commonwealth does have power to make a law for same-sex marriage or to prevent a law being made for same-sex marriage at the state level, but by virtue of the 2004 amendments I actually think they have the undesired, from the proposal of people who put those amendments, perverse effect of opening the field up for a state law that was very explicit in only dealing with forms of marriage that cannot overlap with the forms of marriage dealt with exclusively at the federal level, and that it would be possible, at least arguably, to have such a state law not being inconsistent under 109. But it is a matter of disagreement.

Senator BRANDIS—Are you referring in the observation you just made to the argument that a state law that legislated for civil unions but was explicitly not a law in relation to marriage as defined would for that reason escape being defeated on the ground of inconsistency because of the definition of marriage in the Commonwealth Marriage Act?

Prof. Williams—Certainly in that case but also in the case of a state law which sought to deal with forms of marriage specifically excluded from being dealt with by the federal law. That would of course be same-sex marriage. I note, for example, that Professor Chris Walker from the University of Melbourne has also formed the view that because of the 2004 amendments the federal law has effectively narrowed the field of marriage. That has left scope for states to enter into that field and to do so without giving rise to inconsistency. That is also my view. I have given advice on this as a barrister as well, having looked at it very carefully. It is a question of balance; only the High Court could resolve it. My view is the narrowing of that definition of marriage at the federal level has actually opened up scope now for the states to re-enter a field they have not been in since 1961.

Senator BRANDIS—I think it is a slightly strained construction, though, of the definition provision in section 5 to say that, by defining marriage to mean a particular thing, it has narrowed the meaning of marriage. I would have thought myself, if I may say so with respect, that the terms of the definition are so comprehensive that the most natural reading of that definition is that marriage can only mean a relationship between a man and a woman. I allow for the argument that relationships between people of the same gender may be permitted constitutionally under state law as long as they are not marriages. But I must say I respectfully disagree with the view that a natural reading of the words in section 5 of the Marriage Act is to say that a marriage between a man and a man or between a woman and a woman would be consistent with marriage as defined by the Commonwealth act.

Prof. Williams—And I would recognise that that may well be the correct interpretation, but we will not know until the High Court looks at it. I would simply say that my own view, from looking at it and also the parliamentary debates, is that I think it is defined as being between a man and a woman for the purposes of the federal Marriage Act rather than for what might be seen as a broader purpose of covering the field so as to exclude state law. That is a question of judgment. It is obviously based upon how the High Court has approached other like areas, but it is a question that is notoriously difficult to predict.

I would simply say that, for the purposes of the bill before this committee, it does mean that this issue can essentially be put and should be put to one side. The territory has the power, the states have the power, to make same-sex marriage laws. There is a separate issue about inconsistency, and this bill does not touch on that issue of inconsistency in any way.

Senator BRANDIS—There is also section 88EA about foreign marriages which although obviously not specifically referable to state law would nevertheless give some guidance as to the legislative intention of the act, would it not?

Prof. Williams—Yes, and that was a provision I also took into account. It is a matter of balance. I would certainly not say you are incorrect. I would simply say maybe we have to agree to disagree on this one, because in the same way we do not know whether the Commonwealth can even enact a law for same-sex marriage—and, of course, if it cannot, it cannot even give rise to the inconsistency—we cannot definitively answer this question in the absence of any such laws on the books at any tier of government.

Senator BRANDIS—Why do you say the Commonwealth could not enact a law on same-sex marriage under section 51(xxi)?

Prof. Williams—There are a number of people, including members of the High Court, who have said that marriage may well be defined according to how marriage was understood in 1901—if you take an originalist view—and if it is then, clearly, it would not cover same-sex marriage and so the power would not lie with the Commonwealth, it would lie with the states.

Senator BRANDIS—So, paradoxically, the more constrained the Commonwealth's marriage power is, the broader the scope for the states to move in the field.

Prof. Williams—Exactly. That is why my own view that, on balance, the states may well be able to proceed in that direction is based upon a combination of those things in, really, a sea of uncertainty.

Senator BRANDIS—Thank you.

CHAIR—Professor Williams, thank you very much for your time today. We need to move on to our next witnesses.

Prof. Williams—I understand.

CHAIR—I think you have time constraints as well. Thank you again for your submission and your input into our inquiry into this piece of legislation.

Prof. Williams—Thank you, Chair.

