

Chapter 3

Constitutionality of the Bill

The constitutionality of the Bill

3.1 Many submitters to the inquiry raised questions in relation to the constitutionality of the Bill, specifically the power of the Commonwealth Parliament to legislate for euthanasia.

3.2 Eight submissions considered this question in some detail¹ expressing the full range of views on the Bill's constitutionality. Some thought it was wholly valid or wholly invalid, whilst others thought it was valid in some respects, but not others.

3.3 Clauses 6 and 7 of the Bill address constitutional issues as follows:

6 Constitutional basis for this Act

This Act relies on:

- (a) the Commonwealth's legislative powers under paragraph 51(xxiiiA) of the Constitution; and
- (b) any implied legislative powers of the Commonwealth.

7 Additional operation of this Act

(1) Without prejudice to its effect apart from this section, this Act also has effect as provided by this section.

(2) This Act has, by force of this subsection, the effect it would have if its operation were, by express provision, confined to a medical practitioner employed by a constitutional corporation.

(3) This Act has, by force of this subsection, the effect it would have if its operation were, by express provision, confined to a person engaging in conduct to the extent to which the conduct takes place wholly or partly in a Territory.

(4) In this section:

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.

3.4 Clause 6 affirmatively states two heads of power upon which the Bill rests: subsection 51(xxiiiA) of the *Constitution*, which allows for laws to be made with respect to—*inter alia*—the provision of medical services and 'pharmaceutical, sickness and hospital benefits'; and unnamed legislative powers that are to be implied as being held by the Commonwealth Parliament.

3.5 Clause 7 provides that, in addition to being of general application, the Bill operates as if it were specifically limited to medical practitioners who are employed by a 'constitutional corporation' and to conduct that takes place wholly or partly in a

1 *Submission 1*, pp. 2–8; *Submission 6*, pp. 6–7; *Submission 21*, pp. 2–3; *Submission 36*, attachment; *Submission 40*, pp. 1–3; *Submission 47*; *Submission 53*, pp. 3–5; *Submission 87*, pp. 4–8.

Territory. It would appear to the committee that clause 7 seeks to operate as a 'backup' provision in case the Bill cannot rest on the heads of power relied upon in clause 6. If that were the case, the Bill would continue to operate in the circumstances described in clause 7 (as long as the Bill can rest on those heads of power in those circumstances).

The medical services power

3.6 Subsection 51(xxiiiA) of the *Constitution* provides as follows:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xxiiiA) the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances

3.7 The medical services power was inserted (following a referendum) by the *Constitution Alteration (Social Services) Act 1946*.

3.8 Four key questions were raised in evidence to the committee on the issue of whether the Bill could be supported by the medical services power, namely:

- (i) whether 'dying with dignity medical services' are 'medical services' within the meaning of subsection 51(xxiiiA);
- (ii) whether 'dying with dignity medical services' are 'pharmaceutical, sickness [or] hospital benefits' within the meaning of subsection 51(xxiiiA);
- (iii) if (i) or (ii) are answered in the affirmative, whether the Bill is a law 'with respect to...the provision of' medical services or pharmaceutical, sickness or hospital benefits; and
- (iv) whether the Bill violates the prohibition against 'civil conscription' in subsection 51(xxiiiA).

Meaning of 'medical service'

3.9 The first question is whether the provision of what the Bill calls a 'dying with dignity medical service' is a medical service within the meaning of subsection 51(xxiiiA) of the *Constitution*.

3.10 The range of views expressed in evidence to the committee regarding the characterisation of a 'dying with dignity medical service' as a 'medical service' included the following:

- 'a law will not be one with respect to the provision of medical services merely because it affects that which a medical practitioner may do';²
- the phrase 'medical service' does not have any special or technical meaning;³
- dictionaries do not define 'medical' and/or 'medicine' by reference to practices such as euthanasia, nor does contemporary Australian usage;⁴
- professional bodies such as the Australian Medical Association and the World Medical Association have expressed the view that medical practitioners should not assist in the practice of euthanasia;⁵
- the provision of certain services related to euthanasia were criminal acts at common law and under the laws of the States at the time that subsection 51(xxiiiA) was inserted into the *Constitution* in 1946 and remain so today;⁶
- whilst the range of services that fall within the phrase 'medical services' may change as a result of technological change, they must have at their core the 'diagnosis, treatment, and prevention of disease';⁷
- the provision of services related to euthanasia do not fall within those categories and 'it is difficult to conclude that a skilled lawyer in 1946 would reasonably have considered that the phrase might encompass such conduct in the future';⁸
- the provision of services related to euthanasia are not medical services because '[i]f you have reached, by definition, an end of what medical treatment can do, then that which you are doing is not medical treatment';⁹ and
- as such, including the provision of services related to euthanasia within the scope of 'medical services' 'would represent a fundamental shift in the core meaning of that phrase rather than the enlargement of its radius to accommodate new factual developments'.¹⁰

