The Right to Life Australia Inc.

The exception that makes the rule

Submission to the Legal and Constitutional Affairs Legislation Committee, Parliament of Australia

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Executive Summary

Right to Life Australia (RTLA) opposes measures to repeal the Northern Territory (Self- Government) Act 1978 and repeal the Euthanasia Laws Act 1997 on the basis that this undermines protections afforded to vulnerable citizens, especially indigenous persons, in the Northern Territory and the ACT by Commonwealth legislation.

It is appropriate that the Commonwealth apply the Territories power afforded under s122 of the Australian Constitution for sound policy purposes. In this case, the policy purpose operative under the Euthanasia Laws Act 1997, which the Bill seeks to repeal, provides protection to vulnerable persons whose rights and welfare are threatened by potential introduction of an assisted suicide regime.

While citizens of the Northern Territory and the Australian Capital Territory have a legitimate expectation that the power to make laws for their jurisdictions by their elected political representatives at Territory level will generally be respected, this power is explicitly circumscribed by s122 of the Constitution. This power should be used by the Commonwealth judiciously, and only applied for important policy concerns.

It is argued that defence of vulnerable persons, especially indigenous persons, constitutes exactly this concern. The constitution granted the Commonwealth an exception to legislate in the Territories to pursue matters of national interest of relevance to the Commonwealth understood as the common good of the citizens of Australia.

The Territories power is the exception to the rule of State's rights in the Constitution but stands as the exception that makes the rule. The Commonwealth should always retain the power to legislate in the Territories for the sake of the good public policy. The defence of life is the pursuit of the common good and assisted dying threatens vulnerable Australians. Indigenous Australians in particular have stated this clearly.

The Commonwealth should retain its power to defend the rights of vulnerable persons in the Territories and exercise those rights rather strictly where there is a strong case to preserve the common good. The Parliament in 1997 decided that assisted suicide was not a policy in accord with the common good and threatened the welfare of the vulnerable. This was reaffirmed in 2018 in Parliamentary debate on the Restoring Territory Rights (Assisted Suicide Legislation) Bill 2015. There is no need for the Parliament to alter that definitive position taken in 1997 in Euthanasia Laws Act 1997 and in 2018.

It should also be noted that the short title of the Bill appears to betray its real intent of legislating for also euthanasia in the Australian Capital Territory. It is hoped that the Committee Report will make clear the Bill's role in relation to the Australian Capital Territory.

Recommendations

Recommendation 1:

The Senate Committee recommends the Bill is not given precedence for consideration over other legislation in the current environment where Parliamentary debate should prioritise dealing with the COVID 19 pandemic and associated legislation.

Recommendation 2:

The Senate Committee notes the objection of leading indigenous voices to passage of this legislation in its report as indicated by comments of Senator Dodson cited in this submission.

Recommendation 3:

The Senate Committee notes that s122 of the Constitution allows the Commonwealth the capacity to legislate in the Territories and that this capacity should be retained if only used rarely when policy considerations require such Commonwealth action for the sake of the national interest and the common good.

Recommendation 4:

The Senate Committee notes the impact of the Bill on the capacity of the ACT Government to legislate on the issue of assisted suicide.

Who we are

Right to Life Australia Inc (RTLA) is a non-religious, non-party political peak body focused on ensuring legal protection for the most vulnerable in society. Our advocacy naturally concentrates therefore on end-of-life issues in Australian jurisdictions.

With many thousands of members and supporters across the nation we work with governments, politicians, medical practitioners, lawyers and civil society to enhance debate and reform public policy that best defends the dignity of all human life from its beginning to its natural death.

Introduction

The Ensuring Northern Territory Rights Bill 2021 at first appears to provide meaningful rights to those people living in the Northern Territory as sought in Part I of the Bill.

Part 2 of the Bill seeks to repeal in full the Euthanasia Laws Act 1997 with the effect that both in the Northern Territory and the ACT, these jurisdictions would have the power to pass assisted dying legislation although such laws would remain disallowable instruments.

