Speaker

Ms Julie Dennett
Committee Secretary
Standing Committee on Legal and Constitutional Affairs (Legislation Committee)
Parliament House
Canberra ACT 2600

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

Dear Ms Dennett,

Please see attached submission to the Committee's inquiry into the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010.

Please be aware that while I am making this submission in my capacity as Speaker of the Legislative Assembly for the ACT, given the tight deadline for providing submissions to the committee, I have not had the opportunity to canvass the points I make with all my Assembly colleagues and therefore the submission does not purport to represent their views.

I would welcome the chance to appear before the committee to give evidence.

Yours sincerely,

Shane Rattenbury MLA
Speaker of the Legislative Assembly for the Australian Capital Territory

10 March 2011

Legislative Assembly for the Australian Capital Territory
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Inquiry into Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010

Submission made by Shane Rattenbury MLA
Speaker of the Legislative Assembly for the Australian Capital Territory

Summary

1. The Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 represents a straightforward legislative proposal to confer upon the ACT the right to legislate for the affairs of ACT citizens without interference from the Federal Executive.

2. Whilst acknowledging that the Commonwealth Parliament will always have a role to play in matters associated with the seat of government in the ACT, the passage of this bill will do nothing to diminish the capacity of the Commonwealth Parliament to acquit this role effectively. However, the Federal Executive currently has an excessive power to override properly enacted laws of Legislative Assembly for the ACT as provided for in s35 of the *Australian Capital Territory (Self-Government) Act 1988.*

3. Accordingly, I ask the Standing Committee on Legal and Constitutional Affairs to support the rights of ACT citizens to govern themselves unimpeded by a Federal Executive and to recommend that the Senate pass the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 as a matter of democratic principle.

Legislative history

4. Section 122 of the Constitution states:

> 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.

5. Following the passage of the *Seat of Government Act 1908* 2,327 square kilometres of land were transferred to the Commonwealth from the state of New South Wales for the purposes of establishing a federal territory for the seat of national government, later to become the Australian Capital Territory.[1] From its inception until 1989, the Commonwealth governed the ACT. In 1988, the Commonwealth Parliament passed the *Australian Capital Territory (Self-Government) Act 1988* (and associated legislation) (the Self Government Act) to

[1] M McRae (ed), *Companion to the Standing Orders of the Legislative Assembly for the Australian Capital Territory,* 2009, p 1.

confer full democratic rights and responsibilities on the citizens of the ACT.

6. The establishment of a true democratic polity in the ACT recognised, rightly in my view, that democratic representation was an essential feature of self-determination and that merely because citizens of the ACT happened to live in the national capital where the nation's affairs were attended to, was no reason to deny local residents a say in their own affairs and to elect local representatives with sole responsibility for attending to their interests and concerns.

7. In his second reading speech in the House of Representatives, the then Minister for Arts and Territories explained that, under the bill, '...the Australian Capital Territory will be a body politic under the Crown. It will consist of a legislative arm and an Executive arm to exercise powers as set out in the Bill... The ACT will have the same legislative and Executive powers and responsibility over finances as the States and the Northern Territory'.[2]

8. The minister explained in no uncertain terms that the bill would allow the people of the ACT to 'have the same democratic rights and social responsibilities as their fellow Australians'[3] He added that:

> [Currently], unlike every other person in this country, where a fair go is the creed by which we live, they [people of the ACT] cannot elect a member of their own community to their own government. They have no say in the decisions which affect their everyday lives. What an extraordinary admission in a country so committed to democratic ideals, and why? Are they people somehow different from other Australians? Are they second-class citizens in some way? Do they not understand, or have options on, the issues that confront them daily? Can they not be trusted with their own destiny? The answer to all these questions is very simple. The only difference between these people and the rest of Australia is that they live in the Australian Capital Territory.[4]

9. The Self-Government Act established in the ACT a system of responsible democratic government with an elected legislature charged with making 'laws for the peace, order and good government of the Territory'. Section 35 of the Self Government Act states that:

> **35 Disallowance of enactments**
>
> (1) In this section;
> *enactment* includes part of a an enactment.
>
> (2) Subject to this section, the Governor-General may, by legislative instrument, disallow an enactment within 6 months after it is made.
>
> (3) 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.

