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Committee Secretary
Legal and Constitutional Affairs Legislation Committee
Parliament House
Canberra ACT 2600

Dear Secretary

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

The objective of this Bill to repeal section 35 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) should be supported.

The repeal of section 35 will not remove the power of the Commonwealth to override any ACT law. Such a power is entrenched by section 122 of the Federal Constitution. This means that the object of the Bill in section 4(b) to 'ensure that the Legislative Assembly for the Australian Capital Territory has exclusive legislative authority and responsibility for making laws for the Australian Capital Territory' cannot be achieved by the Bill. This object should be deleted.

In fact, the effect of repealing section 35 is merely to alter the process by which the Commonwealth might override ACT laws. Instead of enabling this to occur under section 35 by way of an executive decision, subject to disallowance by either house of the Federal Parliament, such an override would need to occur by way of legislation passed through both the House of Representatives and the Senate. This latter course is a more appropriate method of achieving this outcome, and is consistent with both good democratic practice and the importance of ensuring that Australian citizens in both States and Territories have, so far as possible, the same democratic rights to self-government.

In addition, the Bill should be amended to provide for further changes to the *Australian Capital Territory (Self-Government) Act* which:

- amend section 8 to enable the ACT Legislative Assembly to determine its own size; and
- remove the power in section 16 of the Governor General, acting on the advice of the federal executive, to unilaterally dissolve the ACT Legislative Assembly.

Where appropriate, these changes should also be applied to the self-government legislation of the Northern Territory.

Ideally, these matters should have been subject some years ago to inquiry and report in consultation with Territory and Commonwealth governments and local populations. However, in the absence of such a process, it is appropriate now to proceed with this legislation.

When the ACT was granted self-government in 1988, the Commonwealth imposed major conditions. This left the ACT system of government with several features more akin to a nineteenth century colonial possession than a modern Australian Territory.

These problems have never been fixed and can still be found in the *Australian Capital Territory (Self-Government) Act*. On the one hand, that law establishes the Legislative Assembly as a properly elected democratic parliament for the ACT. On the other, it permits the federal government a veto over all ACT laws and a power to unilaterally dissolve the Assembly. The law has also been used to pre-emptively deny the ACT's law-making authority.

In other areas the Self-Government Act stops the Assembly from properly running its electoral system. The Act, for example, fixes the size of the Assembly at 17 members and requires Commonwealth action to make any change. This is at odds with the normal scope given to parliaments to determine their own size, a power held by all of the federal and State Parliaments, and even the Commonwealth-created Northern Territory Legislative Assembly.

The powers held by the Commonwealth over ACT affairs are far from hypothetical. They have been used, and their further use threatened, on a number of occasions. This has created a precedent for the ongoing intervention by the Commonwealth in ACT affairs.

An early example was the *Euthanasia Laws Act 1997 (Cth)*, which was conceived as a way to override the legalisation of voluntary euthanasia in the Northern Territory. However, the federal law went further than this and also removed the power of the Northern Territory, the ACT and Norfolk Island to make laws on euthanasia generally. It not only overrode any existing laws on the topic, it took away the power to pass laws in the future.

As a matter of good governance, the Commonwealth should not remove power from a self-governing jurisdiction to make laws on a topic. Removing power is a blunt instrument that prevents the making of any laws, for good or ill, including those that are clearly in the best interests of the local community. It also sends a clear signal that the Commonwealth believes that the Territories are not up to the task of enacting appropriate laws on the subject. This is at odds with the fact that the ACT and the Northern Territory both have a larger population, and a better functioning system of self government, than some of the colonies that became States upon the Federation 1901.

This does not deny the proper role of the Commonwealth to govern for all Australians. Where issues arise in a Territory or a State there is often a legitimate role for the federal Parliament to intervene in the national interest. The problem arises when the federal Parliament singles out and undermines democratic rights in the Territories. Where the Commonwealth overrides State laws it does so by enacting a general law for Australia, and never by taking away the power of a State Parliament. This would not only be seen as an abrogation of States' rights, it would be invalid under the Constitution.

In 2006 the Howard government used its powers in section 35 to veto the ACT *Civil Unions Act 2006* (ACT). This was achieved under section 35 of the *Australian Capital Territory (Self-Government) Act*, under which the federal government can instruct the Governor-General to disallow any law made by the Assembly within six months after it is made.

There is a similar power in section 59 of the Australian Constitution that allows the Queen to annul within one year any law passed by Australia's Federal Parliament. Fortunately, British Monarchs and their instructing British governments have had the sense never to use the power, and even though it still remains in the Constitution it has long since become obsolete.

The federal power over ACT laws can be used in a partisan or opportunistic way, with no reasons needing to be given, nor any consideration paid to the best interests of the people of the ACT. The only fallback for the ACT is that the veto can be overturned by either House of the Federal Parliament.

Among all the Australian Territories, these problems of governance are especially acute in the ACT. Unlike the Northern Territory, the ACT may never be able to escape the parental oversight of the Commonwealth. In *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248, the High Court left open the possibility that the ACT cannot become a State because it includes the seat of the federal government.

Yours sincerely

George Williams