1. The Assembly's power to make laws

1.1. The *Australian Capital Territory (Self-Government) Act 1988* passed by the Commonwealth Parliament establishes the Australian Capital Territory (ACT)[1] as a body politic under the Crown.[2] Parts III and IV of the Act (ss 8 to 34) create the Legislative Assembly for the Australian Capital Territory and make a number of provisions in relation to the constitution of the Assembly, its procedures and powers. Part VIII sets out the broad principles that govern elections to the ACT Assembly.

1.2. The ACT Executive, the government of the Territory, is established by Part V of the Self-Government Act. Part VII makes provisions relating to the finances of the ACT, notably that 'no public money of the Territory shall be issued or spent except as authorised by enactment'.[3] Schedule 4 of the Act sets out the general powers of the executive, principally the responsibility of governing the Territory.

1.3. The ACT Supreme Court already existed at the granting of Self-Government. Part VA of the Self-Government Act defines the extent of its jurisdiction and makes provisions regarding the retirement of its judges. This part also provides for the establishment of a judicial commission and the removal of judicial officers.

1.4. The Legislative Assembly undertakes the basic functions of a legislature. It makes laws for the Territory, represents electors, scrutinises the ACT Executive's administration of the Territory, and considers and authorises revenue and expenditure proposals. The Assembly is not responsible for governing the ACT; that function lies with the ACT Executive.[4] However, importantly, the executive is a product of the Assembly and accountable to it.

1.5. Key provisions of the Self-Government Act stipulate that:

- the Assembly is vested with the power to make laws for the peace, order and good government of the Territory;[5]

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1 Throughout this work the Australian Capital Territory is referred to as 'the Territory' or 'the ACT'. For a comprehensive constitutional analysis of the Self-Government Act, see David Mossop, *The Constitution of the Australian Capital Territory*, The Federation Press, Sydney, 2021.

2 Self-Government Act, s 7. The Australian Capital Territory (Self-Government) Bill 1988 was introduced in the House of Representatives (by the Minister for the Arts and Territories) on 19 October 1988 as part of a package of four bills introduced by the then government to establish Self-Government in the Territory. The other bills were the Australian Capital Territory (Electoral) Bill 1988 (the government's third attempt at introducing an electoral system for the Territory), the Australian Capital Territory (Planning and Land Management) Bill 1988 (aimed at establishing a framework for funding and administering national capital concerns separately from municipal and territorial concerns), and the A.C.T. Self-Government (Consequential Provisions) Bill 1988.

3 'Enactment' means a law made by the Assembly or certain specified Commonwealth Acts or other Acts in force in the Territory.

4 Self-Government Act, ss 36-37.

5 Self-Government Act, s 22.

- the receipt, spending and control of the public money of the Territory is subject to laws enacted by the Assembly;[6]
- the Chief Minister (head of the executive) is elected by the Assembly from among its members;[7]
- the remainder of the executive (ministers) are appointed by the Chief Minister from among the members;[8] and
- the executive is answerable to the Assembly.[9]

1.6. The Assembly has the authority to make legislation regulating its own affairs, including:

- declaring the powers of the Assembly and of its members and committees, which must not exceed the powers, for the time being, of the House of Representatives or of its members or committees;[10] and
- providing for the manner in which its powers, as declared, may be exercised or upheld.[11]

1.7. The Assembly has not made such a law with respect to its non-legislative powers (including its privileges and immunities) and, therefore, with two exceptions,[12] the Assembly has the same privileges as the House of Representatives. For instance, the proceedings of the Assembly are protected by the key immunity of freedom of speech, and the Assembly and its committees have the power to conduct inquiries by compelling the attendance of witnesses, the giving of evidence and the production of documents. More information on the Assembly's powers, privileges and immunities is included in Chapter 2.

1.8. With certain qualifications, the Assembly has the power to make laws for the ACT, including the power to make laws with respect to the exercise of powers by the Australian Capital Territory Executive.[13] Schedule 4 of the Self-Government Act lists those matters within the competence of the ACT Executive; they may be described as 'domestic' matters relating to the Territory, encompassing responsibilities within the purview of both state governments and local governments elsewhere in Australia.