10. In speaking to this clause when the bill was debated in the House of Representatives, the Minister for Territories clearly spelt out the intent behind the

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[2] The Hon A.C. Holding, *House of Representatives Hansard,* 19 October 1988, p 1222
[3] Ibid.
[4] Ibid.

disallowance provisions, stating that 'They are, of course, instruments of last resort and it is the Government's intention to resolve any potential conflict with the ACT by consultation and negotiation'.[5]

Comparison with section 59 of the Australian Constitution

11. Section 35 of the Self Government Act is, in many respects, analogous to section 59 of the Australian Constitution and is instructive in evaluating the present matters before the committee. Section 59 states that:

> 59. The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.

12. Although this provision has been in existence for over 110 years, the crown has never seen fit to exercise its prerogative in this regard and there are, of course, compelling arguments that the provision should be removed altogether from the Constitution. The 1988 report of the Constitutional Commission chaired by Sir Maurice Byers QC recommended that sections 59 and 60 be deleted.[6] Other eminent persons have recommended their excision from the constitutional framework. In a speech given to the Human Rights Law Resource Centre in 2008 the former Chief Justice of the High Court stated that:

> Then there are the transitional and obsolete provisions of the constitution which are littered throughout the text, cloud the true nature of the constitutional framework and impair its readability.
>
> It is high time to be rid of... ss 58, 59 and 60 which permit the reservation of a law for the Queen's pleasure and reserve the Queen's power to disallow a law even after it has been assented to by the Governor-General. The provisions which confer powers on the Queen, with one exception, have become anachronistic.[7]

13. A judgment of the High Court has even gone as far as saying that the operation of the Constitution in relation to this section would not be in accordance with constitutional practice. In a judgement given in 1999 the High Court opined:

> As early as 1929, it was stated in the Report of the Royal commission on the Constitution with reference to the provisions of ss 58 and 59 of the Constitution that "in virtue of the equality of status which, from a constitutional as distinct from a legal point of view, now exists between Great Britain and the self-governing Dominions as members of the British Commonwealth of Nations, and on the principles which are set out in the Report submitted by the Inter-Imperial Relations Committee to the Imperial Conference in 1926", for "British Ministers to tender advice to the Crown against the views of Australian Ministers in any matter

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[5] The Hon AC Holding, *House of Representatives Hansard,* 19 October 1988, p1922.
[6] Final Report of the Constitutional Commission, Volume 1, AGPS, 1988, p 83
[7] The Hon Sir Gerard Brennan, AC, KBE, *The Constitution, Good Government and Human Rights,* speech given to Human Rights Law Resources Centre, Melbourne, 12 March 2008, p 12.

> appertaining to the affairs of the Commonwealth "would "not be in accordance with constitutional practice".[8]

14. Clear parallels emerge between arguments advanced to support removing section 35 from the Self-Government Act and the not infrequent calls from eminent constitutional scholars that the equivalent section in the Australian Constitution be recognised as a redundant anachronism and be similarly removed.

15. It may well be that the British Parliament took the view that the Australian Parliament in its early years needed to be supervised in its activities. However, as acknowledged in the judgement mentioned above, the prospect of the Queen taking advice from her British ministers to disallow an Australian law that had been validly passed by the Australian Parliament would seem extremely remote and would not be consistent with accepted constitutional practice.

16. If we extrapolate that reasoning to the matters before the committee, it is not difficult to see that the s35 provisions provide for the same type of arbitrary curtailment of the legislative prerogative of the ACT legislature. In this context, Senators may wish to contemplate how each of them would respond in the event that the Queen amended or disallowed a properly enacted law of the Commonwealth Parliament and whether or not they would deem it a legitimate exercise of power.

The use of disallowance power – a measure of last resort?

