Supplementary 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

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18 April 2011

*In my earlier submission (no 35) I argued, in summary, that Senator Brown's *Australian Capital Territory (Self-Government) Amendment(Disallowance and Amendment Power of the Commonwealth) Bill 2010* is fraught with legal and constitutional difficulties, and should not be approved by the Committee. This supplementary submission addresses the constitutional issues posed by the Bill in more detail. I thank the Secretary to the Committee for agreeing to accept a supplementary submission from me.

Summary

Senator Brown's Bill seeks to limit the means by which the Commonwealth might make, repeal or amend a law for the government of the Australian Capital Territory and (by an amendment notified subsequently by Senator Brown), for the government of the Northern Territory and for the government of Norfolk Island. The means purported to effect this outcome are the repeal of the following legislative provisions:

- **section 35 of the *Australian Capital Territory (Self-Government) Act 1988*;**
- **section 9 of the *Northern Territory (Self-Government) Act 1978*; and**
- **section 23 of the *Norfolk Island Act 1979*.**

Each of these sections in the context of their respective Acts provides for disallowance of legislation passed by territory Assemblies. For example, subsection 35(2) of the *Australian Capital Territory (Self-Government) Act 1988* provides that:

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

However this provision and the corresponding provisions of the *Northern Territory (Self-Government) Act 1978* and of the *Norfolk Island Act 1979* do not of their own power confer this capacity on the Governor-General. These provisions merely set out powers already available to the Commonwealth under section 22 of the Australian Constitution and which are merely codified for convenience in these territory Acts.

In brief, successful passage of the Bill under consideration would not strip the Commonwealth of whatever means it might legitimately use to enact, repeal or amend particular territory legislation. The various territory self-government Acts are subsidiary enactments dependent completely on the Commonwealth plenary power to make laws for the government of any territory. The maxim 'the river cannot rise above its source' applies to this situation. Any amendment to the self-government Acts of any or all of the three Territories cannot bind nor limit the power of the Commonwealth in the exercise of its powers pursuant to the provisions of section 122 of the Australian Constitution.

Comment

Arguments in submissions to the Committee from certain notable members of the legal and academic profession appear to be expressed in terms of 'basic rights', 'discrimination', 'democratic ideals' and, on occasion, in emotive language. For example:

> 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.
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> 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.
>
> Assoc. Prof. Tom Faunce College of Law, Australian National University Submission No 11

Other academics characterise the power given the Commonwealth by section 22 of the Australian Constitution as a remnant of 'colonial times', for example:

> The disallowance procedure in the Self-Government Acts is modelled on colonial practice. In colonial times, the imperial authorities retained power over colonial legislatures through a power of the Monarch to disallow colonial enactments on the advice of the British executive. There are remnants of this still in section 59 of the *Constitution*, which has long since fallen into disuse. There is no justification for continuing to use a practice of this kind in 21st century Australia.
>
> Prof Cheryl Saunders Sub No 46

Alternatively, it is argued that the Commonwealth should exercise its powers in ways pleasing to one's point of view:

> From a constitutional standpoint the interests of the Commonwealth are well protected by existing constitutional limitations on the territories and the retention of the Executive disallowance power is both unnecessary and undesirable.
>
> Professor John Williams, Submission No 52

Further, the Commonwealth should surrender powers given to it under section 122 of the Constitution in the name of 'the principles of representative government', and the 'civil and political rights' of Territorians:

> (a) In my view that the Federal Parliament is ultimately responsible for the welfare and government of the Territories including of course the Territory which contains the Seat of Government. But in discharging that responsibility the Federal Parliament should also, in my view, recognize, so far as is possible and consistent with the same responsibility, the importance of according to people who live in the Territories the same civil and political rights as are enjoyed by the people who live in the States.
>
> (b) Ordinarily it is accepted that it would be contrary to the principles of representative government to concede to Ministers the powers to disallow or suspend the operation of laws enacted by the elected representatives of the people.
>
> Professor Lindell, submission No 65

The same point is made by the Law Council of Australia which assures the Committee that:

> 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 Territory that forms part of the Commonwealth, or is under the authority of the Commonwealth.
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> Submission No 36

From a local political body:

> ... members believe that citizens of the ACT, unlike citizens of the states are, through the mechanism of section 122 of the Constitution subjected to excessive federal Government interference in their affairs. ....In particular, the ACT should have the right to have laws made by its elected legislative Assembly stand without interference by the Federal Government.
>
> Sub 207 Weston Cree4k ACT ALP Branch, Submission No 207

While it is understandable that the Australian Capital Territory Government should support any measure which reduces the oversight that the Commonwealth may exercise over Territory legislation, it admits that, should Senator Brown's Bill succeed:

> ..... the Federal Parliament's power to legislate for the Territories under section 122 of the Australian Constitution would remain, ensuring, at least, that any override of Territory laws is the subject of federal parliamentary debate. While, in turn, the merits of this Constitutional provision may be disputed, its continuing presence at least confutes any claim that passage of the Bill under inquiry would render the ACT legislatively unfettered. Passage of the Bill would do no more than support the basic principles of democracy.
>
> Submission No 20

A number of submissions correctly state that if the Bill were to be enacted, it would not remove the power of the Commonwealth to override legislation of a Territory:

> We note that 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. We understand that 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, such an override would need to occur by way of legislation passed through both the House of Representatives and the Senate.
>
> This is a more appropriate method of achieving this outcome, and is consistent with the importance of ensuring that Australian citizens in both States and Territories have the same democratic rights to self-government.
>
> Streetlaw (National Association of Legal Centres), Submission No 206

I submit that the arguments cited above, garnered from submissions made to the Committee, whether expressed by academics, legal bodies or a body of ordinary citizens, all display variations of a 'wish-list' of the preferences of the particular person or body. All ignore a critical constitutional power provided for in section 122 of the Australian Constitution:

> **122.** 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.

This section of the Constitution neither specifies, *nor does it limit,* the means by which the Commonwealth may make, and therefore reject, laws for the government of any territory. The Bill under consideration seeks to limit the means by which the Commonwealth might make, repeal or amend a law for the government of the Australian Capital Territory and (by an amendment notified subsequently by Senator Brown), for the government of the Northern Territory, and for the government of Norfolk Island. It is arguable, therefore, that it is not within the power of the Federal Parliament to pass this Bill which, by repealing:

> **section 35 of the *Australian Capital Territory (Self-Government) Act 1988*;**
> **section 9 of the *Northern Territory (Self-Government) Act 1978*; and**
> **section 23 of the *Norfolk Island Act 1979***

would remove the power given to the Governor-General in respect of disallowing an enactment of any of these territories.

Alternatively, it is arguable that these enumerated sections are, and always have been otiose, as the powers of the Commonwealth to make, repeal or amend a law for the government of a territory exists under the provisions of section 122 of the Constitution, absent any such specification of the power by these sections in the legislation pertaining to the Australian Capital Territory, the Northern Territory, and Norfolk Island, respectively. Consequently, even if the Bill were to be enacted, the powers of the Commonwealth provided by section 122 would not be affected.

In summary, the Bill has as its purpose a fettering of a power of the Commonwealth expressed without limitation in the Constitution. Such an intended restriction on the Commonwealth's exercise of powers provided under section 122 could be validly effected only by a referendum conducted under the provisions of section 128 of the Constitution.

The Committee should recommend that the Bill not be proceeded with.