Addressing provisions of the Ensuring Northern Territory Rights Bill 2021

The Senate Standing Committee on Legal and Constitutional Affairs website states "The Committee may not accept submissions that do not directly address the provisions of the bill that is the right of the Northern Territory to legislate without Commonwealth interference, and discuss only the matter of voluntary assisted dying." However, RTLA makes the argument that the continued operation of the current legislation is a legitimate power of the Commonwealth under s122 of the Constitution that should be exercised where necessary for the sake of good public policy.

Euthanasia in the Northern Territory

The Northern Territory was the first jurisdiction in the world to explicitly legalise euthanasia and this law was in operation for under a year. The Rights of the Terminally Ill Bill 1995 (ROTI)[1] saw seven patients make formal use of the Rights of the Terminally Ill (ROTI) Act; four died under the Act- assisted to end their lives overseen by infamous euthanasia doctor Dr Philip Nitschke.

Describing the scheme the Australian Care Alliance an Australian group of medical and legal professionals opposing euthanasia states:

> "Of these there is evidence in three cases (75%) of untreated depression or other mental health issues; in one case (25%) that the person was not terminally ill and in two cases (50%) that further treatment could have relieved their condition. In none of the four cases (0%) was there any evidence of uncontrolled pain."[2]

An evaluation of the circumstances of their deaths - Seven deaths in Darwin: case studies under the Rights of the Terminally Ill Act, Northern Territory, Australia - was published in The Lancet, medical journal in October 1998 by Dr David Kissane and Philip Nitschke.[3]

The socially and medically challenging situations described in the review of the circumstances of those deaths still exist in the Northern Territory today.

The speed of the passage of euthanasia in other states of Australia since 2017 is even more reason not to overturn the Euthanasia Laws Act 1995. Despite assurances to the contrary the numbers of patients assisted to suicide through Victoria's euthanasia scheme enacted in 2017 has already skyrocketed and there are moves to increase availability. [4]

Comparatively, Victoria is a state with comprehensive and well linked health services due to geographical proximity for the majority of its population.

In the Northern Territory (NT) there is a lack of respite services available to palliative care patients and their families. Indigenous people in the NT suffer substantially higher rates of poorly controlled chronic disease and premature mortality associated with poor heath than the Australian population as a whole.

The Northern Territory is a vast land mass covering 1,349,129 square kilometres. It is sparsely populated, with a population of only 246,500 [September 2020] – less than half the number of people as Tasmania – the majority live in the capital city of Darwin. It is right to be concerned that the protection of vulnerable North Territorians would be at risk if the door was now to be 'left open' to the passage of euthanasia legislation.

The physical constraints of providing health care to remote locations, at the behest of unpredictable weather conditions is a harsh reality of life in the Northern Territory for the 50% of people who do not live in towns.

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[1] https://legislation.nt.gov.au/Legislation/RIGHTS-OF-THE-TERMINALLY-ILL-ACT-1995
[2] https://www.australiancarealliance.org.au/northern_territory
[3] Kissane, D W, Street, A, Nitchske, P, "Seven deaths in Darwin: case studies under the Rights of the Terminally Ill Act, Northern Territory, Australia", The Lancet, Vol 352, 3 October 1998, p 1097-1102.
[4] https://www.theage.com.au/national/victoria/patients-too-tired-unwell-to-clear-assisted-dying-s-red-tape-hurdle-20190812-p52g63.html

The publication 'Australian Government Department of Health Exploratory Analysis of Barriers to Palliative Care Issues Report on Aboriginal and Torres Strait Islander Peoples September 2019 – written only 18 months ago - is sobering reading on the barriers to palliative care for Aboriginal and Torres Strait Islander people.[5]

'The Australian Government considers Aboriginal and Torres Strait Islander peoples over the age of 50 'aged', compared with 75 years and older for the non-Indigenous community, reflecting the considerable discrepancies in health and life expectancy. The mortality rate among Aboriginal and Torres Strait Islander peoples is 1.6 times that of non-Indigenous Australians, with cardiovascular disease and cancer the leading causes of death.'

