ADELAIDE LAW SCHOOL
FACULTY OF THE PROFESSIONS

Professor John Williams

LIGERTWOOD BUILDING
THE UNIVERSITY OF ADELAIDE
SA 5005
AUSTRALIA

TELEPHONE +61 8 8303 4018
FACSIMILE +61 8 8303 4344
john.williams@adelaide.edu.au
CRICOS Provider Number 00123M

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Julie Dennett
Committee Secretary
Senate Standing Committees on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Secretary

Re: Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010

The Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 ('the Amendment Bill') introduced by Senator Brown as a Private Senator's Amendment Bill has been the subject of some criticism in the Australian media. For instance AAP has stated that:

> It [the Bill] would overturn a 1997 Commonwealth law banning the Northern Territory, the ACT and Norfolk Island from legalising euthanasia ('Labor to back Greens' territories bill' 1 March 2011).

This assertion is incorrect and fundamentally misunderstands the object and effect of the Amendment Bill. It is this misunderstanding that has prompted me to make a submission to the Senate Committee.

The Amendment Bill's objectives are clearly set out in clause 4; that is to remove the power of the Governor-General to disallow or amend legislation by the self-governing territories. In particular it repeals 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*.

As you would appreciate the Commonwealth Parliament's powers to legislate for the territories is based primarily upon section 122 of the Australian Constitution. Senator Brown's Amendment Bill does not disturb the capacity of the Commonwealth Parliament

to pass law that operate in the territories, including amendments to the self-government Acts.

In light of the comments in the media reports it is important to make some comment in regard to the Amendment Bill and its impact (if any) on euthanasia and same sex marriage laws.

Euthanasia and Same-Sex Marriage laws

The capacity of the self-governing territories to pass legislation on euthanasia is limited by previous amendments to their self-government acts. So for instance sections 23 (1A) and (1B) of the *Australian Capital Territory (Self-Government) Act 1988* state that:

> (1A) The Assembly has no power to make laws permitting or having the effect of permitting (whether subject to conditions or not) the form of intentional killing of another called euthanasia (which includes mercy killing) or the assisting of a person to terminate his or her life.
>
> (1B) The Assembly does have power to make laws with respect to:
>
> (a) the withdrawal or withholding of medical or surgical measures for prolonging the life of a patient but not so as to permit the intentional killing of the patient; and
>
> (b) medical treatment in the provision of palliative care to a dying patient, but not so as to permit the intentional killing of the patient; and
>
> (c) the appointment of an agent by a patient who is authorised to make decisions about the withdrawal or withholding of treatment; and
>
> (d) the repealing of legal sanctions against attempted suicide.

As is clear from the terms of the Amendment Bill that it does not purport to amend section 23 of the *Australian Capital Territory (Self-Government) Act 1988* which remains in force. This is also the case in the Northern Territory and Norfolk Island.

A second issue that has been raised during public discussion is the implication that the Amendment Bill will empower the self-governing territories to successfully legislate for same-sex marriage. Again, the Amendment Bill does deal with this issue. As will be well known the *Marriage Act 1961* (Cth) was amendment in 2004 to include in section 5 a definition of 'marriage' as well as consequential clarifications in section 88EA. These are:

> Subsection 5(1)
>
> *marriage* means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

and

> 88EA Certain unions are not marriages
>
> A union solemnised in a foreign country between:
> (a) a man and another man; or

(b) a woman and another woman;

must not be recognised as a marriage in Australia.

By way of preface it should be noted that there is some disagreement between academic lawyers as to whether or not the Commonwealth Parliament has jurisdiction to authorise a same-sex marriage Act under section 51 (xxi) of the Australian Constitution. Further the capacity of the State and Territory parliaments to pass a same-sex marriage Acts, that would not be inconsistent (and thus operative) with the full operation of the 2004 amendments, is also a point of some debate. Whatever the doubts as to the full effect of the 2004 amendments to the *Marriage Act 1961,* and their ability to prevent the States and Territories from passing same-sex marriage legislation, Senator Brown's Amendment Bill in no way impacts upon that issue.

Senator Brown's Amendment Act does not deal directly, or by implication, with the Commonwealth *Marriage Act 1961*. The legislative capacity of the Territory and State parliaments to legislate on marriage remains the same and is subject to the operation of the current Commonwealth legislation on the topic.

The Territories, the Executive and the Parliament

Undoubtedly the Amendment Bill will remove from the Executive the ability to disallow or amend legislation passed by the parliaments of the Territories. There is an analogy between the situation of the Territories and the Commonwealth. When drafting the Australian Constitution the framers made provision for the Imperial government to disallow or reserve for consideration legislation of the new Commonwealth Parliament. Thus sections 59 and 60 of the Australian Constitution 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.
>
> **60.** A proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of the Parliament, or by Proclamation, that it has received the Queen's assent.

These provisions have never been used and it is unthinkable that today this power would be exercised by the Queen. These powers are inconsistent with Australia's status as an independent self-governing democratic nation. These sections of the Constitution are reflective of a colonial status. Just as today we would not countenance their use in terms of the Australian polity a similar argument can be made about the constitutional development of the territories. Having been granted self-government the elected parliaments of these territories, like the States, they have the capacity to govern themselves within the limits of the constitutional arrangements. The territories have developed into mature self-governing polities and should be freed from the oversight of the Commonwealth Executive. Moreover, in relinquishing this Executive power the status of the Territories is consistent with the federal principle which encourages local deliberation so that communities may to deal with issues that are of concern to them.

Whatever the fate of the Amendment Bill it remains the case that the Commonwealth Parliament will retain control over Territorian legislative initiatives that may be seen to impact adversely upon the Australian community. Arguably this is where such authority should solely be placed and that the repeal section 35 of the *Australian Capital Territory (Self-Government) Act 1988* and its equivalents is in keeping with the developments in parliamentary accountability. 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.

I thank the Committee for the opportunity to make a submission on the Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010. I wish the Committee well in its deliberations.

Yours sincerely,

Professor John Williams