Law Council
OF AUSTRALIA

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

Senate Committee on Legal and Constitutional Affairs Committee

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Acknowledgment

The Law Council acknowledges the assistance of the ACT Bar Association and the NT Bar Association in the preparation of this submission.

Introduction

1. The Law Council of Australia is pleased to provide the following comments to the Senate Committee on Legal and Constitutional Affairs in relation to the provisions of the *Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010* ('the 2010 Bill').

2. This Bill is a Private Senator's Bill, sponsored by Senator Bob Brown. The objects of the Bill are stated in clause 4 as to:

   (a) remove the Governor-General's power under the Australian Capital Territory (Self-Government) Act 1988 to disallow or amend any Act of the Legislative Assembly for the Australian Capital Territory; and

   (b) ensure that the Legislative Assembly for the Australian Capital Territory has exclusive legislative authority and responsibility for making laws for the Australian Capital Territory.

3. The key provision in the 2010 Bill is contained in Schedule 1. It would repeal section 35 of the *Australian Capital Territory (Self-Government) Act 1988* which currently empowers the Governor-General to disallow or amend any Act of the Legislative Assembly for the Australian Capital Territory. Similar provisions are contained in section 9 of the *Northern Territory (Self-Government) Act 1978* and section 23 of the *Norfolk Island Act 1979*. Senator Brown will move amendments to his Bill to incorporate references to the Northern Territory and Norfolk Island.

4. The Law Council generally supports the amended 2010 Bill which would not result in the removal of the Commonwealth's power to override Territory laws, but which would require the full consideration of both Houses of Commonwealth Parliament before such power is exercised. For the Law Council this represents a clear improvement on the current process whereby the Executive has the power to interfere in the internal affairs of another properly-elected government on an ad hoc basis.

General Support for the Bill

5. The Law Council is opposed to unwarranted and inappropriate interference with the legislative powers of Australia's self-governing Territories and for this reason generally supports the 2010 Bill with the amendment proposed by Senator Brown to include references to the Northern Territory and Norfolk Island.[1]

6. The Law Council notes that if passed, the amended 2010 Bill will not have the effect of removing the power of the Commonwealth to override any self-governing Territory law. This is because section 122 of the Commonwealth Constitution preserves the right of the Commonwealth Parliament to make laws for the government of any

[1] See Amendments to be moved by the Leader of the Australian Greens, Senator Bob Brown to the *Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010* available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/s769_amend_a1f6ef20-144b-49a2-b0af-d944823988ff/upload_pdf/7031_ACT_Self-Government_Amendment_AG.pdf;fileType=application%2Fpdf

Territory that forms part of the Commonwealth, or is under the authority of the Commonwealth. For this reason, the Law Council suggests that the object stated in clause 4(2) of the 2010 Bill be removed.

7. The effect of the amended 2010 Bill would be to alter the current process by which the Commonwealth may override self-governing Territory laws. Currently, the legislation relating to the self-governing Territories *empowers* the Governor General, acting on the advice of the Executive, to disallow a Territory law within 6 months after it is made. This has the same effect as repealing the law. This occurs via legislative instrument which is subject to disallowance by either House of Parliament.

8. The amended 2010 Bill will replace this process with a process whereby the Commonwealth may continue to override a Territory law but must do so by way of legislation passed through both Houses of Parliament.

9. The Law Council considers this approach, which requires the full consideration of both Houses of Commonwealth Parliament and removes from the Executive the power to interfere in the internal affairs of another properly-elected government on an ad hoc basis, to better align with the grant of self government and demonstrates a greater respect for the democratic processes of the elected parliaments of the Australian territories.

Concerns with the Commonwealth overriding legislation passed by an elected government of an Australia Territory

10. The Law Council generally supports the 2010 Bill as proposed to be amended on the basis that it has the potential to address, or at least minimise, a number of the concerns the Law Council has previously raised in relation to the Commonwealth overriding legislation passed by an elected government of an Australian Territory.

11. These concerns can be summarised as follows:

<u>Australian Territories have the power of self government which convention demands should not be revoked</u>

12. The Commonwealth Parliament has invested the Australian Territories with the power of self government.[2] Although this power is not absolute and the Commonwealth retains the constitutional power to make laws in respect of the Territories, strong convention has developed against revoking powers granted to subordinate legislatures.

