



Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2010

Catherine Lorimer and Elibritt Karlsen
Law and Bills Digest Section

Contents

| | |
|--|----|
| Purpose | 2 |
| Re-introduction of the Bill..... | 2 |
| Background | 2 |
| Committee Consideration..... | 4 |
| Main issues..... | 5 |
| Territory rights..... | 5 |
| Would passage of this Bill revive the Northern Territory’s 1995 RTI Act? | 5 |
| Would passage of this Bill fundamentally alter anything? | 7 |
| Voluntary Euthanasia..... | 9 |
| Key provisions | 10 |
| Concluding comments | 12 |

Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2010

Date introduced: 29 September 2010

House: The Senate

Portfolio: Private Senator's Bill

Commencement: Upon Royal Assent

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au>.

Purpose

The purpose of the Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2010 (the Bill) is to repeal the *Euthanasia Laws Act 1997* (Cth) (the Euthanasia Laws Act) and to repeal the provisions contained in the self-government Acts of the Northern Territory, Australian Capital Territory, and Norfolk Island that preclude the legislative assemblies of these respective territories from making laws on euthanasia.

Re-introduction of the Bill

An earlier version of the Bill was introduced into the Senate by Senator Bob Brown during the term of the 42nd Parliament.¹ That Bill has now lapsed. The Bill was re-introduced on the second day of the 43rd Parliament. This version of the Bill replicates the earlier version exactly.

Background

In 1995, the Northern Territory Legislative Assembly passed the *Rights of the Terminally Ill Act 1995* (the RTI Act) which commenced operation on 1 July 1996. On 9 September 1996, Kevin Andrews MP introduced a Private Member's Bill into the Commonwealth Parliament.² After a conscience vote in

1. Senator Bob Brown introduced the *Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2008* as a Private Senator's Bill on 17 September 2008. No Explanatory Memorandum was tabled with the Bill.

2. See: J Norberry, *Euthanasia Laws Bill 1996*, Bills digest, no. 45, 1996-97, Department of the Parliamentary Library, Canberra 1996, viewed 18 October 2010, <http://www.aph.gov.au/library/pubs/bd/1996-97/97bd045.htm> for a

both Houses of the Commonwealth Parliament, the Bill was passed and became the *Euthanasia Laws Act 1997* (the Euthanasia Laws Act). In the House of Representatives the votes to carry the Bill were 88 – 35 and in the Senate the Bill was passed with a vote of 38 – 33.

The Euthanasia Laws Act amended three Commonwealth laws—the self-government Acts of the NT, the ACT and Norfolk Island.³ The Euthanasia Laws Act inserted identical provisions in each self-government Act stating that the powers of the particular legislative assembly did not ‘extend to the making of laws which permit or have the effect of permitting (whether subject to conditions or not) the form of intentional killing of another called euthanasia (which includes mercy killing) or the assisting of a person to terminate his or her life’.

The Euthanasia Laws Act also amended the self-government Acts of the NT, the ACT, and Norfolk Island by inserting provisions which permitted each of these respective legislative assemblies to make laws with respect to:

- the withdrawal or withholding of medical or surgical measures for prolonging the life of a patient but not so as to permit the intentional killing of the patient
- medical treatment in the provision of palliative care to a dying patient, but not so as to permit the intentional killing of the patient
- the appointment of an agent by a patient who is authorised to make decisions about the withdrawal or withholding of treatment, and
- the repealing of legal sanctions against attempted suicide.

In the case of the NT, the Euthanasia Laws Act clarified that the RTI Act ‘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 to the commencement of this Act’.⁴ The RTI Act did not come into force until 1 July 1996. This meant that though the RTI Act was invalidated by the Euthanasia Laws Act, acts performed under the RTI Act prior to the enactment of the Euthanasia Laws Act were not unlawful.⁵ It is understood that during this time the life of four patients were terminated after the procedures in the RTI Act had been satisfied.⁶

detailed analysis of the Andrews Bill. The Bill was referred to the Senate Legal and Constitutional Legislation Committee and the final report of the Committee was released in March 1997. See: Euthanasia Laws Bill 1996, viewed 18 October 2010, http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/1996-99/euthanasia/report/report.pdf See also N Cica, *The Senate Legal and Constitutional Legislation Committee's Report on the Euthanasia Laws Bill 1996-Background, Summary and Responses*, Current issues brief, no. 24, 1996-97, Department of the Parliamentary Library, viewed 18 October 2010, <http://www.aph.gov.au/library/pubs/CIB/1996-97/97cib24.htm>

3. *Australian Capital Territory (Self-Government) Act 1988* (Cth); *Northern Territory (Self-Government) Act 1978* (Cth), *Norfolk Island Act 1979* (Cth).
4. Schedule 1 of the *Euthanasia Laws Act 1997*.
5. G Williams and M Drake, ‘Euthanasia laws and the Australian Constitution’, *University of New South Wales Law Journal*, vol. 20 no. 3, 1997, pp. 647-665 at 653.
6. *Ibid.*, p. 649.