3.11 It was recognised, however, that there was room for doubt in this conclusion, brought about by matters including that:

2 *Submission 36*, attachment, p. 23.

3 *Submission 36*, attachment, p. 23.

4 *Submission 36*, attachment, pp. 23, 24.

5 *Submission 1*, pp. 4, 5; *Submission 36*, attachment, pp. 19-20; *Submission 53*, p. 3.

6 *Submission 36*, attachment, pp. 15-16, 17-19, 20-22, 24; *Submission 6*, p. 6.

7 *Submission 36*, attachment, p. 24. See also *Submission 6*, p. 6.

8 *Submission 36*, attachment, p. 24.

9 Mr John Bond QC, Catholic Health Australia, *Proof Committee Hansard*, 15 October 2014, p. 51.

10 *Submission 36*, attachment, p. 24. See also *Submission 1*, p. 5; and *Submission 53*, p. 3.

- there may be a range of views about what the phrase 'medical services' means¹¹ and, in any possible challenge in the High Court, it would not be for the Court to 'pass upon the wisdom or suitability of the particular scheme';¹²
- 'some words or concepts expressed in the Constitution, by their nature or expression, are given an ambulatory meaning so as necessarily to encompass later developments in a particular field' and the concept of 'medical services' could be considered to be of that type;¹³
- where there could be wide or narrow interpretations of a particular provision of the *Constitution*, the broader interpretation should be preferred 'unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose'.¹⁴ The text of the *Constitution*, in other words, should be interpreted 'with all the generality which the words used admit';¹⁵
- the High Court has not 'grappled directly with the meaning of "medical services" or "pharmaceutical, sickness and hospital benefits" in circumstances which shed light on the present issue';¹⁶
- the High Court has, however, accepted that the meaning of 'medical service' is to be 'informed by [the] nature of that which is done by doctors in providing their professional services';¹⁷ and
- it has been held that the scope of the power under subsection 51(xxiiiA) is not confined to that which is legal under State law.¹⁸

3.12 Drawing on a number of these matters, the Public Law and Policy Research Unit at the University of Adelaide concluded that a 'dying with dignity medical service' is a 'medical service' within the meaning of subsection 51(xxiiiA), arguing that the meaning of the phrase 'must be informed by the dynamic nature of the medical practice' and that, 'from a purely constitutional standpoint, there is no obvious

11 *Submission 36*, attachment, p. 24.

12 *Submission 36*, attachment, p. 9, citing *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271, 283.

13 *Submission 36*, attachment, pp. 11, 12, citing *Grain Pool (WA) v Commonwealth* (2000) 202 CLR 479.

14 *Submission 36*, attachment, p. 10, citing *Jumbunna Coal Mine NL v Victoria Coal Miners' Association* (1908) 6 CLR 309, 368.

15 *Submission 36*, attachment, p. 12 and *Submission 47*, p. 5, citing *Grain Pool (WA) v Commonwealth* (2000) 202 CLR 479, [16].

16 *Submission 36*, attachment, p. 8. See also *Submission 47*, pp. 3, 4.

17 *Submission 36*, attachment, p. 6, citing *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201, 256, 287, 293.

18 *Submission 36*, attachment, pp. 6-7, 16, citing *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201, 266.

inference to be drawn that the meaning of 'medical service' is solely limited to the preservation of life'.¹⁹

Meaning of 'pharmaceutical, sickness and hospital benefits'

3.13 The second question concerning the constitutionality of the Bill under the medical services power was whether or not 'dying with dignity medical services' are 'pharmaceutical, sickness and hospital benefits' within the meaning of subsection 51(xxiiiA) of the *Constitution*.²⁰

3.14 Those who concluded that they are not argued, first, that 'dying with dignity medical services' are not 'hospital benefits' because they are not expressed to have any connexion with any hospital and could very well be performed outside hospitals, including within the patient's home.²¹

