Jon Stanhope MLA

CHIEF MINISTER

MINISTER FOR TRANSPORT MINISTER FOR TERRITORY AND MUNICIPAL SERVICES
MINISTER FOR BUSINESS AND ECONOMIC DEVELOPMENT MINISTER FOR LAND AND PROPERTY SERVICES
MINISTER FOR ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS
MINISTER FOR THE ARTS AND HERITAGE

MEMBER FOR GINNINDERRA

Senator Trish Crossin
Chair, Senate Legal and Constitutional Affairs Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Trish

Enclosed is the Australian Capital Territory Government's Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 (the Bill).

Thank you for the opportunity to comment on this important Bill.

I would also appreciate the opportunity to appear before the Committee at its public hearing on 16 March 2011, in strong support of the Bill under inquiry.

Yours sincerely

Jon Stanhope MLA
Chief Minister

ACT LEGISLATIVE ASSEMBLY

London Circuit, Canberra ACT 2601 GPO Box 1020, Canberra ACT 2601
Phone (02) 6205 0104 Fax (02) 6205 0433 Email stanhope@act.gov.au

Australian Capital Territory Government

Submission to the Senate Legal and Constitutional Affairs Committee inquiry into the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010

Foreword

As Chief Minister of the Australian Capital Territory (ACT) I am pleased to affirm the ACT Government's support for the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010.

The commencement of self government in 1989 marked the beginning of a promise of democracy for the citizens of the ACT. In granting self determination in our own affairs, the Commonwealth Government also affirmed that ACT residents would enjoy the same democratic rights as our fellow Australians.

Nearly 22 years later, the ACT has undoubtedly grown and developed into a sophisticated body politic. From ambivalent beginnings, self government is now firmly embedded in the consciousness of our community. The ACT, through its stable government and mature parliament, has embraced the social responsibilities with which it is charged. On average, Canberrans are among the healthiest, best educated and most prosperous in Australia. We are just, free and relatively free of prejudice. We have grown in population terms and as an indispensable presence in our region. We have also grown as a community, a vibrant and engaged polity, and increasingly we are recognised as such by a nation whose capital and seat of government we are proud to uphold and sustain.

The Bill under inquiry, however, brings into sharp focus those aspects of our self government which do not confer the promise of equal democratic rights with our fellow Australians. While a number of the ACT's self government arrangements are in need of updating, preeminent among these concerns is section 35 of our Self Government Act. Without prior scrutiny or debate in the Australian Parliament, enactments of the ACT Legislative Assembly are subject to veto by Commonwealth Executive fiat.

This provision represents a constraint on the legislative rights of the ACT that is both unnecessary and undemocratic. It undermines the mandate of the ACT's Legislative Assembly to make laws for the peace, order and good government of the Territory and restricts the ability of elected Members to represent the needs, desires and aspirations of the people of the ACT.

This view was formalised in a motion passed by the ACT Legislative Assembly on 17 June 2009, which called on the Commonwealth Government to participate in a joint review of the ACT Self Government Act. I have made significant representations to my Federal colleagues to pursue this matter. The Bill under inquiry will support the aims of the review for which the ACT has long been reasoning. It will, simply and sensibly, remove a provision that is outdated, unaccountable and subject to partisan influence.

Of all places in Australia, democracy must be upheld in the place that symbolises it best. This crucial reform is greater than any singular issue: it is a single issue—democracy—at stake here. It is, therefore, in the spirit of democracy that I fully support the Bill under inquiry and commend this Submission to the Committee.

Jon Stanhope MLA
Chief Minister of the ACT

10 March 2011

Introduction

Background

On 29 September 2010, Senator Bob Brown introduced the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 (the Bill) in the Federal Senate. The Bill proposes to repeal section 35 of the *Australian Capital Territory (Self-Government) Act 1988 (Cwlth)* (the Self Government Act).

The stated Objects of the Bill 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 for the Australian Capital Territory; and

(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.

In practice, the Governor-General acts under section 35 on the advice of the Commonwealth Executive. For this reason, and to differentiate them from similar powers under section 122 of the Australian Constitution, the provisions under section 35 of the Self Government Act are collectively referred to as the "Executive disallowance power" or "disallowance power" throughout this Submission.

Summary

The ACT supports the Bill under inquiry. The disallowance power—which, at the commencement of self government, may have seemed entirely necessary—no longer reflects the growth and maturity of governance we have achieved. It constrains the mandate imparted on the elected representatives of the ACT to govern the Territory responsibly and accountably.

It is also an unnecessary provision: the Federal Parliament's power to legislate for the Territories under section 122 of the Australian Constitution would remain, ensuring, at least, that any override of Territory laws is the subject of federal parliamentary debate. While, in turn, the merits of this Constitutional provision may be disputed, its continuing presence at least confutes any claim that passage of the Bill under inquiry would render the ACT legislatively unfettered. Passage of the Bill would do no more than support the basic principles of democracy.