1.9. In introducing the Australian Capital Territory (Self-Government) Bill 1988 into the House of Representatives, the responsible minister advised the House that the

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6 Self-Government Act, s 57.

7 Self-Government Act, s 40.

8 Self-Government Act, s 41.

9 Self-Government Act, ss 40-41 and 48.

10 Self-Government Act, s 24(1)(a).

11 Self-Government Act, s 24(1)(b).

12 The Assembly does not have the power to imprison or fine a person. See also *House of Representatives Practice*, Chapter 19, and *Odgers'*, Chapter 2.

13 Self-Government Act, s 22.

ACT would have the same legislative and executive powers as the states and the Northern Territory.[14] Section 23(1) of the Self-Government Act sets out specific matters in respect of which the Assembly has no powers to make laws[15] and s 23(2) provides that the regulations may omit any of the paragraphs in subsection (1) or reduce the scope of any of those paragraphs.

1.10. Neither of these categories is closed. Since the enactment of the Self-Government Act, the Commonwealth has used its powers—through statute and regulation—to both extend and limit the legislative and executive responsibilities of the Territory. Regulations have been made to amend the Self-Government Act to exclude paragraphs 23(1)(g) and (h),[16] and to add to Schedule 4, extending the range of matters for which the ACT Executive is responsible.[17]

Certain matters beyond the legislative competence of the Assembly

1.11. The Commonwealth's powers to legislate in relation to the territories are conferred by s 122 of the Commonwealth Constitution—the same legislative power used by the Commonwealth to establish self-government in the ACT and the Northern Territory.[18] The *Euthanasia Laws Act 1997* (Cth) was passed by the Commonwealth Parliament primarily in response to Northern Territory legislation (*Rights of the Terminally Ill Act 1995*) legalising euthanasia in that jurisdiction.[19] The Commonwealth Act declared the Northern Territory law void and amended the

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14 House of Representatives Debates, 19 October 1988, p 1923. Transitional provisions were put in place and the Commonwealth retained powers in regard to the establishment of courts, the provision of police services, and the control of legal practitioners, companies and securities.

15 Subject to this section, the Assembly has no power to make laws with respect to:

- the acquisition of property otherwise than on just terms;
- the provision by the Australian Federal Police of police services in relation to the Territory;
- the raising or maintaining of any naval, military or air force;
- the coining of money; and
- the classification of materials for the purposes of censorship.

16 Australian Capital Territory (Self-Government) Regulations 1989. Statutory Rules 1989 No 86 as amended—s 3A. These paragraphs referred to the admission and regulation of legal practitioners and companies, acquisitions and securities.

17 Australian Capital Territory (Self-Government) Regulations 1989. The matters added to Schedule 4 were 'Law and Order', 'Legal practitioners', 'Magistrates Court and Coroners Court' and 'Courts (other than the Magistrates Court and Coroners Court)'.

18 Section 122 states that 'The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit'.

19 A private member's bill, the Medical Treatment (Amendment) Bill 1995, was also presented in the Assembly in 1995 to permit voluntary euthanasia in certain circumstances (MoP, No 18, 20 September 1995, p 137). The Assembly voted not to proceed with the bill at the 'in principle' stage (MoP, No 27, 22 November 1995, p 197).

self government Acts of the Northern Territory, the ACT and Norfolk Island,[20] removing the power from their Assemblies to make laws regarding euthanasia and mercy killing.[21]

1.12. The Euthanasia Laws Bill 1996 provoked considerable debate about the democratic impacts of such legislation. The Senate Standing Committee for the Scrutiny of Bills, in its Fourth Report of 1997, argued that:

> The Commonwealth Parliament having given the Legislative Assembly of each Territory the power 'to make laws for the peace, order and good government' of each Territory, would, by this bill, negate the valid exercise of that legislative power by one of them … and by doing so … create a situation where some Australians are treated in a way different from other citizens because it curtails their present right to self-government in circumstances where, were they to live in the States, it could not do so.[22]