3.15 It was recognised, however, that the position was less clear in relation to sickness and pharmaceutical benefits.²² Catholic Health Australia, for example, recognised that:

- (i) the phrase 'benefits' is not limited to the grant of money and may include the provision of a service;²³
- (ii) sickness (specifically, terminal illness) is a condition precedent to the provision of a 'dying with dignity medical service';²⁴ and
- (iii) the provision of a 'dying with dignity medical service' is likely to involve pharmaceutical compounds.²⁵

3.16 Catholic Health Australia nonetheless argued that a 'dying with dignity medical service' was not a sickness or pharmaceutical benefit for four reasons:

- (i) it is unlikely that the phrases 'sickness benefit' or 'pharmaceutical benefit' include services that were criminal in 1946 and which remain so today;²⁶
- (ii) the concept of benefit includes 'the notion that it will "relieve the person to whom it is provided from a cost which that person would otherwise incur"', but the Bill concerns a service that could otherwise not be provided and in respect of which no liability could

19 *Submission 47*, pp. 5–6.

20 *Submission 36*, attachment, pp. 24–26.

21 *Submission 36*, attachment, p. 25.

22 *Submission 36*, attachment, p. 25.

23 *Submission 36*, attachment, pp. 5, 9, 25, citing *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201, 279 and *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271 at 280.

24 *Submission 36*, attachment, p. 25.

25 *Submission 36*, attachment, p. 25.

26 *Submission 36*, attachment, p. 25.

otherwise be incurred. It therefore 'does not provide for the provision of material aid in the sense of provision of a service (or the payment for it) to relieve against its financial consequence';²⁷

- (iii) a sickness benefit within the meaning of subsection 51(xxiiiA) must be directed towards the consequence of being sick, but 'dying with dignity medical services' are not directed towards that consequence;²⁸ and
- (iv) the definitions of 'benefit' used in the case law support 'the view that there must be a social services character to the legislation'. 'In circumstances where the common law, State law and the medical profession in Australia each rail against the service contemplated, it is difficult to see that it would be proper to view the provision (or payment) of that service of having a social services character'.²⁹

3.17 On the other hand, the Public Law and Policy Research Unit at the University of Adelaide concluded that 'dying with dignity medical services' are 'arguably' sickness and hospital benefits. Having highlighted case law that defines 'benefit' in this context as 'the provision of aid to or for individuals for human wants arising as a consequence of...being sick',³⁰ they reasoned that:

The individual is certainly 'sick' and seeking the services of a medical practitioner. There is scope for an argument that the provision of a service that results in death is not the provision of a benefit. However, we believe there is a strong argument that this would be found to be the provision of a material aid in the form of a service, designed, in the view of Parliament, to promote social welfare and security.³¹

3.18 They further noted that '[t]he interpretation of the head of power in this way highlights that the wisdom or otherwise of measures within this Bill are to be determined by Parliament'.³²

Meaning of 'provision'

3.19 The High Court has often emphasised the importance of the word 'provision' in subsection 51(xxiiiA).³³ In particular, it should be noted that:

27 *Submission 36*, attachment, pp. 25-26, citing *Williams v Commonwealth of Australia* [2014] HCA 23, [46].

28 *Submission 36*, attachment, p. 26, citing *Williams v Commonwealth of Australia* [2014] HCA 23, [46].

29 *Submission 36*, attachment, p. 26.

30 *Williams v Commonwealth of Australia* [2014] HCA 23, [46].

31 *Submission 47*, pp. 6-7. See also *Submission 87*, p. 7.

32 *Submission 47*, p. 7.

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- (a) the power is not a general power to make laws with respect to the matters listed in subsection 51(xxiiiA). It is a power to make laws with respect to *the provision of* such benefits and services;³⁴ and
 - (b) 'the provision of' benefits or services is to be understood as the provision of benefits or services *by the Commonwealth*;³⁵ but
 - (c) benefits and services do not need to be provided directly by the Commonwealth;³⁶ they may be provided, for example, by those in the private sector in return for a government subsidy;³⁷ and
 - (d) the Commonwealth may regulate the provision of benefits and services where this is incidental to their provision by the Commonwealth in order to ensure that the provision is 'effectively administered with due regard to the interests both of the intended recipient and the revenue'.³⁸

3.20 The Public Law and Policy Research Unit at the University of Adelaide submitted that these requirements were satisfied by Part 3 of the Bill, which provides for the payment by the Commonwealth of the costs of 'dying with dignity medical services'.³⁹

Meaning of 'civil conscription'

3.21 Subsection 51(xxiiiA) contains an express prohibition on the use of the medical services power 'to authorize any form of civil conscription'.