13. For example, section 59 of the Australian Constitution provides that "*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.*" However, convention dictates that the Queen does not intervene in or override the legislative powers of the Australian parliament. This provision has become obsolete.

[2] The Legislative Assemblies of the Australian Capital Territory and the Northern Territory have been given plenary legislative power to make laws for the 'peace, order and good government of the Territory'. See *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 22(1); *Northern Territory (Self-Government) Act 1978* (Cth) s 6.

14. This ensures the ongoing validity of Commonwealth laws and provides certainty that the successful passage of a Bill through Parliament signals the end of debate.

15. Similarly, the established convention against revoking powers granted to subordinate legislatures delivers Territorians stability and certainty, notwithstanding that their legislatures are creatures of Commonwealth statute and therefore always vulnerable to direct Commonwealth intervention.

16. The 2010 Bill as proposed to be amended removes the power for the Executive to override Territory laws and would provide a further check on the exercise of power by the Commonwealth in a manner contrary to this convention, by requiring that a decision to override a Territory law be passed as legislation through both Houses of Parliament.

Overriding the laws of the Territories undermines their democratic legitimacy

17. Territorians elect representatives to their local assemblies in the expectation that those representatives will make laws for the peace, order and good governance of their communities within the parameters of the law making powers afforded them by the self-government Acts. It is an affront to the democratic process in which Territorians participate if legislation lawfully passed by their elected representatives is rendered invalid by the operation of Commonwealth laws, which are not of general application, but which are exclusively targeted at the Territories for the express purpose of interfering in their legislative processes.

18. While the current Bill does not completely remove the power of the Commonwealth to override Territory laws, it enhances the democratic quality of this process by requiring that Parliament consider and take responsibility for the decision to override, rather than the Executive.

Commonwealth retains the power to make laws that take precedence

19. As noted in the Bills Digest to the 2010 Bill, the Commonwealth's power to pass laws that take precedence over Territory laws comes not from section 109 of the Constitution, which refers only to States, but from section 122 of the Constitution, which provides the Commonwealth with a general power of legislating for a Territory, unlimited by subject matter. This requires that Territory laws, made by a subordinate legislature, give way to any relevant Commonwealth laws, made by a paramount legislature. As Lockhart J observes in *Attorney-General (Northern Territory) v. Hand* (1989) 90 ALR 59 para [77]:

> *It is beyond the power of the Northern Territory of Australia to make laws repugnant to or inconsistent with laws of the Commonwealth or to exercise powers conferred by Northern Territory laws in a manner inconsistent with, or repugnant to laws of the Commonwealth. It is not a question of inconsistency between the two sets of laws which may otherwise be valid, rather it is a question going to the competency of the subordinate legislature to enact laws or to cause laws to operate in a manner inconsistent with or repugnant to laws of the paramount legislature. Nor can a provision of a law of the Northern Territory operate so as to prevent or curtail the enforcement or enjoyment of a right conferred by a law of the Commonwealth. (references omitted)*

The Commonwealth's interference in the Territories' law making powers has been generally arbitrary and ad hoc.

20. Examples of the Commonwealth's approach to Territory legislation since 1997 demonstrate that the Commonwealth has no consistent, transparent criteria for intervention in the law-making powers of the Territories.

21. For example, in June 2006 the ACT's *Civil Unions Act 2006* was disallowed by the Government General, acting on advice of the Executive. The basis for the Commonwealth Government's intervention was the assertion that the ACT law, which allowed for couples including same sex couples to enter into and register a civil union, compromised the unique status of marriage.

22. Although little explanation was given, in the view of the Commonwealth, this assertion was clearly sufficient to intervene. This disallowance was said to be the first time in Australian history that an unelected representative of the Queen acted to disallow a law passed by an elected parliament. [3]

23. Another example of ad hoc interference with the laws of a Territory concerns the *Euthanasia Laws Bill 1996*, which was introduced into Commonwealth Parliament on 9 September 1996 as a private Members Bill by the Hon Kevin Andrews MP. It was introduced in response to the enactment of the controversial *Rights of the Terminally Ill Act 1995* (NT) which provided a statutory regime that made lawful, in certain circumstances, physician-assisted suicide and active voluntary euthanasia.