1.13. A further objection made by the Senate committee was that:

> The Commonwealth Parliament, by this bill, proposes to intrude on the lawmaking function of the Territories not in accordance with a general principle but on an ad hoc basis. This threatens the certainty which ought exist for its citizens when any one or more of the Territories passes a valid law.[23]

1.14. The ACT Legislative Assembly aligned itself with the views of the Senate committee, resolving on 25 September 1996 that:

> … this Assembly endorses the findings of the Senate Standing Committee for the Scrutiny of Bills in relation to the Euthanasia Laws Bill 1996.[24]

1.15. The Assembly also supported a remonstrance from the Northern Territory Legislative Assembly, presented to the Speaker of the House of Representatives and the President of the Senate on 27 October 1996.[25]

1.16. The power of the Commonwealth Parliament to pass the Euthanasia Laws Bill was not questioned, and neither the reservations of the territories nor the Senate's

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20 With the passage of the Norfolk Island Legislation Amendment Bill 2015, the Commonwealth Parliament amended a range of legislation, including the *Norfolk Island Act 1979*, thereby abolishing the Norfolk Island Legislative Assembly and Executive Council and replacing them with an Advisory Council appointed to support the transition to an elected local regional council.

21 Sections 23(1A) and 23(1B) of the Self-Government Act.

22 Senate Standing Committee for the Scrutiny of Bills, Fourth Report of 1997, 19 March 1997, pp 59-60.

23 Senate Standing Committee for the Scrutiny of Bills, Fourth Report of 1997, 19 March 1997, pp 59-60. This report also contains the response of the bill's proposer to the committee's comments.

24 Assembly Debates, 25 September 1996, pp 3406-3417. The resolution of the Assembly referred to preliminary comments made on the bill by the committee in its *Alert Digest* which were repeated in its final report quoted above.

25 A remonstrance is a petition making a declaration of grievances. On 27 October 1996, the Speaker, the Chief Minister and other members supported the Speaker of the Northern Territory Legislative Assembly and the Chief Minister of the Northern Territory and their delegation (who where present) in presenting the remonstrance to the President of the Senate and the Speaker of the House of Representatives.

scrutiny committee persuaded the parliament that the matter should be left to the territories' own legislatures.[26] In this case it was not disputed that the Northern Territory Assembly had acted within its powers when it passed the *Rights of the Terminally Ill Act 1995*.

1.17. On 18 September 2014, the Assembly passed a resolution calling on the Speaker to write to the Prime Minister and the Commonwealth Minister for Health requesting that the Australian Parliament repeal the limitation imposed by the Euthanasia Laws Act and restore the right of the ACT and other territories to pass laws on the issue of euthanasia.[27]

1.18. On 15 August 2018, a private senator's bill seeking to remove statutory prohibitions on the power of the territories to legislate in relation to euthanasia was defeated in the Senate.[28] Shortly after, the Assembly passed a motion remonstrating with the Senate.[29] Among other matters, the resolution stated that:

> … the Federal Parliament should never determine the rights of Australian citizens based on their postcodes … the Senate has refused to properly seek, let alone take into account, the views of 420 000 citizens of the Australian Capital Territory during its debate about Territory rights'.[30]

1.19. The remonstrance was presented by the Speaker to the Senate President on 13 September 2018.[31]

1.20. The question of limitations on the ACT to pass laws concerning euthanasia was canvassed in the report of the Ninth Assembly's Select Committee on End of Life Choices in the ACT; however, the committee made no recommendations on that issue.[32] On 31 March 2021, the Assembly unanimously passed a resolution, jointly moved by the Leader of the Opposition, the Leader of the ACT Greens and the Minister for Human Rights which, among other matters, called on the Federal Parliament to:

> (a) resolve that no Australian citizen should be disadvantaged or discriminated against with respect to their democratic or human rights on the basis of where they live; and

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26 Although none have been successful to date, since the passage of the Euthanasia Laws Bill 1996, a number of legislative proposals have been put forward to reverse the effects of the Act; for example, the Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008, the Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2010, and the Restoring Territory Rights (Assisted Suicide Legislation) Bill 2015.