[3.13 pm]

SESELJA, Mr Zed, Leader, Canberra Liberals

CHAIR—I welcome Mr Seselja MLA, the Leader of the Opposition in the ACT. Do you have any comments to make on the capacity in which you appear?

Mr Seselja—I am appearing as Leader of the Canberra Liberals.

CHAIR—We have a submission from the Canberra Liberals, which we have numbered 39 for our purposes. I assume there are no amendments or alterations.

Mr Seselja—That is correct.

CHAIR—I now invite you to make some opening comments and then we will go to questions.

Mr Seselja—Thank you for the opportunity. I make statements today as Leader of the Opposition in the ACT Legislative Assembly and leader of the Canberra Liberals but also as a lifelong Canberran. The ACT opposition submits that the bill in question is too narrow in its approach. I believe that the principle of territory rights has been lost in a quagmire of single issues that have confused, deliberately or otherwise, the issues at stake. Unfortunately, we have seen a simplistic debate where supporters of the bill argue that the only way for the territories to move forward is to support this narrow bill. This approach has ignored the need for genuine consultation with the community and the desire for a broader approach. The issue of territory rights is an important one that deserves thorough consideration, scrutiny and consultation. It should consider the full gamut of concerns and provide the community with a complete picture for consideration. We have asked that this committee recommend that this bill not be passed. We have asked that this committee instead becomes a starting point for the hard work of reviewing ACT autonomy in conjunction with the ACT assembly and the ACT community.

In 2009, the ACT celebrated 20 years of self-government. During those celebrations I raised the issue of the ACT's autonomy. I referred to the arbitrary ability of the Commonwealth to reject ACT laws as being anachronistic but argued that any review of such laws should not occur in a vacuum. They should be considered comprehensively, taking into account the consequences of any changes. I therefore called for a comprehensive review of issues around ACT autonomy to be considered at a convention which engaged the community. These calls went unheeded. Instead we have had the absurd position where those claiming to be fighting for territory rights are proceeding with changes to our effective Constitution without bothering to consult the community. I think this is a patronising position. Our submission puts forward a range of issues which should be considered as part of a broader review. These include the ability of the assembly to choose its size, the current executive veto and the ability of the Commonwealth to interfere in planning issues in the ACT, amongst others. Managing constitutional change for the ACT, one amendment at a time, is no way to govern federally or locally.

Not much community engagement has actually occurred. There have been a lot of politicians talking at the community and telling them what they want, but there has not been a lot of asking. One of the few avenues for feedback has been the *Canberra Times*. Readers were asked to participate via an online survey and comment. I do not for a moment believe this is a scientific poll that is weighted to represent the community, but it is the opinion of many hundreds of Canberrans. This is what they had to say. There were two polls in the past month. Firstly, the community was asked: do you support the federal government overruling ACT laws? There were over 1,600 votes—26.4 per cent answered yes, the ACT is not a state; 18.7 per cent voted yes, I am concerned about some ACT laws; and 54.9 per cent voted no, the ACT deserves the right to its own laws. That is effectively 55-45. In another poll the readers were asked if they would support a bill to remove federal rights to overrule ACT laws. Over 800 votes were cast and the results were closer at 52-48. As I stated, this is not a scientific poll, but the results, even on an anecdotal basis, are compelling and do not represent a united community perspective on this issue. Equally, these results do not confirm the overwhelming majority that some groups have claimed. I believe that this shows that this is a complex issue and we have not yet made the case to the community for change. Neither the federal parliament nor the legislative assembly have done the hard work to review the act, consult the community, build a consensus and make changes.

The debate has gone further than it has previously. We have the opportunity to reform governance of the territory and take the community with us. I urge the committee to recommend that this opportunity not be squandered. I urge the committee to recommend that this bill not be passed in its current form and, instead,

recommend that the hard work begin immediately on real reform to ACT autonomy. I thank the committee for the opportunity and I am happy to take questions.

Senator HUMPHRIES—Thanks for your evidence today, Mr Seselja. First of all, I will ask you about the process being used within the legislative assembly to deal with these sorts of issues. You may be aware that earlier today the committee heard from the Speaker of the Northern Territory Legislative Assembly. She appeared with other members of the Northern Territory parliament, from the opposition, and there was a submission put to the committee, which was the unanimous view, we were told, of the Northern Territory parliament. We saw the submission and heard the evidence of the Speaker of the ACT assembly this afternoon, but that purports to be the submission made in his capacity as Speaker of the legislative assembly. Have you seen the publication of the submission on the website?

