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MEMBER FOR GINNINDERRA

Ms Julie Dennett
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Senate Legal and Constitutional Committees
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Parliament House
Canberra ACT 2600
Australia

ACT Greens submission to the Inquiry in the *Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010.*

Dear Ms Dennett,

The ACT Greens strongly support the proposals contained within the *Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010* and the submissions that have been made by the ACT Government, the Speaker of the ACT Legislative Assembly and the Northern Territory Parliament. We would also draw to your attention that the ACT Parliament has passed a motion supporting the passage of the Bill.

Section 35 of the *Australian Capital Territory (Self Government) Act 1988* is fundamentally offensive to representative democracy. Representative democracy is premised on the basis that citizens have the opportunity to elect those who make decisions about the way their community is to function and the laws that govern it. For a system of government to be democratic the ultimate power must be vested in the people and exercised by them or by their elected agents under a free electoral system.

Currently the citizens of the ACT have no ability whatsoever to respond to a decision of a Commonwealth Minister, elected by electorates very distinct from their own, when that Minister using section 35 decides to overrule an enactment of the democratic parliament they do elect. Canberrans cannot vote against a Minister from Queensland or WA who exercises the power given to them by Section 35 that applies exclusively to the ACT. This is perhaps the only case where there is no electoral accountability for action taken by a Member of Parliament in Australia.

It is akin to the exercise of the powers given to the Queen and Governor-General under sections 58, 59 and 60 of Constitution. Imagine the response if such a decision was taken against the people of Australia and not just the people of the ACT and Northern Territory.

Section 35 is at odds with a number of fundamental constitutional principles, limitations and protections. The first of course is that our system of government is premised upon representative democracy; in fact representative government is necessarily mandated by the Constitution.[1] It is the fundamental principle upon which all Australian governments exist and for the Australian parliament to perpetuate the derogation of this principle would indeed reflect very poorly on the state of democracy in Australia. There is no doubt that allowing a power to be exercised without any electoral responsibility to those who it affects is inconsistent with the most basic underpinnings of the constitution.

We are a federal system and the Constitution entrenches the value of regional diversity by protecting the States' Constitutions and their laws.[2] Further the Constitution explicitly protects against discrimination between the residents of different states.[3]

> "The values inherent in Australian Federalism are regional diversity, local participation and decentralisation. The framers of the constitution sought to realise these values through the establishment of two levels of government with limited powers distributed by the Constitution."[4]

Equally in contemplating the creation of self government for the Territories the constitution recognises and implicitly accepts the need for further regional diversity and autonomy for the Territories.

The ACT is a demographically and geographically distinct community and should be allowed to have its own voice and organise and regulate the community in the most appropriate way for the ACT community according to the prevailing ideas and values of the people who live there. It should not have the values of those who represent very different communities imposed upon it.

The fundamental distinction between the rights of those who live in the Territories and those who live in the States should be removed. "The geographical accident of being resident in a Territory should not be a ground for discrimination in terms of basic rights under the Australian Constitution."[5]

In addition to the necessary limitations on Commonwealth legislative power created by system of government established by the constitution there are also a range of other protections created. The High Court of Australia in *Wurridjal v The*

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[1] *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 per Mason CJ, Toohey and Gaudron JJ.
[2] Australian Constitution sections 106,107 and 108.
[3] Australian Constitution section 117.
[4] Finn, P. (ed) *Essays on Law and Government: Volume 1 - Principles and Values* (1994).
[5] Faunce, T (2011), "Inquiry into Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010", Submission no 11, p. 3.

Commonwealth of Australia held that the protection created by section 51 (xxxi) does apply to action taken by the Commonwealth in relation to the Territories under section 122.[6] Until that case the Commonwealth was able to acquire property in the Territories without concern for the guarantee of just terms compensation afforded to those who live in the states. However it is now established that section 122 is not a plenary power and is subject to the limitations and protections created by the rest of Constitution. Implicit in that finding is that the Constitution does not intend to discriminate against the residents of the Territories. Territorians should enjoy the same rights and protections as the rest of the country.

This issue has been clouded by those who don't necessarily oppose the proposed change but do oppose one of the potential consequences and agree with the decision to exercise the power created by section 35 in 2006. The question before the Committee and the Parliament has nothing to do with gay marriage or civil unions. Any views on these issues have no relevance whatsoever to the inquiry before the Committee. If the situation was reversed and the removal of the veto meant that a law that they agreed with would be protected there is no doubt that the groups opposed to the Bill would be vehemently supporting it. This is not about any single issue, rather the question for the Committee is whether or not it is appropriate that a Minister of the Commonwealth should be able to act unilaterally to veto and make null and void an act of a democratically elected parliament?

As the national capital and seat of the Commonwealth Government there will always be a level of control exercised by the Commonwealth over the ACT. Ultimately, in the absence of a referendum the Commonwealth Parliament will always be able to legislate to override the ACT Parliament. It is not unreasonable that this control be restricted to the Parliament and not the given to the Executive.

The ACT is now a well establish body politic with well defined government responsibility and undoubtable electoral accountability. In response to this issue the community has clearly engaged with the issue and been ready to voice their views in favour of true self determination.[7] For the Commonwealth to seek to maintain executive and not even parliamentary control over of relatively small Australian population of otherwise equal Australian citizens does little to advance the notion of democracy and equality.

Yours sincerely,

Meredith Hunter MLA
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[6] *Wurridjal v The Commonwealth of Australia* (2009) 237 CLR 309, per French CJ, Gummow, Hayne and Kirby JJ.
[7] See generally ABC Canberra 666 Breakfast program March 7 – March 10 2011.