10 March 2011

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

SUBMISSION TO THE INQUIRY INTO THE AUSTRALIAN CAPITAL TERRITORY (SELF-GOVERNMENT) AMENDMENT (DISALLOWANCE AND AMENDMENT POWER OF THE COMMONWEALTH) BILL 2010

Dear Ms Dennett,

Equal Love Canberra thanks the committee for the opportunity to make this submission to the inquiry into the *Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010* (Cth).

Equal Love Canberra is a community advocacy group based in the Australian Capital Territory. Since 2008, it has campaigned for the ACT and federal governments to enact laws to fully recognise same-sex, non-heterosexual, and sex and gender diverse (SGD) couples on an equal basis to different-sex couples.

We believe that the equal legal and social recognition of all couples, regardless the sexual or gender identity of partners, is a fundamental right, and couples should not be subject to discrimination on this basis.

Yours sincerely,

John Kloprogge
On behalf of Equal Love Canberra

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Background

Since 2006, legislation enacted or proposed by the ACT Legislative Assembly to remove discrimination against same-sex couples in that jurisdiction has been subject to unnecessary and arbitrary interference from the federal Executive, using section 35 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth).

The use of section 35 has become a tool for federal governments to interfere with a territory's laws in a politically opportunistic way, whenever it likes, and without any regard given to the rights or interests of the residents of the territories.

We believe that the *Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010* (**"the Bill"**) goes some way towards ending the inappropriate interference in ACT affairs by the federal Executive, is a therefore a welcome initiative.

The debate surrounding this Bill has, unfortunately, been marred by some misconceptions and misrepresentations in regard to the laws proposed or enacted by the ACT Government, differences between civil union laws and marriage, and about the need for legislative independence in the ACT. I intend to correct some of these misconceptions below.

Legislative history of ACT civil union laws

In 2006, the *Civil Unions Act 2006* (ACT) was passed by the ACT Legislative Assembly, but immediately quashed by the federal Executive. In 2007, a new bill – the *Civil Partnerships Bill 2007* – was passed by the ACT assembly, but subsequently quashed again by the federal Executive. Following a vote in the Senate to overturn the disallowance motion (which subsequently failed), Liberal senator for the ACT, Gary Humphries, crossed the floor. These laws did not legislate for "same-sex marriage", but the then federal Attorney-General, Phillip Ruddock, nevertheless claimed that they conflicted with federal marriage laws. We contend that this was a case of political opportunism masquerading as legal argument.

After the election of the Rudd Government, the ACT Legislative Assembly passed the *Civil Partnerships Bill.* The proposal was part of the ACT Government's election platform, so it had an political mandate to introduce it. It did not purport to legislate for same-sex marriage, yet it was subject to threats of federal veto from the Rudd Government, and subsequently was amended to remove a ceremonial aspect. In 2008, that bill passed, but was lacking ceremonial aspect and basically resembled the relationship register system that had operated in Tasmania since 2004. In 2009, the ACT Greens introduced the *Civil Partnerships Amendment Bill 2009* (ACT), which sought to add a ceremonial aspect to the previous Act. However, after negotiations with the federal government, both the ACT Greens and ACT Labor agreed to amend the bill to ensure the ceremony did not have the legal effect of "creating" a civil partnership in law. These latest amendments were publically opposed by Equal Love Canberra at the time, and labelled them "unnecessary and exclusionary".

These interferences by the federal government have been an unwelcome and unnecessary intrusion into the lives of ACT residents. Each intrusion was met with anger and disappointment from the gay, lesbian, bisexual, transgender and intersex (GLBTI) community, and their allies, in the ACT and around Australia.

The ACT's same-sex union laws have been unhelpfully labelled "gay marriage" in much of the commentary on the matter. As a result, the public has been misinformed as to the whether the ACT has the authority to enact such laws – in particular, whether the ACT laws "conflict" with the *Marriage Act 1961* (Cth). We believe that none of various incarnations of these laws conflicted with federal laws. (I will return to the constitutional matter shortly).

Euthanasia laws

In 1995, the Northern Territory legislative assembly passed the *Rights of the Terminally Ill Act 1995*, to legalise euthanasia. However, the federal parliament subsequently overrode that Act with the *Euthanasia Laws Act 1997* (Cth) (the "Andrews Bill"). That Act also amended the *Australian Capital Territory (Self-Government) Act 1988* (Cth) to prevent the ACT from legislating for euthanasia.