Mr Seselja—No, I have not.

Senator HUMPHRIES—Was the opposition consulted on the terms of the submission?

Mr Seselja—Not to my knowledge. As far as I am aware none of the members of the opposition was consulted. I am not quite sure in what capacity Mr Rattenbury was appearing. I note that he said he was appearing as Speaker but I am not sure whether he was claiming to represent the views of the assembly, the views of the Greens or the views of the Speaker's office. That is a mystery to me and it is something that Mr Rattenbury would have to explain.

Senator HUMPHRIES—Mr Rattenbury is also a member of the front bench of the Greens in the assembly. Is there a legal affairs committee in the assembly?

Mr Seselja—There is a legal affairs committee. It is chaired by my colleague Mrs Dunne, who is with us here today. The last advice I have is that that committee was not consulted, but I am not part of that committee. It is difficult to know. I am not sure whether Mr Rattenbury was making that submission as a Green or as the Speaker. As I said, I am not sure whether Ms Hunter appeared on behalf of the Greens. It may have been that he was appearing in a dual role.

Senator HUMPHRIES—I go to the part of your submission where you talk about the broader context of reform of the system of self-government in the ACT. You made the point that there are a number of unaddressed issues in the structure and the form of self-government in the territory—things like the power of the assembly to determine its own size, through a special majority. Why is that an issue which needs to be attended to in the context of looking at how self-government works?

Mr Seselja—As I said earlier, I think it is important that we do not look at these issues in a vacuum. The previous witness, Professor Williams, pointed out that we are the only parliament in the world, that he is aware of, that does not have the ability to determine its own size. There does not seem a rational reason for that and I think that that is very much something that should be part of the mix as we look at these things.

I am not in any desperate hurry to see more members in the assembly and I am not sure that people in the community are, but at some point we should have that debate. There seems no reason why the Commonwealth parliament should have any say in that. I have made the point in my submission that that is the sort of thing that should be done through a special majority, because I think that is an important safeguard to stop one party from trying to make changes to the assembly that would benefit them more than other parties. That is something we need to guard against. That could be achieved through a special majority in the assembly. I think that is important.

It is also worth drawing a distinction between us and the Northern Territory. I talk about a broader review. The Northern Territory does not really need that in the sense that they do not have the same constraints. I am not aware of all of the details of their self-government act but as far as I understand it they have the ability to determine their own size whereas we do not. So that is not something they need to look at. They do not have the national capital planning issues that we run into on a relatively regular basis, which should also be part of a broader review. I do not think that lumping the Northern Territory and the ACT together is helpful, in the sense that we are in a different position. As the national capital we have different constraints. We also have constraints, through our self-government act, that the Northern Territory does not have. That is why I think it should be looked at fairly comprehensively.

I know that that is a long answer to your question but certainly that is one aspect. The planning issue is the other aspect and there are a range of other issues which I have also identified in my submission.

Senator HUMPHRIES—I have always assumed that the difference in the constitutional position of the ACT and the Northern Territory, who received self-government about a decade apart, is reflected in part by the fact that self-government in the Northern Territory was a popular concept among citizens of the Northern Territory and in the ACT, at the time at least, it was not a popular concept. Do you think that there is still sensitivity about the concept of self-government in the ACT? Does this require special care in the approach we take towards amending the constitution of the ACT unilaterally, without reference to the ACT community?

Mr Seselja—On the first part, I am not aware of all of the background for Northern Territory self-government so I am not aware of what the community support was like. But certainly in the ACT the people of the ACT voted against self-government when they were given the opportunity in the late seventies. That was then imposed. I do get a sense, whilst I do not think it is a large part of the community, that there is a not insignificant group in the community—and I think it is I reflected in some of the submissions to this inquiry—who would probably prefer that we did not have self-government. I think that debate is behind us. But it is instructive that the people of the ACT were asked whether they wanted self-government and they said no and they were then given self-government. I think it is highly presumptive to assume now that, in offering the changes that are being put forward in this bill and any other changes, that we should necessarily assume that the people of the ACT are all for it.