17. As the committee will be aware, unlike the Federal Parliament whose laws have not been the subject of disallowance by the Crown, the disallowance powers that apply to the ACT were used by the Howard Government in 2006 to override an enactment of the ACT legislature and, by extension, to negate the democratic choices made by the people of the ACT at the preceding election.

18. The use of the disallowance powers have also been publicly threatened on at least one other occasion during the term of the Rudd Government[9]. However, due to the total lack of transparency associated with the exercise of the power or the manner in which it might be invoked, it is possible that the Commonwealth Executive may have considered or threatened its use on other occasions of which neither the committee nor I are aware.

19. On the single occasion that the power was exercised, the Legislative Assembly, in the days leading up to the instrument being signed by then Governor-General, Major General Michael Jeffrey, unanimously resolved to send an Address to him on the matter. A copy of that Address is attached to this submission for the committee's information.

20. It is my view that the promises made by the Minister for the Territories at the time the clause was being considered in 1988, namely that the use of the power would be used as a 'last resort', has not been honoured by the Commonwealth. Rather, it has been used by a government of the day to disallow a law validly passed in the

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[8] Sue v Hill [1999] HCA 30 – 23 June 1999 – S179/1998 and B49/1998.

[9] 'ACT made to axe gay unions', The Australian, 5 May 2008, accessed at: http://www.theaustralian.com.au/news/act-made-to-axe-gay-unions/story-e6frg6nx-1111116244150

Legislative Assembly for the ACT on the sole basis of a simple policy disagreement. The 2006 intervention gives rise to the question as to whether or not the power might again be exercised and in relation to what issue.

21. The disallowance provisions have also been used as a coercive mechanism by which the Federal Executive has sought to influence what laws might or might not be introduced or passed in the Assembly by threatening to invoke s35 should the Assembly not move into line with a desired policy position. Using the disallowance provisions in such a way could well result in a chilling effect whereby ACT legislators become hesitant in fulfilling their role to legislate for the 'peace, order and good government of the ACT' and instead concern themselves with the prevailing policy winds blowing through the Federal cabinet room. Before introducing a bill to the Assembly must an ACT MLA now weigh its merits and prospects not only against what the people of the ACT might desire but also what the ministers of an unelected (by citizens of the ACT) Federal Executive might find opportune or fitting?

22. To have a situation such as this in a 21st century parliament is simply unacceptable.

23. I support the view of one of my predecessors, Speaker Wayne Berry, who noted in a 2008 article appearing in *The Parliamentarian*, that:

> On any reasonable reading of the events that transpired in the lead up to and following the [2006] disallowance, the unavoidable conclusion is that the disallowance was antidemocratic and that these powers should not have been invoked. Indeed, it is my view that these provisions which permit disallowance should be removed from the relevant self government legislation.[10]

24. This position was also affirmed by the Assembly in a resolution passed on 17 June 2009 when it resolved, amongst other things, that:

> (2)... subsection 35(2) of the *Australian Capital Territory (Self-Government) Act 1988* is an unwarranted restriction of democratic rights of ACT citizens (noting this power can be presently exercised by the Governor-General on advice from the Prime Minister without prior scrutiny, debate or vote in the Australian Parliament);
>
> (3)...in the event that section 35 (2) was repealed the Commonwealth Parliament would retain the right to legislate for the ACT under section 122 of the Australian Constitution.[11]

Does s35 accord with the Latimer House Principles adopted by Commonwealth Heads of Government in 2003?

25. In 2003 the Commonwealth Heads of Government (including the then Prime Minister, the Hon John Howard) endorsed the Commonwealth Latimer House Principles on the Three Branches of Government. The Principles had been formulated

[10] Wayne Berry, *Overriding the will of the people: the ACT Civil Unions Act disallowance,* The Parliamentarian, Issue 1 2008 p 1.
[11] Minutes of Proceedings No 22, 17 June 2009, pp247-8.

by the working group of Commonwealth Law ministers, which included the Law Ministers of Australia, Ghana, India, Jamaica, Kenya, Singapore, South Africa and the United Kingdom. The objective of the principles is to:

> Provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth fundamental values.[12]

26. In relation to Executive accountability to Parliament, the principles state:

> Parliaments and governments should maintain high standards of accountability, transparency and responsibility in the conduct of all public business. Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the Executive to the parliament.