27 MoP, No 70, 18 September 2014, pp 766-767.

28 Journals of the Senate, No 108, 15 August 2018, pp 3485-3486.

29 MoP, No 67, 16 August 2018, pp 951, 953.

30 MoP, No 67, 16 August 2018, pp 951-952.

31 At the same time, the Northern Territory Speaker presented a remonstrance to the Senate President on behalf of the Northern Territory Legislative Assembly.

32 Select Committee on End of Life Choices in the ACT, Ninth Assembly, *Report*, March 2019, pp 75-83.

(b) introduce and bring on for debate a bill to remove subsections 23(1A) and (1B) from the *Australian Capital Territory (Self-Government) Act 1988* (Cth) by the end of 2021 …[33]

Disallowance powers of the Commonwealth

1.21. Up until 2011,[34] s 35(2) of the Self-Government Act gave the Governor-General, acting on the advice of the Federal Executive Council—in practice the Commonwealth Government of the day[35]—the power to disallow an enactment of the Assembly.

1.22. The power to disallow an enactment of the Legislative Assembly was, controversially, used in 2006 to disallow the ACT's *Civil Unions Act 2006*. The Federal Government argued that the ACT law was inconsistent with the Commonwealth's Marriage Act:

> We have consistently said … that we would indeed reserve our right to act on this matter if the ACT act, once enacted, continued to contravene, in our view, the clearly stated position in relation to marriage as defined by the Commonwealth Marriage Act 1961.[36]

1.23. The ACT law stated at s 5(2) that 'A civil union is different to a marriage but is to be treated for all purposes under territory law in the same way as a marriage'. The Act applied only to ACT legislation and did not purport to give couples entering a civil union any rights under relevant Commonwealth laws—for example, with regard to taxation or immigration.

1.24. The introduction of legislation on civil unions had been part of the platform of the recently elected ACT Executive, representative of a party that was the first to command a majority in the Assembly in its own right and was viewed by many as a valid exercise of the Assembly's legislative power. In response to the threat of disallowance, the Legislative Assembly unanimously adopted an Address to the Governor-General which noted the unusual position of the Governor-General, who 'neither represents the Crown in relation to the Australian Capital Territory nor acts on advice of the Executive of the Australian Capital Territory' and asserted that:

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33 MoP, No 8, 31 March 2021, pp 103-104.

34 Upon the commencement of the *Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011,* which removed the power of the Governor-General to overturn Territory enactments.

35 See *House of Representatives Practice*, pp 1-14, for a detailed overview of the powers and functions of the Governor-General.

36 Minister for Finance and Administration, Senate Debates, 15 June 2006, p 19. The minister also said, '… it is clear that the intent and purpose of that act is to equate a civil union with a marriage. In that sense we regarded it as repugnant', (Senate Debates, 15 June 2006, p 18), suggesting that the Commonwealth Government's objection was to the policy rather than any conflict with existing Commonwealth law.

> The *Civil Unions Act 2006* is a lawful exercise of the legislative power of the parliament of the Australian Capital Territory, made in pursuance of a political mandate given the parliament by the people of the Australian Capital Territory.[37]

1.25. The Address stated that the ACT believed the power to disallow was constrained by the conventions pertaining to the Crown intervening in the legislative process, and that the ACT stood 'ready to consider amending the Act in accordance with any recommendation made by the Governor-General under s 35(4) of the *Australian Capital Territory (Self-Government) Act 1988'*. Section 35(4) gave the Governor-General the power to make recommendations to the Legislative Assembly regarding possible amendments to any enactment. However, no formal approach was made to the Territory under s 35(4).[38]

1.26. In the explanatory statement to the Instrument of Disallowance issued by authority of the Commonwealth Attorney-General, it was argued that the Act passed by the Assembly:

> … created a statutory scheme for the recognition of relationships which bore a marked similarity to the Commonwealth's scheme for the regulation of marriage. This legislation appeared to undermine marriage, attempted to circumvent the *Marriage Act 1961* (Cth), and may have created ambiguity between civil unions and marriages.