Senator Bob Brown has previously introduced three Private Senator's bills on the issue of voluntary euthanasia which have all subsequently lapsed.⁷ This Bill has evolved from these previous Bills, especially from the Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008 (the 2008 Bill) which was scrutinized by the Senate Standing Committee on Legal and Constitutional Affairs in 2008 (discussed below under 'Committee consideration').

Committee Consideration

On 26 October 2010 the Senate Selection of Bills committee recommended that this Bill not be referred to a committee.

However, it is significant to note that an earlier version of the Bill—the Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008—was referred to the Senate Standing Committee on Legal and Constitutional Affairs (the Senate Committee) for inquiry on 12 March 2008. The 2008 Bill was different from the current bill in that though it too sought to repeal the Euthanasia Laws Act, it also sought to expressly revive the Northern Territory's RTI Act.

Though Committee members ultimately elected not to form a majority view on whether or how the Bill should proceed, Senator Trish Crossin as the Committee Chair (endorsed by Senators Kirk and Marshall), recommended that the Bill proceed subject to the following amendments:⁸

(a) item 2 of Schedule 1 be deleted and replaced with an item which specifically provides that the *Rights of the Terminally Ill Act 1995* (NT) is NOT revived by the Bill;

(b) Schedule 1 be amended to include a provision expressly removing section 50A from the *Northern Territory (Self-Government) Act 1978* (Cth) and equivalent provisions from ACT and Norfolk Island self-government legislation (rather than merely repealing the *Euthanasia Laws Act 1997*); and

(c) clause 3 of the Bill be amended to accurately reflect the legal position of the powers of territory legislative assemblies by:

- deleting the word 'people' and replacing it with 'legislative assemblies'; and

- deleting the words 'terminally ill' and replacing them with 'voluntary euthanasia'.

In his statement to the Committee, Senator Bob Brown expressed support for these three recommendations.⁹ The Bill currently before Parliament has been amended to reflect these drafting concerns (for more information see 'main issues' and 'key provisions').

7. Australian Territories Rights of the Terminally Ill Bill 2007; Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008; Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2008.

8. Senate Standing Committee on Legal and Constitutional Affairs, *Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008* [Provisions], 26 June 2008 pp. 63–65, viewed 18 October 2010, http://www.aph.gov.au/Senate/committee/legcon_cte/terminally_ill/report/index.htm

Main issues

The main issue raised by this Bill is whether the Australian Capital Territory, Northern Territory and Norfolk Island should continue to be expressly precluded by the Commonwealth from legislating on the issue of euthanasia. However, it is extremely difficult to consider this issue in isolation without regard to the broader debate surrounding the legalisation of voluntary euthanasia because the effect of this Bill would enable the Territories to have the same legislative power as the States on this subject matter.

Territory rights

As has been shown with the enactment of the Euthanasia Laws Act, section 122 of the Constitution enables the Commonwealth to override territory legislation and to curtail the power of such legislatures to make laws by amending their self-government Acts.¹⁰ However, in removing (and now potentially restoring) the ability of territory governments to make laws with respect to euthanasia a number of constitutional issues arises. These are succinctly summarised in two previous parliamentary library publications:

- [Constitutional arguments against removing the Territories' power to make laws permitting euthanasia](#)¹¹
- [Constitutional arguments in favour of removing the Territories' power to make laws permitting euthanasia](#)¹²

Would passage of this Bill revive the Northern Territory's 1995 RTI Act?

This Bill contains an application clause which effectively states that the RTI Act has no force or effect as a law of the Territory, except for any action that was done in accordance with the RTI Act prior to the commencement of the Euthanasia Laws Act.¹³ Senator Brown's second reading speech emphasises that this Bill does *not* restore the Northern Territory's RTI Act.¹⁴ A second reading

9. Ibid., p. 79.

10. This is a plenary power, unlimited by subject matter. For more see: G Moens and J Trone, *Lumb and Moens' The Constitution of the Commonwealth of Australia annotated*, seventh edn, LexisNexis Butterworths, 2007, p. 432. However, there are other views that this point remains 'undetermined'. See Blackshield and Williams, *Australian Constitutional Law and Theory*, 5th Edition, 2010, p. 790.