27. I do not consider the use of section 35 by the Federal Executive lives up to this principle. On any reading, a process for disallowance that merely involves a minister convening a brief meeting of the Executive Council to be followed up with a letter to the Governor-General instructing him or her to disallow a law validly passed by another legislature, is in no way transparent. There is no requirement to consult, to make arguments about the basis for the disallowance or even to notify the ACT legislature of the Federal Executive's decision in advance of it being put into effect. Nor does the process maintain a high standard of responsibility to either the parliament from which the Federal Executive is drawn or to the parliament whose law has been disallowed.

28. It is also the case that the use of the disallowance power does not represent a proper mechanism for enforcing the accountability of the Executive to the Parliament. By using section 35 of the Self Government Act, the Executive is placing the onus on the parliament to disallow the instrument that voids a Territory law. However, this is after the event and the Executive need not provide any substantive justification for its decision (a one page explanatory statement was all that was provided to members and senators in the case of the 2006 disallowance).

Issues outside the scope of the inquiry

29. It must be acknowledged that this inquiry has been initiated against a somewhat colourful public debate that has to some extent contaminated what is, in my mind, a fairly straight forward proposition – that the ACT be allowed to conduct its legislative affairs unimpeded by the Commonwealth Executive. It is important to disentangle issues that have been canvassed prominently in recent days about the legislative choices that the Assembly may or may not make and instead focus on the key principle that the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 seeks to address, namely that the citizens of the ACT (and the Northern Territory) should enjoy the same democratic rights and responsibilities as other Australian citizens.

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[12] Legislative Assembly for the Australian Capital Territory, *Standing orders and continuing resolutions of the Legislative Assembly, p 79.*

30. I submit that to properly and fairly consider the matters that arise in considering the bill at hand, it is critical that substantive issues surrounding same-sex marriage or euthanasia not be conflated with the broader question of the democratic independence of the ACT.

S122 sufficient to preserve the Commonwealth's interests

31. Senators may hear arguments advanced in the course of the committee's inquiry that Commonwealth superintendence of the ACT is warranted on the basis that the Commonwealth will maintain a legitimate interest as to what takes place in the ACT given its status as the nation's capital. It is not disputed that there may be rare occasions where the Commonwealth has a proper role to play in some aspects of the ACT's governance where unique seat-of-government type issues arise. However, any Commonwealth involvement in the affairs of the ACT must not be the preserve of a Federal Executive but of the Commonwealth Parliament itself as provided for in s122 of the Constitution.

Conclusion

32. While it is accepted that the Commonwealth Parliament will always have legislative responsibilities in relation to the ACT, the existing provisions in the Self-Government Act permitting disallowance of ACT laws by the Governor-General on the instruction of the Federal Executive Council are undemocratic and are anachronistic in much the same way as are ss 58, 59 and 60 provisions in the Commonwealth Constitution.

33. In the case of the ACT, this is not an academic or theoretical point - the fact that the Federal Executive has chosen to exercise the disallowance powers under s35 of the Self-Government Act and overturn an enactment of the Legislative Assembly for the ACT, creates a high degree of uncertainty as to the extent to the democratic remit that applies in the Territory and casts into considerable doubt the operation of any authentic form of responsible government in this jurisdiction.

34. It is simply an unnecessary impost on the people of the ACT to have a Federal Executive looking over its shoulder in exercising their democratic rights. Removing s35 will strengthen the democratic character of the ACT and provide additional certainty for ACT legislators in performing their roles as elected representatives, ensuring that they are attentive to the needs and aspirations of ACT citizens, rather than the Executive of the Federal Government.