We have had a quick look through the submissions today. I think they are broadly split in terms of support or against. The only feedback we have seen in the media was in relation to the *Canberra Times*—roughly split, but I am not being scientific. So we are seeing, I think, the community still not necessarily crying out for this. So in that sense I think it is worth taking a step back and saying, 'Let's talk to the community and let's actually hear what they have to say.' I look at 35(2) and I think I am reasonably relaxed about changing—and I refer to it as being anachronistic—but I am not relaxed about not consulting the community first, because I think there would be a range of views in the community: some would be desperate to see it changed, many would not care and others might want to see it changed—and I think this has come through in Mr Rattenbury's statements and partially in what Professor Williams had to say—and want to see an alternative process rather than what is there, rather than the executive veto. Whilst, as I say, I am relaxed about it, I would be more relaxed if I were in government. We are all more relaxed about veto powers when we are in power. That is the nature of politics. But the reality is that if we were to remove it without changing, there would be people in the community who would say, 'We don't have an upper house, therefore do we have the necessary checks and balances on a majority government?' All of those things should be canvassed. I think that it is worth having that debate.

The fundamental point I would make is that that seems to have been ignored by many in this debate. It is assumed that the community wants this change, it is assumed that they are desperate for it and it is assumed that if we do not do it in this form right now we are not supporting the people of the ACT. I do not accept that.

Senator HUMPHRIES—So you are confident that if a proper review were done the ACT community would engage with it and would take up the opportunity to look at and constructively examine the way in which self-government is working. So you reckon it would not be an exercise in 'let's go back to pre 1989' and it would be a constructive exercise and it would lead to at least a platform for a better form of self-government in the territory.

Mr Seselja—I think so. I think we owe it to the community to do that. There would be some people who would say, 'Let's go back to no self-government'—there's no doubt about that—but I think that would be a relatively small number. Most people would engage constructively and look at what are the implications of change—and that is what we should always do. We are a small jurisdiction and we are a small assembly so if we make these changes what does that mean and what do we put in their place? I think that is a reasonable thing. I make the point about the ability to determine the assembly's size. I think there should be safeguards as to that. The safeguard that I have suggested is a special majority. I am a big fan of checks and balances. I think the checks and balances we have at the moment are not working perfectly. They are not working that well. There are some unreasonable constraints. That is why discussing the issue broadly—but doing so while taking the community with us rather than assuming that the community is with us—is the right thing to do. As to your point about whether or not the people would engage constructively, from the submissions I have read in a very short space of time—and I think that this is a very quick process; I do not think this is a comprehensive process of gauging the community's views—I note a lot of people have put a lot of thought into their submissions, both for and against, and engaged fairly constructively.

Senator HUMPHRIES—Thank you.

CHAIR—I just had a couple of questions I wanted to ask you. You said you had read all or most of the submissions that we have received to date.

Mr Seselja—No, I have not read all or most of them. I have seen the flavour, I think, of the submissions and broadly whether they support or oppose.

CHAIR—Did you read the submission from Mr Rattenbury?

Mr Seselja—No.

CHAIR—His second paragraph clarifies and today on the *Hansard* he also clarified and I am surprised as leader of the opposition that you did not read the speaker's submission. But anyway for the Hansard record and for your purposes—

Mr Seselja—He did not consult me on it but—

CHAIR—He says that. That is exactly what he says. He says that he is making his submission in his capacity as speaker of the legislative assembly:

… given the tight deadline for providing submissions to the committee, I have not had the opportunity to canvass the points I make with all my Assembly colleagues and therefore the submission does not purport to represent their views.

Quite clearly, upfront in his submission, he states that it is in his capacity as speaker not as a member of the Greens or a member of the executive and he does admit that he did not have a chance to consult members of the assembly because of the tight time line so that is just to clarify that for your purposes.

Mr Seselja—In response to that, I am not really sure why there would not have been time.

CHAIR—That is because submissions to this inquiry closed within four working days.

Mr Seselja—Sure, but we are not that hard to get in touch with.

Senator HUMPHRIES—The Northern Territory parliament had the time to do it.

Mr Seselja—Indeed. I would just reiterate the point that I think it is a confused position for Mr Rattenbury to be speaking as the speaker, who normally speaks on behalf of the legislature, without actually consulting the members of that legislature. That is where I think the confusion arises. I do not accept that that is a reasonable explanation but the speaker and I can agree to disagree on that.

Senator BRANDIS—It is in fact an impertinence for a person who has the office of speaker to say that he is representing his submission as speaker when plainly he is not speaking on anyone's behalf but his own.