1.27. The statement claimed that the Commonwealth's action 'supports the fundamental institution of marriage' which would be 'undermined by any measures that elevate other relationships to the same or similar level of public recognition or status'.[39]

1.28. The explanatory statement also took issue with the claims made in the Legislative Assembly's Address to the Governor-General, arguing that:

> … the power of the Governor-General to disallow an enactment under section 35 of the Act is at large and is not constrained by the policy considerations set out in that Address. The ACT Self-Government Act specifies no conditions that need to be satisfied before the power to disallow an enactment may be exercised.[40]

1.29. A subsequent bill, the Civil Partnerships Bill 2006, ostensibly drafted to overcome objections to the first Act, was introduced into the Assembly in late 2006 but did not progress after the Commonwealth Attorney-General indicated he would

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37 MoP, No 67, 8 June 2006, p 738.

38 MoP, No 67, 8 June 2006, pp 738-739. It should be noted that, in debate in the Senate, the Minister for Finance and Administration, stated that the Commonwealth 'gave the ACT every opportunity to restructure its Civil Unions Act to ensure that it did not contradict the Commonwealth's responsibility for and its definition of the institution of marriage'. Senate Debates, 14 September 2006, p 80.

39 Explanatory Statement, issued by the Authority of the Attorney-General for the Minister for Local Government, Territories and Roads, 13 June 2006.

40 Explanatory Statement, issued by the Authority of the Attorney-General for the Minister for Local Government, Territories and Roads, 13 June 2006.

recommend to the Governor-General that it also be disallowed.[41] The bill later passed the Assembly with amendments (that were in line with the Commonwealth Attorney-General's comments) on 9 May 2008.

1.30. The histories of the Northern Territory's Rights of the Terminally Ill Act and the ACT's Civil Unions Act are reminders that the powers vested in the territories are not entrenched 'constitutional' rights analogous to the powers of the Commonwealth and the states as provided for under the Commonwealth Constitution. The Commonwealth Minister for Finance and Administration made that clear during debate on a motion to disallow the instrument that disallowed the Civil Unions Act:

> … the constitutional fact is that the territories are not states and that the territories are subject to the Commonwealth's authority, as set out clearly in section 122 of the Constitution … We seek to grant a degree of autonomy to the territories but, at the end of the day, to the extent that territories, which are ultimately answerable to this Commonwealth, contravene positions of the Commonwealth then we have the obvious authority—and indeed in this case, in our strong view, the responsibility—to act.[42]

1.31. An opposition senator, articulated an alternative position:

> If self-government in the ACT is to have any meaning at all, it must mean that the ACT legislature can determine policy of this sort. It has no bearing on what happens outside the ACT and it has no bearing on the ACT's special role as the seat of the Commonwealth government. It will only affect the way certain relationships are treated within the Canberra community and under territory law. It has no further effect than that.[43]

1.32. The opposition senator noted the differences between marriage as described in the Commonwealth Marriage Act and civil unions as described in the ACT legislation. He argued that the two pieces of legislation were not in conflict and that the Commonwealth Government's objection was to the specific policy, not to the exercise of legislative authority by the Assembly.

1.33. In introducing the Self-Government Bill into the House of Representatives in 1988, the then Minister for the Arts and Territories asked what were assumed at the time to be rhetorical questions:

> Are these people somehow different from other Australians? Are they second-class citizens in some way? Do they not understand, or have opinions on, the issues that confront them daily? Can they not be trusted with their own destiny?

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41 Catherine Naylor, 'Feds quash second gay bill', *Canberra Times*, 7 February 2007, p 1.

42 Senator N Minchin, Senate Debates, 15 June 2006, pp 19-20.

43 Senator J Ludwig, Senate Debates, 15 June 2006, p 21.

1.34. The minister also stressed that the powers retained by the Commonwealth over the ACT were 'instruments of last resort',[44] suggesting an intention to give the ACT a high degree of autonomy in dealing with its own affairs.

Removal of Commonwealth's disallowance powers

1.35. In June 2006, a private senator's bill was introduced to amend the Self-Government Act to remove the power of the Governor-General to disallow territory legislation. The Australian Capital Territory (Self-Government) Amendment (Disallowance Power of the Commonwealth) Bill 2006 sought to remove that power in order that Territory legislation could only be overturned by an Act of the Commonwealth Parliament.