We support the right of the territories to legislate for euthanasia, if they wish, without interference from the federal government or federal Executive.

Can the territories govern themselves?

Another misconception that has affected the debate has been the extent to which the territories can govern their own populaces. The cultural make-up of Canberra has been presented as a reason to prevent the ACT from making its own laws. Stephen Lunn in *The Australian* claimed that:

> It's no surprise that Canberrans have a different perspective on matters of public interest, given the distinct demographics of the national capital. Canberra is well-educated, professional and rich.
>
> More than 60 per cent of residents have a post-school qualification compared with 52.5 per cent nationally. Nearly 45 per cent of workers identify as managers or professionals, compared with 33 per cent across the country. The average income is $51,300 compared with $43,900 and the unemployment rate is 2.9 per cent against 5 per cent nationally. [1]

However, this argument suffers from a number of flaws. Firstly, all states and territories have a unique cultural make-up, within different levels of income, education level and employment. No state or territory has demographics that reflect precisely the overall make-up of Australian society. But this is hardly a reason to deny any of these jurisdictions from making their own laws. (Indeed, the representatives who sit in federal parliament come from demographic backgrounds that diverge greatly from the overall demographics of Australian society.)

Secondly, the laws that the territories may want to enact, but are prevented from doing, are for the benefit of the citizens within those territories. Such laws do not purport to adversely impinge on the geography or personal lives of citizens in other jurisdictions. There is no

[1] Lunn, Stephen. "Veto 'makes ACT second-class citizens'", *The Australian*, 5 March 2011. <http://www.theaustralian.com.au/national-affairs/veto-makes-act-second-class-citizens/story-fn59niix-1226016140068>

“national interest”, and therefore it is irrelevant whether the territories’ demographics reflect the demographics of Australia as a whole.

Thirdly, it can hardly be argued that higher income, employment or education levels actually *disqualify* people from governing themselves.

Democracy and Self-Government in the ACT

It has occasionally been argued that ACT laws should be subject to federal vetoes because ACT residents voted against moving to self-government before the *Australian Capital Territory (Self-Government) Act 1988* (Cth) came into force.

However, this argument is misconceived, because it ignores the fact that, today, members of the ACT legislative assembly are voted in *by* ACT residents, to *represent the interests* of ACT residents. Where ACT citizens are unhappy with the laws that are made by their elected representatives in the legislative assembly, they can vote for different representatives.

Further, this argument seems to suggest that historical concerns about ACT self-government were due to concerns about the representativeness of a future ACT legislative assembly. In making this claim, the argument ignores the historical context of the self-government debate, and ignores the possibility that ACT residents might have come to appreciate the existence of their legislative assembly and the opportunity to have their local interests represented at a local level.

Second-class citizens

After 23 years with “self-government”, ACT residents may now be wondering whether their territory should consider becoming a state, as residents of states appear to have more rights to make their own laws. As ACT Chief Minister, Jon Stanhope, writes:

> Imagine that the Federal Parliament were today to pass a law that would allow the Prime Minister, on a whim and without reference to anyone else, to instruct the Governor-General to overturn any - or indeed every - piece of legislation the Queensland Parliament passed on behalf of the people of that state.
>
> Imagine that Julia Gillard or Tony Abbott decided tomorrow that Tasmania, with a population of about half a million, was really too small to be trusted to legislate on the same matters as other states, and that the Prime Minister ought to be able to overturn any of its laws without mounting an argument, without going to court, just on a fancy.
>
> It's impossible to imagine either scenario becoming a reality at least not without community outrage. Yet today in Australia the people of the ACT - quickly catching up in number to those living in Tasmania - endure precisely this form of second-class citizenship.[2]

[2] Stanhope, John (2011) “Injustice comes with the territory”, *The Canberra Times*, 4 March 2011. <http://www.canberratimes.com.au/news/opinion/editorial/general/injustice-comes-with-the-territory/2093687.aspx>

The Chief Minister captures the problem well. ACT citizens are vulnerable to having their laws inexplicably and arbitrarily quashed by the federal executive, in a way that residents of states would find inconceivable were it to happen to them.