Senator BOB BROWN—Madam Chair, on a point of order.

CHAIR—What is your point of order, Senator Brown?

Senator BOB BROWN—It is a reflection on another member of a parliament and it is not proper for this committee.

CHAIR—You are right. I want to clarify for everybody's sake that Mr Rattenbury quite clearly today actually said that he was here as speaker and had not canvassed the views of his colleagues. I am just correcting the facts so that this committee and you are aware of that.

Senator BRANDIS—Madam Chair, on a point of order, it is certainly not unparliamentary to describe a person from another parliament as guilty of impertinence. The only extramural function of a speaker is to speak on behalf of the parliament, so for Mr Rattenbury to have said that is impertinent and indeed ignorant.

CHAIR—I do not agree with you and I am the chair. I do believe that it is unparliamentary. I will not have a debate with you about withdrawing it, but I would hope that you would do that.

Senator BRANDIS—No, I won't.

CHAIR—He is the speaker of the assembly and that is the position I am putting and just correcting the record.

Senator FORSHAW—Was he invited to make a submission as speaker? That is what I thought I heard earlier.

CHAIR—Yes, he was.

Senator FORSHAW—That was what I wanted to check.

CHAIR—Yes, he was. Both parliaments and chief ministers were invited to do that. He responded in that capacity. If you take the time to look at his submission and covering letter you will be able to clarify that for

yourself. The chief minister of the ACT today said that he had been calling for a review of the ACT (Self-Government) Act for 10 years now and that neither the previous federal government nor this one have responded to that. Have you in your capacity called for a review of the Self-Government Act? Could you tell us who you might have written to or spoken to about that?

Mr Seselja—Yes I have. On the chief minister's position I do not think it has been helpful that the chief minister has looked to have a fight constantly with the federal parliament rather than to actually engage with governments of either persuasion. I think there is probably a reason due to the chief minister's particular style that he has been unsuccessful. I have called publicly and I mentioned in my opening submission that I have called for it back in 2009 when we had the 20-year anniversary. We have moved in the assembly when this has come up to call for a broader debate. That has generally not been supported by the Labor Party and the Greens. We have continued to argue for that point. I called for a convention to look at these matters.

My position in relation to how we approach this is that the ACT should take the time to consult with the community and then go forward. That has not happened. That was rejected by my parliamentary colleagues, my opponents, in the ACT. I did not hear all of Mr Stanhope's comments but I understand that in his comments he was not yet sure whether he wanted to see a review or whether he had a concluded view. If I am verballing him, I am happy to be corrected. But he seemed a little confused as to which way he was going on the review. But if he does now genuinely support a review—a genuine, open, broad review that engages with the community—he will have 100 per cent support, because we have been calling for it.

I would expect that if this committee were to recommend that it would be taken fairly seriously by the government and by the parliament. I would certainly hope that the federal government would take seriously the recommendations of a committee made up of members across the political spectrum. So I would just reiterate that I have been out there calling for that, and I think it would be a very good outcome.

CHAIR—Have you written to anybody in the federal government about it?

Mr Seselja—I do not recall whether I have specifically written. I could check on that. But I have made public statements in the assembly. We have moved motions to call on that. So our position on this has been pretty clear.

CHAIR—Would it be unusual that you would have a review of the self-government act without actually involving the federal government in that? Or is it your view that the assembly should go ahead and have that review and just present the findings to the federal government and then let them know you are doing it?

Mr Seselja—I think ideally it would be joint. A joint committee of the assembly and the Commonwealth would be a good way to do that because, obviously, it is a Commonwealth act of parliament but it affects us and it affects the people we represent. But I also think it is broader than the self-government act. I have talked about some of the issues around the National Capital Authority and the National Capital Plan. Unfortunately, though, that has not been heeded to date. I do not see now why that kind of process could not be set up. It is really for the committee to consider whether or not it agrees with the position that, either through a joint process or some sort of process that engaged the community, engaged the assembly and engaged the Commonwealth parliament, we could not get a review. I have not sensed in either this committee or more broadly that there is complete hostility to that, but I could be wrong.

CHAIR—Before I go to questions, I just want to highlight here, Senator Brandis, for your sake, the understanding of 193(3), which says that senators shall not use offensive words against either house or parliament or a house of a state or territory parliament or any member of such house or against a judicial officer and all imputations of improper motives and all personal reflections on those houses' members or officers shall be considered highly disorderly. As Chair, I am requesting that you withdraw those words, please.

