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Committee Secretary
Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
Canberra ACT 2600

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

Thank you for the opportunity to comment on the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 (the Bill).

The Australian Christian Lobby (ACL) is opposed to the Bill, which would remove the power of the Commonwealth executive to disallow laws of the ACT legislature. Proposed amendments to the Bill provide for similar provisions to be removed from the federal legislation governing the self-governing territories of the Northern Territory and Norfolk Island. Most of the discussion below will focus on the primary jurisdictional target of the Bill, the Australian Capital Territory.

Respect for the Constitution and states' rights

The Commonwealth's override provision with regard to territories provides an important check and balance on the power of small territory legislatures. In the same way that an upper house protects the citizens of a state from the overreach of power by an executive government, the ability of the executive government of the Commonwealth, which is representative of the voters of the entire nation and in a position to provide national leadership, to veto the legislation of territories is an important check on the exploitation of otherwise appropriate territorial powers of self-government by those seeking to introduce a local precedent that will have national ramifications.

We do not believe that territory legislatures are incapable of deciding important matters of policy, and for those supporting this Bill to attempt to divert discussion of the issue by using this claim is to trivialise the important constitutional issues at stake. The reality is that small territory parliaments do not have a house of review and are too small a forum to be progressing controversial social policies with national, precedent-setting implications. The issue is not that a territory is denied the

capacity to pass laws that govern its own citizens, but that a small legislature, without the checks and balances of a larger state legislature, will set legislative precedents that states may find difficult not to mimic because of the inevitable anomalies that the establishment of local regimes may create.

Supporters of the Bill have presented it with rights-based justifications, arguing that it grants territory citizens the same democratic rights as other Australian citizens to have their local legislature pass laws without Commonwealth interference.[1] There are several weaknesses in this line of reasoning. Firstly, territories do not for good reason have the same standing under the Constitution as states, and therefore their legislatures are not vested with the same independent powers of self-government. Section 122 of the Constitution enables the Commonwealth Government to make laws for the government of any territory.

Secondly, unlike the much larger state legislatures, the three territory parliaments that are the subject of the Bill do not have the democratic check and balance of an upper house, like the legislatures of all states except Queensland. Without a house of review, the citizens of territories do not have the same democratic checks on their assemblies and executive governments as do the citizens of states. A check is therefore necessary through the disallowance power of the Commonwealth, which maintains authority over the territories via the Constitution.

Thirdly, the Australian Capital Territory, which is at the centre of this debate about 'territory rights', only has self-governing powers, including the law-making powers of the legislative assembly, because the powers have been conferred on it by the Commonwealth Parliament through the *Australian Capital Territory (Self-Government) Act 1988* (the Act). The disallowance power, section 35 of the Act, was part of the original arrangement made by the Commonwealth to cede some, but not absolute, legislative powers to the ACT's Legislative Assembly.

To later demand the removal of an agreed measure to curb the considerable powers of the ACT executive government, in order to have the same legislative powers of a state government that is subject to the scrutiny of an upper house, is anti-democratic in its appeal to state equivalency, and disrespectful of the power-sharing arrangement determined for self-government. It is illustrative that a majority of Canberrans did not support self-government at the time it was implemented by the federal government.

The political objectives of the Bill

It is clear to the ACL that the Bill is primarily about the political pursuit of the Greens' social agenda rather than the 'rights' of Australian citizens who reside in territories. In the same way that Senator Brown's Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2010 is about forwarding the Greens' agenda on euthanasia, the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 is about pursuing the Greens' political objectives regarding same sex relationship recognition. The rights of Australians living in territories appear secondary to the Greens' social agenda, being a means to an end.

[1] See for example: Stanhope, J. (2011, March 4), 'Equal rights for Territorians', *The Australian*, http://www.theaustralian.com.au/news/opinion/equal-rights-for-territorians/story-e6frg6zo-1226015581380

In this context, and given that the Greens will soon have the balance of power in the Senate, it is no co-incidence that the Bill would transfer authority to override territory legislation to both houses of the Federal Parliament.

Within three months of the then Howard Coalition Government striking down the ACT's attempt to mimic Commonwealth marriage through a civil union scheme in 2006, Senator Brown introduced the Australian Capital Territory (Self-Government) Amendment (Disallowance Power of the Commonwealth) Bill 2006 into the Federal Parliament. In introducing the 2006 bill, which would have had essentially the same legislative outcome as the 2010 bill for the ACT, Senator Brown reasoned that, "The national government overrode the civil union legislation passed by the Australian Capital Territory's Legislative Assembly. That outcome gave rise to today's bill."[2]

If the primary motivation of the 2006 bill was to remedy a Greens' grievance held in relation to same sex relationship recognition, it can be reasonably held that same sex relationship recognition is the basis of the 2010 bill. Indeed, Treasurer Wayne Swan has publicly declared that the pursuit of the Greens' same sex marriage agenda through the ACT Legislative Assembly is an "entirely legitimate" concern of those opposed to the Bill.[3]

The Commonwealth executive acting to protect the significant institution of marriage, as set down in Commonwealth law, against the encroachment of the ACT legislature into the jurisdictional domain of the Commonwealth was an entirely legitimate exercise of the override power of section 35 of the *Australian Capital Territory (Self-Government) Act 1988*. A similar response would be expected were a territory to again seek to undermine legislation in an area over which the Commonwealth has constitutional jurisdiction.