3.22 The submission of Catholic Health Australia provided a helpful description of the events that led to the inclusion of subsection 51(xxiiiA) in 1946,⁴⁰ which included the explanation that the prohibition on civil conscription was inserted to allay fears that 'the proposed amendment would grant the Commonwealth the power to nationalise medical and dental services'.⁴¹

33 See, for example, *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201, 260, 279; *General Practitioners Society of Australia v Commonwealth* (1980) 145 CLR 532, 557 and *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271, 279.

34 *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201, 242-243.

35 *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271, 279; *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201, 243, 254, 260, 279, 292.

36 *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201, 260-261.

37 *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271, 282.

38 *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271, 281-284.

39 *Submission 47*, p. 4.

40 *Submission 36*, attachment, pp. 13-15.

41 *Submission 36*, attachment, p. 13.

3.23 The prohibition on civil conscription has been described as referring to:

...any sort of compulsion to engage in practice as a doctor or a dentist or to perform particular medical or dental services. However, in its natural meaning it does not refer to compulsion to do, in a particular way, some act in the course of carrying on practice or performing a service, when there is no compulsion to carry on the practice or perform the service.⁴²

3.24 Importantly, the prohibition on civil conscription only applies to the provision of 'medical and dental services' and not to the other elements of subsection 51(xxiiiA).⁴³

The corporations power

3.25 Subsection 51(xx) of the *Constitution* provides as follows:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

...

(xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth

3.26 As noted above, clause 7(2) of the Bill provides as follows:

(2) This Act has, by force of this subsection, the effect it would have if its operation were, by express provision, confined to a medical practitioner employed by a constitutional corporation.

3.27 Clause 7(4) defines 'constitutional corporation' to mean 'a corporation to which paragraph 51(xx) of the Constitution applies'. Any foreign corporation or any Australian corporation that engages in substantial trading and financial activities will be considered a 'constitutional corporation'.⁴⁴

3.28 The corporations power has been interpreted broadly in recent times by the High Court. In the so-called 'Work Choices Case', the majority held that the corporations power extended to any law which 'imposes a duty or liability, or confers a right or privilege, only on a constitutional corporation'.⁴⁵ The majority held that this included regulating the conduct of 'those through whom it acts', including employees.⁴⁶ More recently, the Court has emphasised that, to fall within the

42 *General Practitioners Society in Australia v Commonwealth* (1980) 145 CLR 532, 557.

43 *Federal Council of the British Medical Association in Australia v Commonwealth* (1949) 79 CLR 201, 254-255, 261, 281-282, 286-287.

44 *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190; *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282; *Commonwealth v Tasmania* (1983) 158 CLR 1.

45 *Submission 36*, attachment, p. 27, citing *New South Wales v Commonwealth* (2006) 229 CLR 1, [181].

46 *Submission 36*, attachment, p. 27, citing *New South Wales v Commonwealth* (2006) 229 CLR 1, [181].

corporations power, the law needs to regulate or permit acts done by or on behalf of corporations.⁴⁷

3.29 Catholic Health Australia argued that the Bill would not be supported by the corporations power if it applied only to medical practitioners employed by a constitutional corporation for four reasons, namely that:

- (i) the Bill 'would still be directed to the conduct and activities of persons who are "medical practitioners" rather than the constitutional corporation who employed them'. Only medical practitioners (and not the constitutional corporations that employed them) would receive the benefit of the immunity; only medical practitioners would be taken to have entered into an agreement with the Commonwealth for the performance of the service; and only medical practitioners would have the right to claim payment. Furthermore, there would be no requirement even that the medical practitioner provide the service in the course of their employment by the constitutional corporation.⁴⁸
- (ii) there is no requirement in the Bill that the medical practitioner provide the service on behalf of the constitutional corporation;⁴⁹
- (iii) 'the mere fact that the subject of regulation by the Bill was an employee of a constitutional corporation [is not a] sufficient connection with the s. 51(xx) head of power to warrant a conclusion that the Bill was an exercise of power with respect to constitutional corporations. Some more substantial connection with the activities of the constitutional corporation which themselves were being regulated would be required',⁵⁰ and
- (iv) the method of reimbursement envisaged in the Bill 'seems to us to [be] more consistent' with the reliance on the 'medical services' power.⁵¹

3.30 The Public Law and Policy Research Unit at the University of Adelaide appeared to agree with the thrust of these arguments, suggesting that the argument for validity under the corporations power would be strengthened if clause 7(2) were amended to read as follows:

This Act has, by force of this subsection, the effect it would have if all references to a 'medical practitioner' were, by express provision, confined

47 *Williams v Commonwealth of Australia* [2014] HCA 23, [50].