It continues "Given the gap in mortality rates, Aboriginal and Torres Strait Islander peoples experience the death of family, friends and community members far more frequently than the non-Indigenous population, and for some communities, death is so frequent that they 'are in either acute or chronic shock from constant bereavement'. These and other experiences of trauma and loss have intergenerational effects."

The rate of palliative care-related hospitalisations across public hospitals in Australia is about twice as high for Aboriginal and Torres Strait Islander peoples as for other Australians. 12 Conversely, in 2015-16, only 1.3% of palliative care-related encounters in general practice were recorded as being provided to Aboriginal and Torres Strait Islander peoples.

Barriers to accessing palliative care include lack of awareness and understanding of palliative care, fear or mistrust of 'Western' medicine and/or healthcare providers and services, transgenerational trauma, grief and loss, language and communication barriers, talking about death and dying to be taboo, or 'bad talk', 'Cultural shyness' or kinship rules determining who is the right person to provide care.

This stark reminder of life for First Nations people shows the Euthanasia Laws Act 1997 is needed now more than ever.

Views of Indigenous Persons

The Rights of the Terminally Ill Act of the Northern Territory and the ACT is seen as breaking these fundamental constitutional responsibilities placed upon the Parliament. These are the perspectives of indigenous persons. This debate was considered in 2018 by the Parliament in relation to the Bill entitled: Restoring Territory Rights (Assisted Suicide Legislation) Bill 2015.

The leading indigenous national politician, Senator Dodson stated in his contribution to this debate the following remarks:

> In Yawuru we have three concepts that guide our experience of life. They shape our ways of knowing and understanding, and are the collective approach to our existence on this earth and, to that extent, any afterlife that may come. They are: mabu ngarrungu(nil), a strong community—the wellbeing of all is paramount; mabu buru, a strong place and a good country—human behaviour and needs must be balanced in their demands and needs of what creation provides; and mabu liyan, a healthy spirit and good feeling. Individual wellbeing and

[5] https://www.health.gov.au/sites/default/files/documents/2020/01/exploratory-analysis-of-barriers-to-palliative-care-issues-report-on-aboriginal-and-torres-strait-islander-peoples.pdf

> that of our society not only have to be balanced but be at peace with each other within the context of our existence and experience.
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> This concept of interconnectedness is one that transcends across many First Nations groups. It is grounded in our understanding that human resilience is based on our relationships with each other and our connectedness with the world around us. The quality of life for individuals and for our communities are intertwined, not limited to the wellbeing of an individual. We are fundamentally responsible for honouring our fellow human beings. We are called to carry responsibilities, to exercise duties and to honour those who are in need, who are ill, who are elderly, who are dependent and those of the next generation to value life with love, respect and responsibility. This is true of family members and unknown individuals. Moving away from such principles and values begins to reshape the value of human beings and our civil society, in my view.
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> We exist not as solitary individuals; we exist within a family, a community, our cultures and ethos, and in the kinship landscape. I'm a great admirer of those who have cared for loved ones and made personal sacrifices to do so. Not everyone is able to do this, I know, and I do not condemn them for the choices that they make. In the broad sense, we are part of a common humanity. If we give one person the right to make that decision—that is, to assist in committing suicide—we as a whole are affected. If we give one family that right, we as a whole are affected. If we give one state or territory that right, we as a country are affected. If we give one nation the right to determine life, our common humanity is affected. I cannot support this legislation.

Senator Dodson made a further strong contribution to this debate in the Australian Newspaper in relation to the Western Australian assisted suicide legislation. He stated:

> The Northern Territory experience in the 1990s suggests the mere presence of this legislation may be a barrier to First Nations people receiving healthcare. Fears and suspicions of "white-fella" medicine will only increase, and the capacity to ascertain informed consent will be difficult.

