Submission

on the

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

to the

Senate Legal and Constitutional Affairs Committee

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by

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1. Introduction

On 2 March 2011 the Senate referred the *Australian Capital Territory (Self Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010* for inquiry and report.

This Private Senator's Bill, sponsored by Senator Bob Brown, would amend the *Australian Capital Territory (Self Government) Bill 1988* to repeal the provision which enables the Governor-General to disallow and recommend amendments to any Act made by the Australian Capital Territory Legislative Assembly. Further amendments proposed by Senator Brown would make similar amendments to the *Northern Territory (Self Government) Act 1978* and the *Norfolk Island Act 1979*. The stated object of the Bill and the amendments is to give exclusive legislative authority for the three territories to their local legislatures.

Submissions are due by Thursday 10 March 2011. The reporting date is 21 March 2011.

2. Territories are not States

Territories are not States. They rely on the Commonwealth Government for their existence, and to a large extent for their maintenance and funding. It is therefore appropriate that the Commonwealth Government should retain the right of veto over Territory legislation.

3. Territory parliaments are unicameral

Unlike most parliaments in the Westminster tradition, Australian Territory parliaments lack an upper house or house of review to provide a check and balance on the power of the Chief Minister and his or her government.

As Lord Acton has said, *All power tends to corrupt – and absolute power corrupts absolutely*. It is therefore appropriate that the Commonwealth Government should retain its power to act as a house of review for Territory parliaments.

4. The Commonwealth Government has not abused its power

The case for amending the *Australian Capital Territory (Self Government) Bill 1988* requires evidence proving that the Commonwealth Government has abused its power in the past. Yet in his second reading speech on the Bill on 29 September 2010, Senator Brown made no attempt to produce such evidence.

On the contrary, on the only occasions when the power has been used, it has been used for good reason in the interests of the whole nation – to retain the special status of marriage.

5. Comments by Paul Kelly

Paul Kelly, editor-at-large of *The Australian*, has published an article ("New Territory laws cause fresh problems for Labor", 9/3/11, p 12) opposing the Australian Capital Territory (Self Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010. He said:

> The current push to remove the Australian government's executive veto over laws passed by the ACT's Legislative Assembly is inexorably tied to same-sex recognition.
>
> The Chief Minister for the ACT, Jon Stanhope, leads a government that has waged a long and aggressive campaign to advance same-sex recognition. Indeed, the history of bills on this subject suggests a crusade by the Labor-Green majority in the ACT assembly.
>
> If the ACT had the constitutional power to legislate for same-sex marriage then it would do so. Such a law would almost certainly be unconstitutional and Attorney-General Robert McClelland has been at pains to ensure that existing ACT laws do not infringe on the national government's marriage power under the Constitution.
>
> But the history of this issue shows an ACT assembly that will push to the limits.
>
> It is still early days but the signals from the ACT Greens are that passage of Greens leader Bob Brown's current bill to remove the commonwealth's executive veto will lead to further ACT legislative amendments to bolster the same-sex recognition cause. Indeed, it would be surprising if this did not happen.
>
> This reality is concealed by the form of the debate, notably the spurious assertion the ACT is entitled to "equal rights" with the states and, as a consequence, the "intolerable" national government veto power must be repealed.
>
> Like a row of donkeys, media commentators line up to repeat this nonsense behind an angry Stanhope, complaining that the ACT as a jurisdiction suffers from restrictions that do not apply to the states. The reason is simple.
>
> The ACT is not a state. It is the creation of the national government and parliament, and its reason for existence is to provide the seat of national administration. The ACT lacks many privileges of the states guaranteed by the Constitution. The ACT has no claim to statehood. It never will be a state. Its constitutionally inferior status is enshrined for good reason. No amount of foot stamping by Stanhope or Canberra journalists will alter this truth.
>
> It means that while Australian citizens living in the ACT should be accorded the same political rights as other citizens, this does not gainsay the more limited nature of the ACT as a self-governing entity whose originating purpose as a territory still remains.
>
> Brown first moved this measure in September 2006. His reason? He was retaliating against the Howard government's use of its veto under section 35 of the ACT (Self-Government) Act to disallow the ACT's same-sex recognition law. Prime minister John Howard knocked out the

territory's 2006 Civil Unions Act with its explanatory memorandum declaring, in triumph, that a same-sex civil union is "given the same legal recognition under ACT law as marriage".

This law was a frontal challenge to Howard and to the national parliament that had previously legislated that a marriage was a union between a man and a woman. Howard said: "The legislation, by its own admission, is an attempt to equate civil unions with marriage and we don't find that acceptable."

It was the first time the national government had used this veto that, in crude terms, is akin to a form of "reserve" power. The move incensed the ACT government and champions of same-sex recognition. At the time the federal Labor Party decided to support Brown's bill. But the measure was lost. The context, however, was unmistakable: the push for greater ACT power was driven by the same-sex battle.

In a complicated aftermath the ACT continued its campaign and mounted more bills. Indeed, the issue seemed to be an ACT obsession. After Kevin Rudd's victory, McClelland, as Attorney-General, resisted ACT efforts and opposed civil unions legislation, only to be attacked by Brown. In 2008 the ACT staged a tactical retreat and legislated an innocuous new law.

Then in 2009 the ACT Greens relaunched the battle with a new bill providing for a legally binding ceremony that recognised same-sex unions. McClelland negotiated, with his purpose being "to ensure the amendments were consistent with the Marriage Act". This time the ACT agreed on further concessions by amendments and, as a consequence, McClelland was satisfied and the bill became law. It was a victory for same-sex recognition. It showed the tenacity of this cause in the ACT and revealed the political method for progress: a Greens bill supported by Labor.

Brown has now reappeared with a new bill for the federal parliament to remove the national government's executive veto over ACT laws. Gillard Labor's response, as managed by Local Government Minister Simon Crean, is no surprise. Labor is supporting this bill consistent with its 2006 decision. Crean points out the ACT cannot legislate for euthanasia (because of the famous 1997 Andrews bill) and civil unions laws are already on the ACT books courtesy of the McClelland sanctioned 2009 law.

While the issue has been referred to a Senate committee, Gillard Labor can be expected to support Brown's bill and repeal the executive veto. This will eliminate, to a significant extent, the national government's leverage over the ACT assembly. It opens the way for the Greens to push for stronger same-sex recognition, at least to revive the original 2009 bill before the concessions to McClelland. The Labor government is more cautious, saying it has no current plans to strengthen the law. Among the ACT Greens, however, there is talk about the extent to which the commonwealth's marriage power can be tested.

The history of this issue and the aggressive same-sex recognition stance of the ACT assembly suggests it would be delusional to think any extra freedom accorded the territory on this issue will not be fully seized at some stage.

What, in summary, are the consequences of Brown's latest bill?

They are threefold: it gives the ACT assembly more scope on the same-sex issue, where it has battled the national government for a decade; it means the main check on the ACT becomes the national parliament's constitutional power to overturn a territory law; and it means this power is unlikely to be used because of the coming Labor-Greens Senate majority.

This story is a classic example of a Labor-Greens ascendancy in the national parliament giving more scope to a Labor-Green majority in the ACT. This is the core political outcome. It is being sold under the false proposition that more power for the ACT is a good thing.

Good for whom? Good for the Stanhope government and the Greens. But this arrangement is not good for Australia.

It is entirely appropriate and prudent the national government retain this executive power, given the ACT is the home of the national institutions. The one certainty is that its removal will be regretted at some stage down the track because in terms of improving our national governance this step is a negative, not a plus.

6. Conclusion

The Australian Capital Territory (Self Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 should be rejected.