Ensuring Northern Territory Rights Bill 2021

Introduction

[I am a retired lawyer. My last full-time position was as one of the first two full- time Deputy Presidents of the Commonwealth Administrative Appeals Tribunal. I was originally appointed to the Tribunal in 1978 as its first full-time Senior Member.

Prior to that I had extensive experience in the public and private law sectors, including 12 years in the Commonwealth Attorney-General's Department, 13 years in a legal practice in Canberra, of which I was a founding partner, 4 years as the founding Principal Lecturer in Law at the (then) Canberra College of Advanced Education and 3 years as a part-time Commissioner of the Commonwealth Law Reform Commission.]

Summary

1. I strongly support the restoration of the power of the Northern Territory Legislative Assembly to make laws on euthanasia under the *Ensuring Northern Territory Rights Bill 2021*[1] ("the ENTR Bill").
2. In my submission, the removal of this power from the Self-Government Acts of both Territories[2] by the *Euthanasia Laws Act 1997* ("the Andrews Bill") was an unwarranted and opportunistic intervention in the right to self-government conferred by the Federal Parliament on the residents of both Territories. For the reasons that follow, I submit that the power should be restored.

Right to Self-Government

3. Although the ENTR Bill is limited to seeking restoration of the power of the NT Legislative Assembly to make laws on euthanasia, it is my submission that the Bill raises a fundamental issue as to the right to self-government that applies equally to the ACT. I submit that the Bill should be considered in that light.
4. When the Northern Territory was granted self-government in 1978, followed by the ACT in 1988, each Territory was established as a body politic under the Crown with a unicameral parliamentary system vesting independent plenary legislative power in a Legislative Assembly to make laws for the peace, order and good government of the Territory.

[1] Schedule 1, Part 1, s.2 of the *Ensuring Northern Territory Rights Bill 2021*

[2] The *Northern Territory (Self-Government) Act 1978* and the *Australian Capital Territory (Self-Government) Act 1988.*

5. The High Court has characterised these legislative powers as "plenary (complete) powers of legislation as large, and of the same nature, as those of Parliament itself"[3], and as "a plenary power of the same quality as, for example, that enjoyed by the legislatures of the States."[4].
6. The Self-Government Acts are, in effect, the Constitutions of the two Territories. Subject to the Commonwealth Constitution and any federal laws extending to the Territories, the legislative powers conferred were broad enough to authorise the enactment of a law on euthanasia. (There were some limitations of a federal nature imposed on the powers conferred on the ACT Legislative Assembly, but they are not presently relevant[5]).
7. There is no doubt, however, that the Territories have a lesser status under our Constitution than do the States and that the Commonwealth Parliament has the power under s.122 of the Constitution to override a valid law made by a Territory legislature, if considered necessary.
8. Nevertheless, in my submission, if the grant of self-government is to be meaningful, it carries with it a legitimate expectation that the democratically elected legislature should be allowed to exercise its powers without unwarranted intervention by the Federal Parliament. If the right to self-government is to be respected, it is my submission that intervention should only occur in the rarest of circumstances, and should go no further than is necessary to remedy the problem that gave rise to the intervention.

The Andrews Bill

9. The Andrews Bill, a Private Member's Bill introduced by Kevin Andrews MP, was the first and, to date, the only occasion on which Parliament has intervened to override a validly enacted law of either Territory. It is now over 40 years since the grant of self-government to the NT, and 23 years since the Andrews Bill intervention. The ACT has been in existence as a self-governing Territory for over 30 years, and has never had a validly enacted law overridden in this way.
10. The trigger for this Bill, as the Committee is aware, was the passage by the NT Legislative Assembly of the *Rights of the Terminally Ill Act 1995* (the RTI Act). The Northern Territory was the first jurisdiction in Australia to enact a law authorising euthanasia. At that time, euthanasia was a particularly sensitive

[3] *Capital Duplicators v ACT (No.1) (1992)177 CLR 248 at 281 per Brennan, Deane and Toohey* JJ
[4] *R v Toohey; Ex parte Northern Territory Land Council (1981) 151 CLR 170 at 279 per Wilson J.*
[5] Australian Capital Territory (Self-Government) Act 1988, section 23 (1).

and controversial subject, not only in Australia, but elsewhere in the western world.