Here are his remarks in detail:[6]

> Western Australia is considering a piece of legislation that may be the most consequential set of laws passed by its 40th parliament: a bill that radically changes our understanding of life, death and suffering; a bill that legalises an individual choice to die, or voluntary assisted suicide.
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> I have serious concerns about this bill and believe if passed into law it will be the source of confusion and potentially contain unintended consequences. Because of communication and medical protocols that are not clear, and concerns over the principle "free prior and informed consent", Aboriginal people will yet again be at the mercy of the professionals who are authorised to prescribe and administer the lethal drugs if you indicate a willingness to end your misery in this life.

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6 https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fnation%2Fpolitics%2Fpat-dodsons-warning-on-legalised-euthanasia%2Fnews-story%2Fc363dfa011c59046d07bb4c093a2867c&memtype=anonymous&mode=premium

These are no ordinary times and with the West Australian parliament at a crossroads I feel compelled as a senator for Western Australia to provide my perspective on this important issue — a First Nations perspective but coming from different foundations from those that may be based one way or another on Christocentric belief systems.

It is important to note that, until recent times, First Nations affairs have largely been the province of state jurisdictions. The 1967 referendum and resulting constitutional changes have not necessarily translated to exclusive commonwealth government control of Aboriginal affairs.

This is most evident in health policy, where the ideological development of commonwealth-driven Aboriginal self-determination has been in tension with state-controlled mainstream service delivery. To put it simply, the right of First Nations people to manage their health, their way, has mainly been championed by federal governments, not necessarily state governments. The evident lack of public commentary on Aboriginal self-determination surrounding this bill concerns me because it fails to recognise Aboriginal ideas on civil society or other concerns with its quality.

Aboriginal people's unique conception of life and death, their holistic understanding of health, and their fundamentally collectivist nature is part of their concept of civil society. These are matters only gradually being understood by health professionals in the field, or through sustained research. For the more than 100,000 First Nations people in Western Australia, this is important — and they have a right to be fully informed and heard. The Western civil society has had an alleged need for this change to the sanctity of life. This sanctity-of-life understanding has much resonance with our perspectives and First Nations have respected it. Now, with little education or explanation we are confused as to why a change is necessary.

The UN Declaration on the Rights of Indigenous Peoples, article 24.2, states: "Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realisation of this right."

First Nations need not look far to see that Australia has totally failed in its duty of care to respect this fundamental right. Repeated Closing the Gap speeches tabled to parliament and traumatic coronial inquires with numbing regularity remind us that at every stage of life, First Nations people do not enjoy a quality of life afforded by the most basic instruments of human rights. This indictment should not simply exist abstractly in keynote speeches or academic literature. It should offend us daily, and it must inform any conversation or deliberation about an individual choice to end life in Western Australia.

First Australians live shorter lives. Their babies are likelier to die of preventable diseases. They watch their friends, cousins and siblings prematurely end their own lives. They have had their hearts broken too often when there is a "death in custody" because of misjudgement, prejudice or ignorance as their culture faces power and authority. One simply cannot bear witness to this reality — where First Nations are overrepresented at every stage of our health and criminal justice systems — and put forward another avenue to death. As representatives and legislators, surely we must be focusing our attention on enacting laws that help prolong life and restore the right to enjoy a healthy life. Our endeavours should be directed to enabling all citizens to access the highest quality of healthcare. It's about priorities, values and care.

The duty of care we saddle those administering and prescribing this system with is an onerous one and morally cannot be conveniently shoved off to government legal drafters.

The Northern Territory experience in the 1990s suggests the mere presence of this legislation may be a barrier to First Nations people receiving healthcare. Fears and suspicions of "white-fella" medicine will only increase, and the capacity to ascertain informed consent will be difficult.

Supporters of this bill — most with good intentions and compassion for loved ones — build their case on an individualist rights agenda. Such a perspective emphasises the rights of an individual and ignores the wider influence of such decisions on those around them — families, friends and communities. Individual choice is an important component of this but it should not be the only significant factor because other humans are going to be required to live with the consequences of their part in ending the life of another.