35. It is my sincere hope that the committee recommends that the Senate pass the Inquiry into Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 and fulfil the promise made by the Commonwealth Parliament at the time self-government in the ACT was established, namely that the people of the ACT 'have the same democratic rights and social responsibilities as their fellow Australians'

36. This should not be a contentious or controversial idea but a simple matter of respecting the autonomy of the people of the ACT and the ability of their elected representatives to legislate on affairs that have no bearing on Canberra's role as the seat of government for the Commonwealth.

ATTACHMENT A

ADDRESS TO HIS EXCELLENCY THE GOVERNOR-GENERAL

Mr Corbell (Attorney-General), pursuant to notice, moved—That, pursuant to standing order 268, this Assembly makes the following Address to His Excellency the Governor-General:

YOUR EXCELLENCY:

The Legislative Assembly for the Australian Capital Territory respectfully submits the following Address to His Excellency the Governor-General of the Commonwealth of Australia:

Under section 35 of the *Australian Capital Territory (Self-Government) Act 1988*, the Governor-General may disallow or recommend amendments to a law made by the parliament of the Australian Capital Territory.

The Australian Capital Territory has been advised that the Commonwealth proposes to recommend that the Governor-General disallow the *Civil Unions Act 2006*, a law made by the parliament of the Australian Capital Territory.

While understanding that the Governor-General neither represents the Crown in relation to the Australian Capital Territory nor acts on advice of the Executive of the Australian Capital Territory, the parliament of the Australian Capital Territory directs your attention to the unusual circumstances presented by section 35 of the *Australian Capital Territory (Self-Government) Act 1988* and respectfully submits that in considering advice from the Federal Executive Council the following matters should be taken into consideration:

The Australian Capital Territory is a body politic with a plenary grant of power.

Members of the Australian Capital Territory parliament are elected by free election on the basis of pre-election commitments made known to the electorate. The election of members on the basis of pre-election commitments, including commitments relating to the *Civil Unions Act 2006*, gives members of the Assembly a political mandate to pursue the commitments.

Members of the present Australian Capital Territory parliament debated and passed the *Civil Unions Act 2006*.

The *Civil Unions Act 2006* is a lawful exercise of the legislative power of the parliament of the Australian Capital Territory, made in pursuance of a political mandate given the parliament by the people of the Australian Capital Territory.

By convention, the Crown seldom intervenes once a law is made, so as to delay or frustrate the commencement of the law, save in unusual circumstances where the law because of its exceptional circumstances might be beyond the power of the parliament or is otherwise defective.

The Commonwealth has indicated publicly that it will seek to disallow the *Civil Unions Act 2006* on the basis that it trespasses on a legitimate area of Commonwealth policy, namely that dealt with in the Marriage Act.

The Australian Capital Territory disagrees with the proposition that the *Civil Unions Act 2006* has such an effect.

However, mindful of the need for legislatures to operate cooperatively within a federal system, the Australian Capital Territory stands ready to consider amending the *Civil Unions Act 2006* were the Governor-General to make

recommendations concerning the amendment of the Act, to resolve any outstanding ambiguities.

The Australian Capital Territory does not seek to interpose contrary advice to that which might be provided to the Governor-General by the Federal Executive Council.

Instead it makes the following points:

(1) This is the first time that the Governor-General will be requested to disallow a law of the Australian Capital Territory under section 35. This is an exceptional request, which will inevitably form the basis for future precedent, not just in relation to the Australian Capital Territory, but in relation to self-governing territories and other polities, including the Commonwealth itself.

(2) It is submitted that the power to disallow does not exist at large, but is constrained by ordinary convention in relation to Crown consideration of new legislation.

(3) The Australian Capital Territory stands ready to consider amending the Act in accordance with any recommendation made by the Governor-General under subsection 35(4) of the *Australian Capital Territory (Self-Government) Act 1988*.

Address to the Governor General by the Legislative Assembly for the Australian Capital Territory

Minutes of Proceedings *No. 67—8 June 2006*