

During the course of giving evidence before the Standing Committee on Legal and Constitutional Affairs inquiry into the Northern Territory National Emergency Response Bill 2007 & Related Bills a question was asked of the Law Council of Australia witnesses regarding certain provisions in the Bills which variously provide for the Commonwealth Minister to repeal provisions in the legislation (section 114 of the FACSIA Bill) or to declare that certain Divisions, or specified provisions in Divisions, of the NER Bill will cease to have effect (clauses 19, 22 and 24 of the NER Bill).

These are examples of Henry VIII clauses, so-called because they enable the Minister, simply by a stroke of the pen, to change the legal framework. Henry VIII clauses are regarded as contrary to fundamental legal principles as they give insufficient regard to the institution of Parliament as the supreme legislature; they erode the function of the Parliament to legislate.

It is Parliament who has the constitutional obligation to make laws under section 122 of the Constitution (the power referred to by the Commonwealth Minister in his second reading speech, Hansard HR 7 August 2007, p7). It is also Parliament who has the constitutional obligation to make laws for the peace, order and good government of the Commonwealth when exercising legislative powers under section 51 of the Constitution.

Thus it is the constitutional intention that all proposed Commonwealth legislation affecting the people of the Australia, a State or a Territory should proceed through the Parliament. It is the responsibility of Parliament to express the views, and represent the best interests, of the people. The assumption upon which democracy proceeds is that the people, through their elected representatives, exercise a measure of control, and indeed ultimate control, over legislation which is enacted in the Parliament. Thus an Act of Parliament ought to be changed only by another Act of Parliament.

The Law Council opposes provisions which give the Minister the power to repeal and to amend legislation (by declaration that certain provisions will cease to have effect) without any parliamentary scrutiny or control. In effect, the Minister is

given the power to make new laws and change the legal framework as he goes along. This is an invasion of traditional Parliamentary rights to amend or repeal legislation.

As Earl Russell concluded, in a House of Lords Debate on similar clauses (531 H. L. Debs., col 586, 22 July 1991):

“Like alcohol Henry VIII clauses are addictive and prohibition is the only answer.”