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

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Repeal of Section 35 of the ACT (Self-Government) Act 1988

In 1988 four Federal Acts set up the ACT as a body politic: the Australian Capital Territory (Self - Government) Act 1988; the Australian Capital Territory (Electoral) Act 1988; the Australian Capital Territory (Planning and Land Management) Act 1988; and the ACT Self-Government (Consequential Provisions) Act 1988.

The Bill under scrutiny proposes to repeal the following:
AUSTRALIAN CAPITAL TERRITORY (SELF-GOVERNMENT) ACT 1988 – SECT 35
Disallowance of enactments
(1) In this section: "enactment" includes a part of an enactment.
(2) Subject to this section, the Governor General may, by legislative instrument, disallow an enactment within 6 months after it is made.
(4) The Governor General may, within 6 months after an enactment is made, recommend to the Assembly any amendments of the enactment, or of any other enactment, that the Governor General considers to be desirable as a result of considering the enactment.
(5) Where the Governor General so recommends any amendments, the time within which the Governor General may disallow the enactment is extended for 6 months after the date of the recommendation.
(6) Upon publication in the Commonwealth Gazette of notice of the disallowance of an enactment, the disallowance has, subject to subsection (7), the same effect as a repeal of the enactment.
(7) If a provision of a disallowed enactment amended or repealed an enactment that was in force immediately before the commencement of that provision, the disallowance revives the previous enactment from the date of publication of the notice of disallowance as if the disallowed provision had not been made.
(8) For the purposes of this section, an enactment shall be taken to be made when it is notified in the Territory Gazette under this Part.

The Governor General is appointed under the Federal Constitution by the Prime Minister. The Governor General does not have power to disallow Federal or State Legislation in the same manner. This creates an anomalous situation in terms of democratic rights for citizens of the territories.

That citizens of the Australian Commonwealth should be treated equally in terms of their democratic rights is a principle that has received acknowledgement in the High Court. In *Attorney-General (Cth)(Ex rel McKinlay) v The Commonwealth* (1975) 135 CLR 1, the High Court held that although 'something approaching numerical equality' of voters in each elector was important, it was not something that was necessarily found in the Constitution as a guarantee of representative democracy. In the case *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 232, Mason CJ, Toohey and Gaudron JJ held that the concept of representative democracy was embodied in the Constitution. In the *Queen v Pearson ex parte Sipka* [1983] 152 CLR 254 at 268 Murphy J stated "Section 41 is one of the few guarantees of the rights of persons in the Australian Constitution. It should be given the purposive interpretation which accords with its plain words, with its context of other provisions of unlimited duration, and it contrast with transitional provisions. Constitutions are to be read broadly and not pedantically. Guarantees of personal rights should not be read narrowly. A right to vote is so precious that it should not [be] read out of the constitution by implication. Rather every reasonable presumption and interpretation should be adopted which favours the right of people to participate in the elections of those who represent them."

It is particularly invidious in this context that section 122 of the Constitution allows the Federal government to pass laws overriding those passed by the electors of the Territories.

Whilst amending section 122 of the Constitution to reflect that changing democratic responsibilities that self-government has brought the Territories will be a long term proposition, repealing section 35 of the ACT Self-Government Act is a measure that can and should be taken now. What the citizens of the ACT or NT vote about should be no concern of members of federal Parliament if it raises no issues that would create constitutional objections should the same legislation have been passed by the States. 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.

Need for Additional Senate Representation for Australian Territories

It is sometimes thought that the ACT only has two senators because that is what the Constitution prescribes. This is not so. Section 122 of the Constitution provides: "The Parliament…may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it sees fit."

This section provided the constitutional support for the *Senate (Representation of Territories) Act* passed after the double dissolution in 1974. This Act survived constitutional challenge in two High Court cases- the *First and Second Territory Senators Cases* (1975 & 1977). In broad terms, the judges divided over whether the basic legal principle to apply was protection of democratic representation, or of the federal nature of the Constitution. Judgments favouring the latter emphasised section 122 might be used to flood the Senate with Territory senators. Judges prioritising the former considered it undemocratic for Australian citizens to have no Senate representation merely because of the geographic accident of their residing in the Northern Territory (NT) or the ACT. Self government and population growth in the Territories (ACT to over 350,000 and NT 225,000, with Tasmania by comparison 500,000) has made the issue more pressing in terms of basic democratic principles.

No particular number being Constitutionally prescribed, it is widely believed that the two major parties decided as a compromise to allocate two senators to each Territory on the basis that, under the proportional representation quota system, they would get one each.

Section 7 of the Constitution allows the Parliament to make laws increasing the number of senators in each State. The so-called "nexus provision" in section 24, however, requires the total numbers of House of Representatives members must be "as nearly as practicable, twice the number of senators". The *Representation Act 1983* now specifies 12 senators for each of the six States. These 12 state senators serve six-year terms, half retiring every three years. The current total number of 76 senators thus is a consequence of the *Commonwealth Electoral Act* providing that two senators

are to be elected from each of the ACT and Northern Territory. These senators always are elected concurrently with members of the House of Representatives and so serve three-year terms.

The High Court in *McKellar's Case* in 1977 held that the people of the ACT and NT and any senators they elect are not included in the 'nexus' calculation under section 24 of the Constitution. The parliament nonetheless inserted into the *Commonwealth Electoral Act* an unusually discriminatory provision (section 40) allowing the number of senators in the ACT (or the Northern Territory) to increase beyond two only when there are '6 or more' members of the House of Representatives in those jurisdictions.

This peculiar legislative constraint on ACT and NT Senate representation is contrary to basic principles of proportional representation. The Australian Senate proportional representation electoral system involves each elector's vote being transferred between candidates in the order of the elector's preferences. A candidate is elected when his or her total number of votes equals or exceeds a quota calculated using a mathematical formula. In the ACT, if two candidates get 33.3% of the Senate vote they have a quota and all other candidates are eliminated, but in the six states, a successful Senate candidate need only get 14.3% of the vote at a half-Senate election to obtain a seat.

The standard justification for proportional representation is that it facilitates the composition of the Senate reflecting the overall proportion of votes allocated in each State or Territory. By assisting the election of independents and candidates of smaller parties, proportional voting now is considered to perform an important democratic function in ensuring the Senate's role as a genuine house of legislative review by people representing a wide range of community interests. Yet this intended beneficial outcome is undermined when electors in a particular jurisdiction have only a limited number of senators to elect (two in the Territories, instead of twelve in the States).

Given the changing nature of Australian population and polity it is now unacceptable in terms of fundamental principles of democracy underpinning proportional representation that there are only two senators in the ACT and NT. The

Commonwealth Electoral Act should be amended to require the ACT and NT be represented each by four senators serving three year terms (a third the Senate representation of every State).