11. In my submission, the Bill raised issues of fundamental importance to the right of the Territories to self-government, in particular - (i) as to the circumstances (if any) in which intervention by the Commonwealth Parliament was necessary and (ii) as to how that intervention should be achieved.
12. Mr Andrews disagreed[6]. This was "not a debate about territory rights", he said. "Territories do not have rights – they have responsibilities, particularly to protect the ill and the vulnerable". These extraordinary assertions, which displayed contempt for the right to self-government granted by Parliament to each Territory, set the tone for an emotional debate in which arguments about the merits or otherwise of euthanasia overwhelmed any consideration of the Territories' right to self-government.

A Step Too Far

13. So far as the Northern Territory was concerned, the Andrews Bill provided as follows: -

> "50A. (1) Subject to this section the power of the Legislative Assembly…. In relation to the making of laws does not extend to the making of laws which permit….euthanasia (which includes mercy killing) or the assisting of a person to terminate his or her life.
>
> …….
>
> For the avoidance of doubt, the enactment of the Legislative Assembly called the Rights of the Terminally Ill Act 1995 has no force or effect as a law of the Territory, except as regards the lawfulness or validity of anything done in accordance therewith prior the commencement of this Act."
>
> (An almost identical section (but excluding the "For avoidance of doubt" clause) was enacted, at the same time, removing the power of the ACT Legislative Assembly to make such laws in the future. The ACT legislature had not enacted any law on euthanasia.)

14. Although the drafting of this section tended to obscure the fact, the immediate purpose of the Andrews Bill was to render the RTI Act of no force

[6] House of Representatives Hansard, 28 October, 1996

and effect. A law along the lines of the "For avoidance of doubt" clause was all that was needed to achieve that purpose. That would have resolved the problem that triggered the Andrews Bill and would have left the plenary legislative powers granted to the Territories unaffected.

15. The justification for so doing was said to be that it was not appropriate for the smallest legislature in the Commonwealth to lead the way in legislating on such a controversial issue. Overriding the RTI Act sent a clear message to the Territories that any future attempt to lead the way on this issue would invite the same fate as suffered by the RTI Act. Nothing more was required.
16. Clearly, however, the major objective of the Andrews Bill, in my submission, was to use the overriding of the RTI Act as an excuse for ensuring that neither Territory would be able to make such laws in the future, no matter how much community and governmental attitudes to euthanasia might change. In my submission, there was no justification for so doing.
17. The removal of this power appears to have been driven primarily by Mr Andrews' doubtless sincerely held belief that euthanasia is wrong and should never be allowed. He is undoubtedly entitled to that belief, but he was not entitled, in my submission, to impose it on the self-governing Territories.
18. This unwarranted, opportunistic intervention made a mockery of the grant of self-government, the whole purpose of which was to enable the Territories to take responsibility for the management of their own affairs and, so far as constitutionally possible, to enjoy the same right to decide such issues as is enjoyed by residents of the States.
19. By removing the power to make such laws, the Andrews Bill discriminated most unfairly against the residents of the Territories, treating them as second-class Australian citizens quite incapable of making a mature decision on this increasingly important issue.

Conclusion

20. Overriding the RTI Act was one thing; removing the power of the Territories to make laws on euthanasia in the future was quite another. In my submission, it constituted an unwarranted interference with the right to self-government conferred on both Territories and denied to the residents any opportunity to decide this important issue for themselves.
21. The consequences of this intervention are now all too apparent. Since 1997, societal and governmental attitudes towards this controversial human rights issue have changed dramatically, not only in Australia, but also in other parts of the world.

22. We now have voluntary assisted dying laws enacted in Victoria, Western Australia, Tasmania and South Australia. A law recommended by a Parliamentary Committee will be debated in the Queensland Parliament shortly. New South Wales is expected to be considering a Bill before the end of this year.
23. The enactment of these laws makes it obvious that the conservative views espoused in the Andrews Bill do not reflect the views of the majority of contemporary Australians. The States have moved on, but the Territories have been left in a 1990s time-warp of Mr Andrews' making. That glaring inequality should, in my submission, be rectified.
24. In conclusion, it is my submission that the plenary legislative powers of the Territory legislatures should never have been removed. I strongly support the restoration of the plenary legislative powers of the NT Legislative Assembly as proposed in the ENTR Bill.

Allan N Hall AM LLB (Syd.) – 28 August, 2021