Finally, there are a number of other areas in which the ACT's Self Government Act should be updated. Some of these are technical provisions that are more appropriately the subject of Territory law. This Submission, however, addresses two issues of particular significance: the ability of the ACT Assembly to determine its own size; and recognition of Indigenous traditional custodianship of the land that now forms the ACT. One can be implemented immediately through simple amendments to the Bill under inquiry. The second will require due consideration and consultation by the people of Canberra, but it is equally important. The resolution of both will help to ensure the ACT's Self Government Act—effectively our constitution—continues to reflect the growth and aspirations of the people of the Territory.

On 1 March 2011, Senator Brown proposed amendments to the Bill under inquiry which would similarly amend the self government acts of the Northern Territory and Norfolk Island to remove the Executive disallowance power. The extension of this Bill under inquiry to those Territories is entirely in keeping with the arguments set out here.

Disallowance and amendment power of the Commonwealth Executive

The removal of the Executive disallowance and amendment power is the Bill's central purpose. The power, codified in section 35 of the Self Government Act, is an outdated and unnecessary constraint on the democratic right of the citizens of the ACT. The Bill, if enacted, would not give the Territories superior rights; but it would bring us closer to equal rights.

A national capital and a local community

The ACT acknowledges the unique circumstances that justify the nation's permanent interest in the government of the Territory. All Australians have a legitimate interest in the estate of their nation's capital and the Commonwealth Government has a right to pursue, through the National Capital Authority, its "continuing interest in the strategic planning, promotion, development and enhancement of Canberra as the National Capital."[1]

As the prospect became increasingly real more than two decades ago, self government in the ACT was met with ambivalence, and occasional hostility, by the community. Indeed, the First Assembly in 1989 included four Members committed to abolishing the very parliament to which they had been elected. In these early days, self government—discomfited by association with metre-long ballot papers and newly-formed parties with absurd names—at times attracted the derision of a public that was, as yet, unconvinced.

We must also remember that the process of negotiating self government for the ACT was incremental and progressive. Initially, the legislative powers proposed to be conferred on the ACT were significantly restricted in scope—the broad plenary powers of the Assembly only took final form in amendments concerning the justice powers negotiated during debate in the Senate. What was to become section 35 of the Self Government Act was thus included to guard against the Assembly's making laws in a manner that, under earlier iterations of the Bill granting self government, would have been outside its legislative competence.

In this context, as the Territory moved from government by an administrative adjunct of the Commonwealth to reasonably full self determination, it is understandable that the then Australian Government considered the Executive disallowance power a necessary precaution to ensure stability and safeguard the national interest.

At the ten year mark of self government, the Commonwealth and the ACT convened a panel, comprising a senior official from each government and headed independently by Professor Philip Pettit, to undertake a joint review of the governance of the ACT.[2] This panel conducted extensive consultation, including holding public hearings, accepting public submissions, convening expert seminars and interviewing the majority of (then) current and past Members of the Legislative Assembly.[3] One of the recurring themes of the panel's engagement with the community was the desire to see the Commonwealth Executive's power of arbitrary veto removed to further democratise our self government arrangements.[4] The panel ultimately agreed the provision of an arbitrary Commonwealth veto was an inappropriate aspect of the ACT's constitutional system.[5]

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[1] Commonwealth Government (2011), *The National Capital Authority* http://www.nationalcapital.gov.au/index.php?option=com_content&view=category&layout=blog&id=36&Itemid=146.

[2] Pettit, P (1998), *Review of the Governance of the Australian Capital Territory* (Canberra: Chief Minister's Department).

[3] *ibid.*, p. 9-10.

[4] *ibid.*, pp. 65-66.

[5] *ibid.*, p. 3.

Nearly 13 years later, in our 22nd year of self government, the repeal of section 35 of our Self Government Act can only be considered long overdue.

A constraint on democracy

The Executive disallowance power has now become an unreasonable constraint on democracy. In 1988, the Commonwealth insisted the disallowance provisions were "instruments of last resort"[6] and promised to confer on ACT citizens "the same democratic rights and social responsibilities as their fellow Australians".[7] There is no doubt stable, mature self government is now firmly entrenched in the Territory. However, the Commonwealth's promise remains only partially fulfilled.

The constitutional development of the ACT has been recognised by the High Court. It is now settled that the Territory's legislature is a separate body. The plenary lawmaking powers of the Territory to legislate may derive from the Self Government Act—a piece of Commonwealth legislation—but the making of ACT laws does not involve the exercise of federal legislative power.[8] Similarly, the judiciary of the ACT is separate and independent[9] and the executive of the ACT is independent, so that its fiscus, or taxation and revenue arrangements, is distinct from the Federal fiscus.[10]

That section 35 empowers the Commonwealth Government, with no popular mandate, to administratively override the laws of the Territory's legitimate legislature is a fundamental erosion of Australia's democratic standards. The disallowance power creates a high degree of uncertainty as to the status of existing and future enactments of the Legislative Assembly for the ACT and the scope of the Assembly's law making powers. In effect—and in a manner unique to the Territories—the provision affords citizens of the ACT no clear line of ultimate accountability for the laws passed by their elected representatives. This provides for a lower standard of democracy for the citizens of the ACT when compared to Australians living in one of the six States.