24. The purpose of the Commonwealth Bill was to take away the power of the legislative assemblies of the NT, the ACT and Norfolk Island to make laws which permit euthanasia. The Bill was passed in 1997. In 2008 Senator Brown introduced the *Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008* which sought to repeal the Euthanasia Laws Act 1996 (Cth) but the Bill was not passed. Senator Brown has recently introduced the *Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2010*.[4]

25. In April 2008 the Law Council made a submission to the Senate Committee on Legal and Constitutional Affairs supporting the *Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008* on the grounds that the *Euthanasia Laws Act 1997* constituted an unnecessary interference by the Commonwealth Parliament in the internal affairs of the properly-elected Northern Territory (NT) government.[5] Having passed the *Northern Territory (Self Government) Act 1978*, the Law Council submitted that the Commonwealth should not seek to derogate from that grant of self-government on a domestic issue. In taking this position, the Law Council made no judgement about the rights or wrongs of euthanasia, on which the Council does not have a position.

26. The Law Council notes that the 2010 Bill as proposed to be amended does not remove the power of the Commonwealth Parliament to make laws for a Territory, including laws such as the *Euthanasia Laws Act 1997* which remove the power of the Territories to legislate in certain areas.

[3] Jon Stanhope, Chief Minister of the ACT, 'A mandate to legislate?', Speech at Melbourne University, Lecture in Honour of Sir Anthony Mason, 5 October 2006.

[4] See http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=priority,title;page=8;query=Dataset_Phrase%3A%22billhome%22%20ParliamentNumber%3A%2243%22;rec=11;resCount=Default

[5] See http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6807213F-1C23-CACD-2205-729F871CF170&siteName=lca

27. To this end, the Law Council urges that the 2010 Bill as proposed to be amended should be passed in order to respect the rights of the democratically elected legislatures in self-governing Territories to make laws concerning domestic matters.

Further amendments relating to the Australian Capital Territory and the Northern Territory

28. In a number of ways the ACT is particularly vulnerable to interference by the Commonwealth in its legislative activities. For example, the *Australian Capital Territory (Self-Government) Act 1988* invests the Commonwealth with more significant powers to intervene in its parliamentary process than those contained in the *Northern Territory (Self-Government) Act 1978.*

29. For this reason, in addition to repealing section 35*,* the Law Council encourages the Committee to give consideration to recommending that there should be an examination of the Constitutional status of the ACT, particularly the legislation constituting self-government, given the experience of self-government since 1989.[6] Such an examination could consider whether there are provisions in that legislation which could be repealed or amended.

30. Parliamentarians and citizens of both the ACT and the Northern Territory (NT) have also expressed concern at what they consider to be the 'constitutional inequality' of Australian Territories when compared with Australian States which will remain regardless of the passage of the 2010 Bill as amended.[7] The Law Council encourages the Committee to recommend that there should be an examination of the position of the self-governing Territories with the aim of ensuring that they enjoy equality with the States as near as constitutionally possible.

31. In the NT, efforts have been underway to gauge community support for Statehood for the NT, and recommendations have been made for a process for drafting a constitution to be voted on by the people of the Northern Territory. The Law Council notes that the Northern Territory Legislative Standing Committee on Legal and Constitutional Affairs has expressed its strong support for the 2010 Bill and has also urged this Committee to give consideration to the wider constitutional issue of Statehood for the NT.[8]

[6] In addition to the *Australian Capital Territory (Self-Government) Act 1988,* such an examination could also address other legislation, eg the *Australian Capital Territory (Planning and Land Management) Act 1988.*
[7] See for example, Northern Territory Legal and Constitutional Affairs Committee submission to Senate Legal and Constitutional Affairs Committee Inquiry into the *Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010* (7 March 2011) available at http://www.aph.gov.au/senate/committee/legcon_ctte/actterrirtory_self_government/submissions.htm
[8] See Northern Territory Legal and Constitutional Affairs Committee submission to Senate Legal and Constitutional Affairs Committee Inquiry into the *Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010* (7 March 2011) available at http://www.aph.gov.au/senate/committee/legcon_ctte/actterrirtory_self_government/submissions.htm

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.