1.36. In speaking to the bill, the senator proposing it acknowledged that the Commonwealth had the power to override territory legislation but argued that it was inappropriate that legislation properly made by a democratically elected legislature should be subject to disallowance by government fiat.[45] The bill was adjourned at the second reading in September 2006 and proceeded no further.

1.37. In 2010, a private senator introduced the Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Bill, which again sought to remove the Governor-General's disallowance powers under s 35 of the Self-Government Act.[46]

1.38. The Senate's Standing Committee on Legal and Constitutional Affairs (Legislation Committee) held an inquiry into the bill. The Assembly Speaker made a written submission to the committee supporting passage of the bill. In it, he argued that the disallowance powers undermined the democratic character of the Assembly and that the powers vested in the Commonwealth by s 122 of the Commonwealth Constitution were sufficient to protect the Commonwealth's interest in legislating for the territories. He made the point that, where the Commonwealth wished to curtail the lawmaking ambit of the Assembly, the Commonwealth Parliament was the proper authority to exercise such a power, rather than the Federal Executive via the Governor-General.[47] The Speaker submitted that:

> It is my view that the promises made by the Minister for the Territories at the time the clause [containing the provisions that would become section 35 of the act] was being considered in 1988, namely that the use of the power would be

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44 Hon C Holding, Minister for the Arts and Territories, House of Representatives Debates, 19 October 1988, p 1922.

45 Senator B Brown, Senate Debates, 14 September 2006, pp 59-61.

46 It also sought to repeal s 9 of the *Northern Territory (Self-Government) Act 1978,* which contained equivalent provisions.

47 Shane Rattenbury MLA, submission to the Senate Standing Committee on Legal and Constitutional Affairs (Legislation Committee) inquiry into Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010, 10 March 2011, p 8.

> used as a 'last resort', has not been honoured by the Commonwealth. Rather, it has been used by a government of the day to disallow a law validly passed in the Legislative Assembly on the sole basis of a simple policy disagreement.[48]

1.39. On 16 March 2011, the Assembly Speaker appeared at a Senate committee public hearing—to date, the first and only time that the Assembly's presiding officer has made such an appearance—to give evidence. At that hearing, the Speaker said:

> 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.[49]

1.40. In its report on the inquiry, the Senate committee recommended that the bill be passed with amendments, and an amended bill was passed by the Senate on 18 August 2011 and by the House of Representatives on 1 November 2011.[50] Upon commencement of the *Territories Self-Government Legislation Amendment (Disallowance and Amendment of Laws) Act 2011* on 4 December 2011, s 35 of the Self-Government Act was repealed in order that the Commonwealth Government, through the Governor-General, was no longer able to disallow an enactment of the Assembly, nor to recommend amendments to any enactment.

Inconsistency with Commonwealth laws

Marriage Equality (Same Sex) Act 2013

1.41. Even though the powers of the Commonwealth Government to disallow Assembly legislation have been removed, laws passed by the Assembly must be consistent with Commonwealth laws. Section 28 of the Self-Government Act provides

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48 Shane Rattenbury MLA, submission to the Senate Standing Committee on Legal and Constitutional Affairs (Legislation Committee) inquiry into Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010, 10 March 2011, p 5.

49 Proof committee Hansard, Senate, Legal and Constitutional Affairs Legislation Committee, Wednesday, 16 March 2011, Canberra, p 27.

50 The then Federal Opposition proposed amendments seeking to provide that 'the Assembly may not enact any law that is inconsistent with the *Marriage Act 1961*'. These amendments were not passed. See House of Representatives, Votes and Proceedings, No 76, 1 November 2011, pp 1027-1028.

that an Assembly enactment[51] is subordinate to laws of the Commonwealth in force in the Territory or instruments of a legislative character made under those laws.[52] This means that a Territory enactment has no effect to the extent that is inconsistent with a Commonwealth law.

1.42. On 22 October 2013, the Assembly passed the Marriage Equality (Same Sex) Bill 2013, which commenced on 7 November 2013. The Commonwealth Government, remaining opposed to the policy of same-sex marriage but no longer able to exercise the disallowance power, challenged the validity of the *Marriage Equality (Same Sex) Act 2013* in the High Court on the grounds that the ACT law was inconsistent with the *Marriage Act 1961* (Cth).