Senator BRANDIS—Madam Chair, I am very familiar with standing order 193(3). I do not consider that the word 'impertinent' is on any reasonable construction a violation of the prohibition and I do not withdraw.

CHAIR—I am Chair and I am requesting that you withdraw those words.

Senator BRANDIS—You have heard my response.

CHAIR—I think we will convene a private meeting.

Senator BOB BROWN—Madam Chair, can I commend that it was not the word 'pertinent' but it was the highly reflective word 'impertinent' and it was a breach of the standing order, as you have said, and the matter be referred to the President for a ruling.

CHAIR—I have requested that we have a private meeting, which I think we now need to do.

Senator BOB BROWN—I agree with that.

CHAIR—If you are going to defy the chair's ruling, I think we need to suspend this hearing and have a private meeting. We have not finished with the witness, and we may well come back to you. But I am not going to be chairing a Senate committee inquiry when my ruling is defied, unless we deal with it privately.

Proceedings suspended from 3.38 pm to 3.57 pm

CHAIR—Mr Seselja, thank you for your patience. We are going to go to Senator Trood with further questions to you.

Senator TROOD—Good to see you, Mr Seselja. I have a couple of quick questions. The first relates to a proposition which has been presented to the committee in some of the submissions. It has been stated in various ways but essentially it runs along the lines that a small, unicameral legislature should have some kind of federal oversight. Do you have a view on that proposition?

Mr Seselja—My view on that is that I believe in checks and balances. I do not think that the checks and balances we have got at the moment are ideal. The relatively arbitrary nature of the overrule does cause some concern, but that is something that I would like to hear more from the community on. Taking a broader perspective on it, looking at democracy, if we were to remove the veto power and not replace it with anything, there would be an argument that, with nine members of the assembly, we would be more powerful, I think, than most of the states in some ways. People will have a view on that.

As I said earlier, people are going to have a different view depending on the issue and depending on whether or not they are in power, often. But there should be checks and balances. That is where the discussion needs to go. If you get rid of this, what do you replace it with, if anything? If you do not replace it, then is the community comfortable with that? I think there would be that concern in the community, but we need to have a broad discussion with the community on it. That is really why I have been saying that, if we were to go ahead with the bill in its current form, we would not really be having due regard to not just the broader issues but also the views of the community. That should be front and centre.

Senator TROOD—I think you said earlier in response to a question that you thought there would be strong community support for a wider discussion about territory self-government.

Mr Seselja—I am not sure whether that is quite what I said. Frankly, I do not feel any push for this in the community. I do not get a sense in the community that they desperately want to see this changed; nor are they desperately against it. Most people would not give it a lot of thought. That is the reality. That said, with thinking Canberrans, and many Canberrans would engage in such a process, if we were to do it in a comprehensive way we would gauge the views of the community but there certainly is not a wide spread push. I believe I have received only one or two e-mails directly on this issue in the last couple of weeks. It is rarely ever raised with me. I do not believe it was discussed at all during the last ACT election so it is not high on the agenda. Nonetheless it is an important issue which we need to deal with but it is not top of mind for most people in the ACT.

Senator PRATT—What is your opinion of the specific object of this bill?

Mr Seselja—The object seems to be changing, based on what Professor Williams had to say earlier, in terms of how it is described or whether it would give equal rights. I heard Professor Williams say that he did not agree with whether it would give equal rights to the people of the territory as to other parts of the nation. Taking the broad term rather than the specific—what are the object of the bill?—I think the idea of having people in the ACT not subject to arbitrary veto is worth considering but I do not believe that we should be going ahead without properly gauging community opinion on it and I do not think that has occurred today.

Senator PRATT—Do you have a firm view as to whether or not the federal executive should have the right to overrule the territory's legislature?

Mr Seselja—No. What I said in my opening statement and back in 2009 is that the way it is at the moment is anachronistic.

Senator PRATT—I cannot help but see your evidence today in terms of your submission, which does not even point to the substantive question in the bill about the capacity of the executive to override the ACT, as anything but a backward step from that position taken in 2009.

Mr Seselja—Not at all because what I went on to say in my speech in 2009 was that it should not be done in a vacuum and it should not be done without consulting the community. That is exactly what I have said to this committee in my submission and in my evidence today. My position has been consistent, to say yes, it appears anachronistic to me, but I am not so arrogant as to think that I would make changes like this without genuine consultation with the community. I also believe that it should be done as part of a broader consideration of ACT autonomy.