In an increasingly atomised world, we are finding it harder than ever to understand the interconnectedness of our social structures and the political choices that hold them together.

First Nations have always been about survival and balance. Death is about returning your body to your place in the land and your spirit to the sky. Your Rai (embryonic essence) may return as part of a newborn member of your people. So, life and death are interwoven with country, community and creation. It is simply not just about the individual leaving this world. It is about being intrinsically interwoven with the dynamic of nature and the powers that sustain it.

Collectivist conceptions of civil society are common features of First Nations. This can be seen in notions of "health" — the National Aboriginal Community-Controlled Health Organisation says Aboriginal health "means not just the physical wellbeing of an individual but refers to the social, emotional and cultural wellbeing of the whole community in which each individual is able to achieve their full potential as a human being, thereby bringing about the total wellbeing of their community. It is a whole-of-life view and includes the cyclical concept of life-death-life."

Clearly, the quality of life for individuals and communities is intertwined and we are fundamentally responsible for honouring our fellow human beings — those in need, those who are ill and those who are elderly and frail. Others may have a different perspective and that has to be respected, but so does our view. We come from different cultures and societies so civil society has to accommodate this.

There are significant deficiencies in this bill and the process that has led to it. Consultations with First Nations have not been conducted well; stakeholder submissions were not made to an exposure draft of the bill; and too many assurances depend on the 18-month implementation phase. On paper, the bill allows for clinicians to initiate a discussion about voluntary assisted dying — a measure specifically opposed by the Aboriginal Health Council of Western Australia — and clinicians who may discuss it by phone, email or telehealth may fall foul of the commonwealth Criminal Code. For a bill that reimagines our approach to human existence, it is important that proper consideration is given to details and it is not rammed through parliament with late-night sittings. There are many lives to be affected including the individual who makes a choice to end life.

I have not taken the decision to express my views lightly. I acknowledge the burden of sacrifice carers often have to carry, the all-encompassing pain of suffering, and the natural human

> desire to alleviate it. I admire the dignity with which many have cared for their loved ones to their end. I do not condemn anyone for the choices they make.
>
> However, I also believe in the dignity and sanctity of the individual and the importance of not allowing a state to make such a conclusive decision on our common humanity — the power to assist someone in taking their own life.

Clearly a leading advocate of indigenous voices voted against this legislation in 2018 and repeated his concerns in 2019. Indigenous persons do not support this Bill.

Australia Capital Territory Impacts

Although the Short Title of the Bill seems to indicate that Bill relates to the Northern Territory only the Long Title of the Bill and Part 2 indicates that the Bill also allows the ACT to legislate on assisted suicide. It is open to the Senate Committee in its report to note the impact of the Bill on the capacity of the ACT Government to legislate on assisted dying. This aspect of the Bill has not yet been subject to full debate in the community and the citizens of the ACT may not be fully aware of the impact of this proposed legislation. Ideally the Short Title of the Bill should be amended to reflect the intent of Part 2 of the Bill and be made consistent with the Long Title of the Bill.

The role of s122 of the Constitution

It is appropriate that the Commonwealth apply the Territories power afforded under s122 of the Australian Constitution for sound policy purposes. In this case, the policy purpose operative under the Euthanasia Laws Act 1997, which the Bill seeks to repeal, provides protection to vulnerable persons whose rights and welfare are threatened by potential introduction of an assisted suicide regime.

While citizens of the Northern Territory and the Australian Capital Territory have a legitimate expectation that the power to make laws for their jurisdictions by their elected political representatives at Territory level will generally be respected, this power is explicitly circumscribed by s122 of the Constitution. This power should be used by the Commonwealth judiciously, and only applied for important policy concerns.

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definitive position taken in 1997 in Euthanasia Laws Act 1997 and reaffirmed in 2018 on debate Restoring Territory Rights (Assisted Suicide Legislation) Bill 2015.

Recommendations:

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