1.43. The court unanimously held that the whole of the ACT law was of no effect, on the basis that it was inconsistent with the Commonwealth Marriage Act. [53]

Cannabis laws

1.44. On 25 September 2019, the Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018 was passed by the Assembly.[54] The bill, introduced by a private member, sought to legalise the personal possession and use of small amounts of cannabis.[55] The passage of the bill followed a public inquiry by the Assembly's Standing Committee on Health, Ageing and Community Services, which recommended that the Assembly support the bill, subject to a number of amendments.[56]

1.45. Throughout the committee's deliberations and during debate on the bill itself, concerns were raised as to whether such legislation passed in the ACT was able to operate effectively, as a matter of law, given that Division 308 of the *Criminal Code Act 1995* (Cth) criminalises possession of 'controlled drugs', including cannabis. In evidence to the Assembly committee, the ACT Solicitor-General, observed that:

> On the question of whether or not commonwealth law … covers the field or is an exclusive statement of the law on the topic, the commonwealth law plainly is not because it allows room for state and territory laws to operate. The question then becomes, in effect, a matter of construction to see if the state and territory law can in fact operate within the leaps and bounds of

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51 The Self-Government Act, s 3 (Interpretation), defines 'enactment' as meaning (a) a law (however described or entitled) made by the Assembly under the Act; or (b) a law, or part of a law, that is an enactment because of section 34 (Certain laws converted into enactments) of the Act.

52 This provision aligns with s 109 of the Constitution: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

53 *The Commonwealth v Australian Capital Territory* [2013] HCA 55; 250 CLR 441.

54 MoP, No 115, 25 September 2019, p 1669.

55 Assembly Debates, 28 November 2018, pp 4939-4942.

56 Standing Committee on Health, Ageing and Community Services, *Inquiry into Drugs of Dependence (Personal Cannabis Use) Amendment Bill 2018*, June 2019, Report 7, p 5.

> what is permitted under the commonwealth law, that is, that it is properly a justification or an excuse under a law of a state or territory and that it is not such a wildly divergent justification or excuse as to in fact amount to an [incompatibility] with the commonwealth code.
>
> One thing that both states and the commonwealth have learned over the years is that you might have a provision in a commonwealth law that says "and a state law can operate" but it is ultimately a matter for the courts to determine whether or not it is in fact inconsistent and inoperable.
>
> In the ACT's instance, it is not only fitting within that statutory framework that is within the Criminal Code but also obviously within the provisions of section 28 of the self-government act which provides for dealing with inconsistent laws between the commonwealth and the territory.[57]

1.46. To date, these issues have not yet been tested in a court.

Non-interference with the Commonwealth Parliament

1.47. Under s 29 of the Self-Government Act, both Houses of the Commonwealth Parliament have the power to resolve that a particular Assembly enactment, or parts of an enactment, do not apply to that House, to the members of that House, or within the parliamentary precincts.[58] These resolutions are not retroactive and have effect as if the enactment was repealed by another enactment.[59]

1.48. The provision was inserted during Senate consideration of the self-government legislation, there having been concern within the Territory, the Parliament and on behalf of some parliamentary officials, that the Assembly could inadvertently make laws that could detrimentally affect the functioning of the Commonwealth Parliament; domestic matters such as shopping hours and parking were referred to as examples.

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57 Transcript of evidence, Standing Committee on Health, Ageing and Community Services, *Inquiry into Drugs of Dependence (Personal Cannabis Us) Amendment Bill*, 8 May 2019, pp 115-16.

58 To date, no such resolutions have been passed.

59 See Senate Debates, 24 November 1988, pp 2817-2818. This is clearly a longstanding issue. In 1714, as the House of Lords dealt with the Hanoverian succession, it nevertheless found time to direct the High Steward of the City of Westminster to ensure that no hackney coaches, carriages, drays or carts obstructed access to parliament during its sittings—see House of Lords Journals, Vol 20, 9 August 1714.