Such laws as have been duly formulated, debated and passed in the ACT's parliament by elected representatives should not be subject to the arbitrary, unilateral veto of federal Ministers elected outside the ACT.

A needless provision

The Executive disallowance power, considered in the context of existing Constitutional constraints on the Territories' governance arrangements, renders it conclusively unnecessary. While the Bill under inquiry reasserts the primacy of the legitimate Territory parliament, it does not remove the power of the Commonwealth parliament to make laws that apply in the ACT.

Section 122 of the Australian Constitution addresses the governance of Australian territories, providing:

> 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.

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[6] Hunter, M (2009), 'Debate speech: Remonstrance—Australian Capital Territory (Self-Government) Act 1998', 17 June, http://www.hansard.act.gov.au/hansard/2009/pdfs/20090617.pdf.
[7] *ibid.*
[8] *Svikart v Stewart* (1994) 181 CLR 548.
[9] *Capital TV and Appliances Pty ltd v Falconer* (1971) 125 CLR 591.
[10] *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248.

In short, the Federal Parliament will retain its power to legislate to make laws for the Territories. While the suggestion that Federal Parliament's removing power from Territories may be, in itself, inappropriate,[11] at least a legislative disallowance process provides for greater scrutiny, transparency and debate than arbitrary veto by Executive fiat.

In addition, the Bill does not upset the current law such that territory laws cannot be inconsistent with Commonwealth laws (inconsistency between Commonwealth and ACT laws is dealt with by section 28 of the Self Government Act).

The existing Constitutional provisions, therefore, confute any suggestion that passage of the Bill under inquiry would deliver legislative power beyond—or even *equal to*—that of the States. It does not privilege the ACT in any way.

[11] Williams, G (2010), "Euthanasia Bill Needed for Healthy Democracy", *Sydney Morning Herald*, 9 November. http://www.smh.com.au/opinion/politics/euthanasia-bill-needed-for-healthy-democracy-20101108-17kh8.html?skin=text-only.

Other significant issues with the ACT's Self Government Act

While the Bill under inquiry proposes only to repeal section 35 of the ACT's Self Government Act, the ACT requests the Senate Committee also considers the merit of two crucial additional reforms to our self government arrangements. The first can be implemented immediately and should be included as an amendment to the current Bill under inquiry. The second would require due consultation and consideration and is not proposed as an immediate amendment to the Bill—but it is equally important.

Ability to set the size of the ACT Legislative Assembly

Unlike the Northern Territory and all States in Australia, the ACT is in the anomalous position of not being able to control the size of its own parliament. This number is set at 17 Members by section 8(2) of the Self Government Act. Section 8(3) provides that the Assembly may resolve to increase its size, but Commonwealth regulation is required to effect the change.

Any elected parliament should have the exclusive power to determine its own size. This has been explicitly acknowledged as a fundamental principle of governance by Dr Allan Hawke AC, in his recent review of the ACT Public Sector,[12] by Professor Philip Pettit, in his 1998 review of the governance of the ACT[13] and by Professor George Williams in, amongst other writings, his Submission to this inquiry.[14]

In nearly 22 years of self government, the Assembly's size has never been varied, despite the number of electors increasing from 170,000 at the commencement of self government to the current estimate of 242,842.[15] A series of committees and inquiries has recommended an increase in the number of the ACT's representatives in order to effectively run a Westminster system with a Government, Opposition and parliamentary committees.[16]

The merit of varying the size of the ACT's parliament, or the particular numbers involved, is beyond the scope of this Submission. It is clear that the requirement of Commonwealth regulation to give effect to a simple matter in the exclusive purview of the ACT parliament is administratively cumbersome and unnecessary.

The ACT Government suggests amendments to the Bill could be drafted which simplify this process by transferring this responsibility to the ACT Legislative Assembly without reference to the Commonwealth Government or Parliament.

Recognition of Indigenous traditional ownership

As the primary document that prescribes the size and powers of the ACT Legislative Assembly and the role of the Executive, the Self Government Act is effectively our constitution. It is, therefore, the appropriate vehicle in which to incorporate a preamble that formally recognises Indigenous Australians as the traditional owners of the land that now forms the ACT.

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[12] Hawke, A (2011), *Governing the City State: ACTPS Review Final Report*, February, p. 34. http://www.actpsreview.act.gov.au/__data/assets/pdf_file/0011/188363/Attachments.pdf

[13] Pettit (1998), *Review of the Governance of the Australian Capital Territory*, p. 3.

[14] Williams, G (2011), "Inquiry into Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010", 3 March, p. 1. https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=a8c2d55e-cf73-48c4-9e5f-90540aef967e

[15] Hawke (2011), *Governing the City State*, p. 33.

[16] *ibid*, pp. 31-33.

The ACT Government has favoured the introduction of such a preamble for some time. The possibility has been discussed with the ACT's Aboriginal and Torres Strait Islander Elected Body, the democratically elected voice of our Indigenous community, which would support it.

It is clear this particular proposed amendment to our Self Government Act will require due consultation and consideration. The ACT Government does not propose this as an immediate amendment to the Bill under inquiry. We do, however, wish to emphasise this as a priority area of future reform.