48 *Submission 36*, attachment, pp. 27–28.

49 *Submission 36*, attachment, p. 28.

50 *Submission 36*, attachment, p. 29.

51 *Submission 36*, attachment, p. 29.

to a medical practitioner employed by a constitutional corporation *acting in the course of their employment by that corporation*.⁵²

3.31 At the public hearing conducted in Melbourne, Mr John Bond QC (who prepared the legal opinion that was attached to the submission of Catholic Health Australia), accepted that the amendment suggested by the Public Law and Policy Research Unit probably would improve the chances of the Bill surviving challenge on constitutional grounds.⁵³ He maintained, however, that—in his view—the Bill would still be unconstitutional, because:

The bill is about saying: 'Medical practitioners can do this. Medical practitioners will be immune. Medical practitioners will be deemed to have entered into a contract with the Commonwealth for remuneration. Anyone else who seeks to induce them by the payment of money will be guilty of an offence.' That is all about medical practitioners; it is not about constitutional corporations.⁵⁴

3.32 He further submitted that:

...if the act was about medical practitioners acting in the course of their employment by that corporation then probably the constitutional corporation that employed them and paid them money to do it would be in breach of the prohibition against making inducements for the giving of this service.⁵⁵

The territories power

3.33 Section 122 of the *Constitution* provides as follows:

Government of territories

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

3.34 Clause 7(3) of the Bill provides as follows:

This Act has, by force of this subsection, the effect it would have if its operation were, by express provision, confined to a person engaging in conduct to the extent to which the conduct takes place wholly or partly in a Territory.

3.35 Catholic Health Australia accepted that, insofar as conduct occurring in a Territory is concerned, the Bill would be a valid exercise of the power conferred by

52 *Submission 47*, pp. 7–8. See also *Submission 87*, p. 8.

53 John Bond QC, *Committee Hansard*, 15 October 2014, p. 50.

54 John Bond QC, *Committee Hansard*, 15 October 2014, p. 50.

55 John Bond QC, *Committee Hansard*, 15 October 2014, p. 50.

section 122 of the *Constitution*. It noted, in particular, that the territories power is 'unlimited and unqualified in point of subject matter'.⁵⁶ The Public Law and Policy Research Unit at the University of Adelaide concluded that the Bill could 'easily rely' on the territories power.⁵⁷

Implied powers

3.36 Because neither the committee nor the submitters have had the benefit of an Explanatory Memorandum or similar document, they have had to deduce for themselves what the phrase 'implied legislative powers of the Commonwealth' in clause 6 means.

3.37 No submission considered that there was an applicable implied power upon which the Bill could rest.⁵⁸

Consequences of invalidity

3.38 A key element of the Bill is to provide immunities to medical practitioners who provide 'dying with dignity medical services'. Specifically, where a person acts in good faith, for the purposes of the Bill and in accordance with the Bill, clause 24 provides an immunity from 'civil, criminal or disciplinary action' and clause 25 provides that such acts do not 'constitute an offence against a law of the Commonwealth, a State or a Territory'.

3.39 As noted by the submission of the Public Law and Policy Research Unit of the University of Adelaide, '[t]his requires the Bill to create an inconsistency with the relevant State legislation under s 109 of the Constitution, thus rendering the State laws inoperative'.⁵⁹ As the submission points out, there are very serious possible consequences for doctors who provide 'dying with dignity medical services' if the Bill is enacted but later found to be unconstitutional.⁶⁰ Such medical practitioners may find themselves facing homicide charges, despite the fact that they fully complied with the provisions of the Bill.

56 *Submission 46*, attachment, p. 30, quoting *Teori Tau v Commonwealth* (1969) 119 CLR 564, 570.

57 *Submission 47*, p. 8.

58 *Submission 1*, pp. 5–6; *Submission 36*, attachment, p. 4.

59 *Submission 47*, pp 2, 9–10.

60 *Submission 47*, p 2.