Senator PRATT—I can accept that. Nevertheless, your submission itself does not address the substantive question about the object of the bill before us.

Mr Seselja—It makes that exact point on a number of occasions.

Senator PRATT—All it does is draw attention to the issues that are not within the bill; it does not actually—

Mr Seselja—It makes the exact point I have been making since 2009 which is that it should not be done in a vacuum and should not be done without community consultation. That is the position of the Canberra Liberals and that is my very strong position and that has been a consistent position.

Senator BOB BROWN—Mr Seselja, you said that the opportunity should not be squandered. How did this opportunity come about?

Mr Seselja—In terms of what we are considering today?

Senator BOB BROWN—Yes.

Mr Seselja—It partly came about obviously by looking at your bill.

Senator BOB BROWN—Can you tell the committee how long you have been in the ACT assembly?

Mr Seselja—Since 2004.

Senator BOB BROWN—Can you tell the committee what approaches you have made to ministers or to this parliament to have the comprehensive review that you are speaking about and where, in written form, those approaches are?

Mr Seselja—In written form it has been through the assembly.

Senator BOB BROWN—I am talking about approaches to this parliament for a comprehensive review.

Mr Seselja—I think there was a question earlier on that and I am not aware of any particular letters to ministers. I was asked this question before in terms of how significant an issue this is in my electorate and it is not in the top 10, so it has not been high on the agenda. But I have been consistently arguing and making the case in the assembly through motions and through speeches that we should have this comprehensive review.

Senator BOB BROWN—Why did you do that if it is not one of the top ten on your agenda?

Mr Seselja—Sorry?

Senator BOB BROWN—You are arguing against yourself here, aren't you?

Mr Seselja—No, not at all.

Senator BOB BROWN—Can you tell me whether you think in moves to reform the Australian Constitution the parliament should halt looking, for example, at recognition of Indigenous people or local government until a full review of the Constitution has been undertaken and a comprehensive proposal to reform the national Constitution is undertaken?

Mr Seselja—I see where you are going with it, Senator Brown.

Senator BOB BROWN—I hope so.

Mr Seselja—I think that, in terms of reviews of the Commonwealth Constitution, I am not a constitutional scholar, nor have I advocated for massive changes to the Commonwealth Constitution. I would consider them on their merits. On the ACT's effective constitution—that is broader I think than the self-government act and I have touched on some of the other constraints through Commonwealth law—I have formed a view that it should be reviewed and reviewed comprehensively. That is my stated position. In terms of whether or not the Commonwealth Constitution should be comprehensively reviewed, it is not something I have given a lot of consideration to.

Senator BOB BROWN—Thank you.

Senator FORSHAW—Just so I have got that clear, what you are saying is that there should be a review of the ACT self-government act.

Mr Seselja—If I can just correct that slightly, what I have made clear is that it would include the self-government act but it is about ACT autonomy, so it would look at some other issues that are not necessarily in the ACT self-government act, such as the ability of the Commonwealth to interfere in planning issues in the ACT, which is contained in other legislation.

Senator FORSHAW—The other question I was going to ask has been asked by Senator Brown. It was in regard to what steps the Liberal Party took following the decision in 2006 to utilise section 35. It is the only time it has ever been used. But your evidence is that nothing specific was done.

Mr Seselja—I became leader in 2007 and it is something that I certainly came to consider more at the 20-year anniversary of self-government. That was in 2009. There was a—

Senator FORSHAW—Did the opposition object to that at the time? Just refresh my memory.

Mr Seselja—To what?

Senator FORSHAW—To the use of section 35 to override the territory's legislation. We know that the Labor Party did and the Greens did. What was the position of the Liberal Party?

Mr Seselja—To be honest, I do not actually recall.

Senator FORSHAW—Could you check that and let us know?

Mr Seselja—I could check that and get back to you. I was not leader then and it was not my portfolio area, so it was not a debate that I was driving. I am sure we could provide you with that information.

Senator FORSHAW—Thank you. As soon as you can.

Mr Seselja—Sure.

CHAIR—We have finished taking evidence from you today. Thank you very much for your submission and for making yourself available to us today.

Mr Seselja—My pleasure. Thank you very much.

Committee adjourned at 4.10 pm