The members of the ACT Legislative Assembly might have a mandate to implement same sex relationship recognition for its citizens, but should not, with a majority vote of just nine members, impose a controversial social agenda on an entire nation, particularly as the political representation of the Assembly is not reflected in the wider Australian community. The bill might politically empower the small franchise of the ACT, but it is anti-democratic in by-passing the views of millions of Australians who deserve voice in any debate about marriage and its mimicking, which is the reason it is an area of Commonwealth jurisdiction.

The Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 is not concerned with the democratic rights of Australians living in territories, but about the Greens being able to pursue their own questionable legislative, policy and social agenda through a small parliament where they have disproportionate power compared to other jurisdictions – power out of all proportion to their electoral support. As the ACT, the Northern Territory and Norfolk Island are not states, analogies with such are false and unhelpful when it comes to discussing the Bill.

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[2] Brown, B. (2006, September 14), *Senate Hansard*, Australian Capital Territory (Self-Government) Amendment (Disallowance Power of the Commonwealth) Bill 2006 – Second reading speech, p. 90, http://www.aph.gov.au/hansard/senate/dailys/ds140906.pdf

[3] Massola, J. (2011, March 3), 'ALP concerns that Greens territories bill could lead to gay marriage are legitimate, says Swan', *The Australian*, http://www.theaustralian.com.au/national-affairs/alp-concerns-that-greens-territories-bill-could-lead-to-gay-marriage-are-legitimate-says-swan/story-fn59niix-1226015167076

Relative analytical capacity

An important feature of the passage of contentious legislation is the analysis given the claims on which the legislation is based.

States, by their larger legislative and bureaucratic capacity, have the ability to comprehensively analyse issues through fully constituted inquiries and the calling of expert witnesses. This continually frustrates the Greens in particular, who have found that four state legislatures decided not to proceed with euthanasia legislation after the depth of analysis possible in the states made it clear to even those sympathetic to it, that it was not possible to frame safeguards that adequately protect the vulnerable.

This is of course not a comment on the intellectual capacity of the territories as is often mischievously represented, but is rather a reflection on the advantages of scale that the states have in their ability to devote the resources and time that these issues deserve and that the Greens have reason to avoid, given their often extreme agendas. It represents another and important reason for the override facility given to the Commonwealth in the Constitution.

Legislation by fatigue

An important aspect of the intention of the Greens in sponsoring this legislation is to remove the power of the Commonwealth executive to provide nationally-representative leadership when intervening in territory legislation that has national implications, and instead to place the Federal Parliament in a position of having to vote on the Greens' agendas, therefore making the consideration of the legislation by parliament the immediate default.

There is no doubt that this would be exploited by the Greens in the same way that they continue to bring forward euthanasia in the states, despite its having been considered and rejected by the same legislature, in some cases within just the previous year. This political tactic wastes valuable parliamentary time and places undue pressure on parliaments to capitulate to extreme agendas in order to protect the parliament's need to deal with more pressing matters of government.

The retention of the prerogative of the executive to intervene, where the Attorney confirms that the territory legislation is incompatible with Commonwealth law or outside its jurisdiction, is important to preserve the proper priorities and functions of both the Government and the Federal Parliament. The Government should provide national leadership on issues of national importance, and the Federal Parliament should provide democratic accountability for the Government. The Greens should not be allowed to subvert this intent of the Constitution, an important protection against the minority power they are attempting to wield.

Conclusion

It is anti-democratic for a majority of just nine MLAs, who are not accountable to the checks and balances of an upper house, to be empowered to dictate the national agenda for controversial social policy including at this point, marriage and relationship recognition. These are national debates requiring national participation, not mischievous precedent-setting contrived by a party representing an electoral minority.

The override provisions as they exist are important for their recognition of the differences in scale of territory and state legislatures and bureaucracies, and the resulting difference in capacity to safely analyse precedent-setting social change so loved by the Greens. The continued rejection of euthanasia by states after extensive inquiry proves this advantage.

The Committee should also ensure that minority agendas are not allowed to distract the Parliament and waste parliamentary time as is clearly the intent of the Greens in wanting to remove the prerogative of the executive to overturn territory legislation found to be incompatible.

Senator Brown's Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 appears to be motivated by the Greens' grievances over legitimate Commonwealth involvement in the controversial same sex relationship recognition initiatives of the ACT Legislative Assembly, rather than any genuine interest in the democratic rights of people living in territories.

We call on the Senate Committee to reject the Bill.

Thank you for your consideration of our views.

Yours sincerely,

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Managing Director