

## **Peril in self-rule gaps**

By George Williams

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The latest episode in the story of civil unions amounts to more than a failure to remove discrimination against same-sex couples. It is also yet another example of the flaws that undermine ACT self- government. These allowed the repeal of territory power over euthanasia in 1997, John Howard's veto of civil unions in 2006 and the Rudd Government's threat to veto the latest incarnation of the civil unions law. They have permitted a pattern of opportunistic intervention in ACT affairs.

Federal systems of government, including systems with self- governing territories, often include a central power to override local interests. A basic aspect of good governance is that just because a person holds a power of this kind does not mean they are right to use it, let alone to single out and undermine democratic rights in a particular jurisdiction.

The best approach is often one of principled restraint whereby a central government only intervenes by legislating on a national basis for the whole community. There are many parliaments around the world vulnerable to having their laws vetoed by a higher power. However, by convention, such vetoes tend not to be used. Once self-government has been granted, a reasonable expectation is created that the will of local people as expressed in their elections should be respected.

Over time, an unbreakable convention can develop based upon sound democratic practice that the power to veto local laws should never be applied. After all, what is the point of establishing a parliament to legislate according to a local mandate, only to override this when this runs counter to federal policy? If this were to be the approach, it would be better to continue to direct local affairs from the national level.

The foundation of any system of self-government is that political responsibility must rest with the local legislature so that bad decisions are paid for at the ballot box and good decisions are rewarded with future opportunities in office. A federal veto breaks this nexus of responsibility and creates inconsistencies of governance. This can undermine community faith in the value of local democracy. Why campaign on an issue locally when an appeal to a higher power may suffice?

A good example of another veto power is section 59 of the Australian Constitution. It grants the British monarch the power to annul within one year any law passed by our Federal Parliament. The power has never been exercised, nor has this ever seriously been contemplated. It is a clear example of a power that could have been used, but common sense and democratic values have always prevailed. Its disuse is now so complete that the power is regarded as obsolete.

When it comes to the ACT, the reverse conception has taken hold. A political convention has emerged that it is appropriate for federal governments to veto territory laws that are contrary to federal policy. Moreover, what had previously been limited to the Howard government has been reinforced by the new Rudd administration. The convention is now open to either side of politics.

One of the arguments sometimes used to justify federal intervention in the laws of the ACT and Northern Territory is that their legislative assemblies are not real

parliaments. This was one line of questioning put to me when I gave evidence last month to the Senate Legal and Constitutional Committee in its ongoing inquiry into whether to remove the restrictions on the territories legislating about euthanasia.

Not only does this argument demean voters in the territories, it holds no weight when it comes to constitutional principle. The legislative assemblies may be small, but so is the parliament of a jurisdiction like Tasmania, and even though both lack an upper chamber, this is also the case in Queensland.

There is no basis for finding the assemblies of a lesser constitutional status when it comes to democratic representation. They are constituted only after a free and fair election and deserve the regard and respect that should follow from this. While the territory parliaments certainly have their faults and more could be done to improve them as popular chambers, this can also be said of every other parliament in Australia.

In threatening a veto of any civil unions law that allowed same-sex partners to register their relationship with a public ceremony, the Commonwealth asserted an exclusive right to legislate about marriage. In fact, the Constitution does not give the Commonwealth exclusive power in the area. The federal marriage power lies in section 51 of the Constitution. It is structured on the basis that laws on marriage, like topics such as taxation and quarantine, can be passed by both the Commonwealth and the states, and thus also by the territories. There are other powers held exclusively by the Commonwealth Parliament, as set out in section 52, but that list does not make any mention of marriage.

Where in an area like marriage Commonwealth laws conflict with those of a state or territory, the federal law has precedence. The problem for the Commonwealth is that its own marriage law leaves a gap for the states and territories to legislate not only for the recognition of same-sex partnerships, but even for same-sex marriage.

Until 2004, it was arguable that the federal marriage law was so broad that it covered the field with regard to marriage so as to leave no room at all for state or territory laws. However, amendments that year by the Howard government made it absolutely clear that Commonwealth law should be taken only to extend to marriage for people of different sexes and not at all to same-sex partnerships. It now provides that "marriage means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life".

By setting out so clearly the only type of marriage to fall under federal law, the change ironically created an opening for state and territory laws on other forms of marriage. The ACT civil unions law, which would have recognised and allowed people to celebrate same-sex relationships though not same-sex marriage, would have fallen into this gap. If the Commonwealth had taken the ACT law to the High Court, the outcome would likely have been that both could stand with no inconsistency between them.

It will be interesting to see if any state takes the opportunity to legislate not just for civil unions with public ceremonies, but same-sex marriage. The Federal Government would not have the easy option of vetoing such a law. Although Australia is some way off from recognising any form of same-sex marriage, other nations have already gone down this path, including Canada, South Africa, Spain and some parts of the United States. The ACT civil union move was modest by such standards, and would have been seen in many other nations as simply catching up with a position reached some years ago.

With the benefit of hindsight, it might be argued that the Stanhope Government adopted a misconceived strategy. Rather than putting civil unions back on the agenda so soon after the federal election, it might have first sought to secure reform of its self-governance arrangements. This could have cleared the way for a civil unions law of its own design in the future.

However, the Stanhope Government cannot be faulted for pursuing the path it did when, soon after the 2007 election, Prime Minister Kevin Rudd said he would not override ACT legislation allowing for civil unions because it was a matter for states and territories. "On these matters, states and territories are answerable to their own jurisdictions," he said. Given these statements, it came as a major shock to see the ACT's attempt to legislate for its own citizens so quickly repelled.

What was left was for the ACT Government to accept a civil unions law on terms determined by the Federal Government. This was a better outcome than no law at all. The amended Bill was passed in the Assembly early yesterday morning. With the issue now resolved, the Stanhope Government must seek to take the Commonwealth back to the drawing board when it comes to self- government.

This episode has exposed problems that must be addressed before they defeat other important initiatives by the ACT parliament. It is time the fundamentals were re-examined, and changes made to break a destructive cycle of federal intervention that undermines ACT self- government and democracy.

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