Elsewhere, the Chief Minister summed up the issue eloquently:

> There's a sword hanging over our heads if we dare express an opinion over something that's controversial or something that a group of people within the federal Parliament - who don't represent us, who aren't elected by us, who have no responsibility for us, who barely think about us - disagree with.[3]

We argue that this Bill will build upon the self-government reforms of 1988. After 23 years of "self-government", it is time that this concept represented more than mere words. This Bill represents a natural development of the local democratic rights that ACT residents were first afforded in 1988.

Same-sex marriage and the Constitution

Certainly a major factor motivating those who oppose this Bill is an unfounded fear of same-sex marriage or civil partnership ceremonies. As outlined above, it is incorrect to equate this Bill to a bill for same-sex marriage or euthanasia. However, there is reason to believe that the ACT – indeed, any state or territory – can legislate for same-sex marriage, based on legal advice from George Williams, professor of constitutional law at the University of New South Wales.

Professor Williams argues that the *Marriage Amendment Act 2004* (Cth) actually opened up the possibility of same-sex marriage at the state or territory level. By defining marriage in federal law as 'between a man and a woman', that Act limited the field of federal responsibility for marriage to those unions between heterosexual couples – while leaving the field of same-sex marriage open to states and territories. Referring to the constitutionality of the *Same-sex Marriage Bill 2005* (Tas), Professor Williams concludes:

> [It is] my opinion is that the proposed Same-Sex Marriage Act would not be rendered inoperative under section 109 of the Constitution. It is not inconsistent with the Commonwealth Marriage Act because the two Acts operate in different fields.[4]

This opinion has since been endorsed by Kristen Walker, Associate Professor of constitutional law at the University of Melbourne.[5]

Civil unions are not the same as same-sex marriage

Equal Love Canberra is eager to distinguish between "marriage" and "civil unions", as this distinction has been unnecessarily confused in the recent debate. We believe that there is no

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[3] McLintock P and Solly R, (2011) "Stanhope fires shot at MPs over rights bill", ABC News online. <http://www.abc.net.au/news/stories/2011/03/03/3153760.htm>

[4] Williams, George (2005). "Advice re proposed Same-Sex Marriage Act", *Tasmanian Gay & Lesbian Rights Group*. < http://tglrg.org/more/82_0_1_0_M3/>

[5] Walker, Kristen (2005). "Opinion on Constitutional Validity of Tasmanian Same-Sex Marriage Bill", *Tasmanian Gay & Lesbian Rights Group.* <http://tglrg.org/more/116_0_1_0_M3/>.

substitute for equality in *marriage* laws, and we ultimately want the *Marriage Act 1961* (Cth) to be amended to allow all couples to marry regardless of the sex or gender of the partners. Australian Marriage Equality (AME) accurately captures our views on this matter, in their paper, "A Failed Experiment: Why civil unions are no substitute for marriage equality".[6]

The need for same-sex marriage

Equal Love Canberra endorses the case made else by Australian Marriage Equality (AME) in its submission to the inquiry into the *Marriage Equality Bill 2009* (Cth).

In particular, we note that 62 per cent of Australians now support marriage equality, according to a Galaxy poll in 2010.[7] Further, marriage equality presents no threat to freedom of religion, as religions will be free to choose who they marry regardless of whether same-sex marriage was allowed or not.[8]

Conclusion

Equal Love Canberra endorses the *Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 (Cth)*. The Bill represents a natural development of the democratic rights of the citizens of Australia's territories. It allows territories to make laws which better reflect the interests of territorians, particularly in relation to the recognition of same-sex couples. The territories each have a democratically-elected legislature with a moral and political mandate to legislate on local matters. Federal interference in territory laws in recent years has been unnecessary and arbitrary, and often done for short-term political advantage. It is time to end the abuse of section 35 of the *Self-Government Act 1988* (Cth), and give ACT citizens to decide the laws that govern them.

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[6] Australian Marriage Equality (2009). "A Failed Experiment: Why civil unions are no substitute for marriage equality", *Australian Marriage Equality*.
<http://www.australianmarriageequality.com/AME-MarriageNotCivilUnions.pdf>

[7] Galaxy research (2010) "Same-sex marriage study", *Australian Marriage Equality*.
<http://www.australianmarriageequality.com/wp/wp-content/uploads/2010/12/Full-Galaxy-Poll-Results-2010.pdf>

[8] Australian Marriage Equality (2011). "Marriage equality and religion".
<http://www.australianmarriageequality.com/wp/wp-content/uploads/2010/10/AME-fact-religion.pdf>