More than just a flag
George Williams
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Canberrans are well educated, employed at record levels and in receipt of the highest average incomes in Australia, but we are not trusted to govern ourselves. When the ACT was granted self- government in 1988, the Commonwealth imposed major conditions. This left Canberra's system of government with several features more akin to a 19th 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 1988. On the one hand, that law establishes the Legislative Assembly as a properly elected democratic parliament for the ACT. On the other, it permits a federal government veto over all ACT laws and 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 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 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, a number of times. This has created a precedent for ongoing intervention by the Commonwealth.

An early example was the 1997 Euthanasia Laws Act of the Federal Parliament. Championed by then Coalition backbencher Kevin Andrews, the Act 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 overrode any existing laws on the topic, and also took away the power to pass laws in the future.

Last month the Senate Standing Committee on Legal and Constitutional Affairs began an inquiry into whether the Euthanasia Laws Act should be repealed. It certainly should be. As a matter of democratic principle and 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 Canberra community. It also sends a clear signal that the Commonwealth believes the ACT is not up the task of enacting appropriate laws on the subject.

This does not deny the proper role of the Commonwealth to govern for all Australians. Where issues arise in a territory or state there is often a legitimate role for the Federal Parliament to intervene in the national interest, such as in regard to the national economy or environmental issues. The problem arises when it 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 to veto the ACT Civil Unions Act. Under the Self- Government Act, 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 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 given, nor any consideration paid to the best interests of ACT people. The only fallback for the ACT is that the veto can be overturned by one of the houses of the Federal Parliament. A motion was moved in the Senate to overturn the civil unions veto, but it was defeated despite ACT Senator Gary Humphries crossing the floor.

The Howard government's use of the veto is unlikely to be a one-off. Prime Minister Kevin Rudd said soon after his election that he would not override ACT legislation allowing civil unions because it was a matter for states and territories. However, the latest attempt by the Stanhope Government to introduce civil unions has led to a change of tune, with the Federal Government threatening to strike down any ACT law that provides for a public ceremony.

Among all 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 overseeing of the Commonwealth. Judges of the High Court have suggested that because the ACT includes the seat of the Federal Government it cannot become a state. It would be possible to become a state by excising the parliamentary zone from the ACT, but if that occurred you would have to ask what reason there would be for the ACT to exist in the first place.

The governance problems of the ACT are further magnified by the Constitution and the federal electoral system. Both treat Canberrans as second-class citizens. The problems disappear, and full democratic rights are restored, across the border.

Canberra does poorly compared with other small jurisdictions when it comes to representation in the Federal Parliament. Tasmania has a population of about 490,000 people and five representatives in the House of Representatives and 12 in the Senate, but the ACT, with 340,000 people, only has four MPs in Federal Parliament. This is the same number as the Northern Territory, which has a population of about 200,000. This can have a major impact in the division of resources between jurisdictions and, combined with its lack of marginal seats, makes the ACT an unlikely target for any pork-barrelling. The few representatives of the ACT in Federal Parliament can be especially telling when the Commonwealth is considering whether to use its veto and other powers in the Self-Government Act.

The voice of people in the ACT is also muted in referendums to change the Constitution. People living in a territory did not get to vote in any referendum until 1977, and even since then their vote has been given a lesser value than people living in the states. A successful referendum needs both a national majority of ''yes'' votes and a majority of ''yes'' votes in a majority of the states. The votes of people living in the ACT only count for the national vote and hence only have half the weight of people living in a state.

The Constitution confers very few human rights. However, those that it does include are often expressed or have been interpreted by the High Court only to protect people who

live in the states. For example, federal laws cannot discriminate between the states in how taxes are imposed, but this is possible when territories are involved. Similarly, the Constitution says no law can discriminate on the basis of which state a person lives in, but discrimination is permissible against people because they live in the ACT.

These legal realities leave Canberrans in a very unsatisfactory position. We have self-government, but pass laws that diverge from federal policy at our peril. The ACT can also lack the numbers and thus political clout to defend its interests effectively in the federal arena, leaving it open to opportunistic interventions and as an easier target in tough times for funding and other cuts.

This is not just a problem for the ACT, it is also a weakness in Australia's federal system. In the case of civil unions, the problems undermine the ability of the ACT, with the support of its population, to be an Australian leader in recognising same-sex relationships and removing discrimination. It would be a real loss to the diversity that is meant to underpin Australia's federal system if the new ideas and innovations that may only be likely to first emerge in the ACT cannot be tried and tested.

The position of the territories in Australia has always been awkward. The Commonwealth was given extraordinary powers over them in 1901, including full power over the terms of self-government because the Commonwealth was expected to assume responsibility over internal territories and also external ones Australia might acquire in the Pacific or elsewhere. Internal territories such as the Northern Territory were contemplated by the framers of the Constitution as having a transitional status. Being a territory was just a step on the way to statehood. The framers did not anticipate the problems of the ACT that might never be able to escape this transient status and thus allow it to achieve its full powers of independence.

Fortunately, because most of the problems are of the Commonwealth's making, they are within its power to fix. With this year marking the 20th anniversary of the grant of self-government to the ACT, it is time to review the structure of how the territory is governed. It is long past time that the ACT was given a system of self-government that lived up to the name.

George Williams is the Anthony Mason Professor at the University of NSW and a visiting fellow at the ANU College of Law.