11. N Cica, *Constitutional arguments against removing the Territories' power to make laws permitting euthanasia*, Research note, no. 33, 1996—97, Parliamentary Library, Canberra, viewed 28 October 2010, <http://www.aph.gov.au/library/pubs/rn/1996-97/97rn33.htm>

12. N Cica, *Constitutional arguments in favour of removing the Territories' power to make laws permitting euthanasia*, Research note, no. 32, 1996—97, Parliamentary Library, Canberra, viewed 28 October 2010, <http://www.aph.gov.au/library/pubs/rn/1996-97/97rn32.htm>

13. **Proposed clause 2 of Schedule 2.**

14. B Brown, 'Second reading speech: Restoring Territory Rights (Voluntary Euthanasia Legislation) Bill 2010', Senate, *Debates*, 29 September 2010, p. 305, viewed 22 October 2010,

speech can be used as an aid to interpretation of a statute.¹⁵ So although this may be correct, it must be noted that the Euthanasia Laws Act did not contain a provision that expressly repealed the Northern Territory's RTI Act. Rather Schedule 1 contained a clause which stated the Act had no force or effect as a law:

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 to the commencement of this Act.¹⁶

It appears generally accepted that the effect of this statutory formulation is that the Northern Territory's RTI Act was overridden and made inoperative by the Euthanasia Laws Act. According to Pearce and Geddes:

...it should be borne in mind that where an Act contains provisions that are inconsistent with an item of delegated legislation [such as a Territory law], the latter will be rendered invalid, thereby, in effect, being repealed.¹⁷

The RTI Act and accompanying regulations have not been repealed by the Northern Territory Legislative Assembly so whether passage of this Bill might revive the RTI Act has an element of uncertainty.

As previously noted, the Chair of the Senate Committee, Senator Trish Crossin (endorsed by Senators Kirk and Marshall) was of the view that re-enactment of the RTI Act was a matter for the Northern Territory Legislative Assembly should it decide to do so (if it were to be given the opportunity). She recommended that 'item 2 of Schedule 1 of the [2008] Bill should therefore be deleted and replaced with an item which specifically states that the NT RTI Act is NOT revived by the Bill'.¹⁸

When Senator Brown requested a suggestion of how the Bill could be amended to address uncertainties in this respect he chose not to adopt the statutory formulation proposed by Professor George Williams and Dr Andrew Lynch of the Gilbert + Tobin Centre for Public Law which was to insert the following application clause:

For the avoidance of doubt, this Act does not have the effect of returning the enactment of the Legislative Assembly called the Rights of the Terminally Ill Act 1995 to legislative force.¹⁹

http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2010-09-29/0144/hansard_frag.pdf;fileType=application%2Fpdf

15. *Acts Interpretation Act 1901*, section 15AB.
16. Clause 2 of Schedule 1, *Euthanasia Laws Act 1997*.
17. DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, sixth edn, 2006, p. 257.
18. Senate Committee on Legal and Constitutional Affairs, *Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008*, op. cit., p. 65.
19. University of NSW Gilbert + Tobin Centre of Public Law, Senate Legal and Constitutional Affairs Committee, *Inquiry into Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008*, Answers to Questions on notice, 7 May 2008,

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.

Senator Brown instead adopted a statutory formulation with regard to the RTI Act which is more consistent with the formulation contained in the Euthanasia Laws Act. That is:

To avoid doubt, the enactment of the Legislative Assembly of the Northern Territory of Australia 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 with that enactment prior to the commencement of the *Euthanasia Laws Act 1997*.²⁰

In the absence of judicial authority, the weight of academic opinion is that the Northern Territory's RTI Act was impliedly repealed by the Euthanasia Laws Act.²¹ If so, section 7 of the Commonwealth's *Acts Interpretation Act 1901* relevantly provides that:

The repeal of an Act or part thereof by which a previous Act or part thereof was repealed **shall not have the effect of reviving such last-mentioned Act or part thereof without express words**. [emphasis added].

In this context it is significant to note that Professor Williams doubts whether the Commonwealth has the power to retrospectively reinstate a territory Act that has *not* been sustained by a legislative power (that is the power to legislate on euthanasia) for such a long time:

However, there is significant judicial and academic opinion which suggests that laws made by territory legislatures are not merely suspended or dormant for the duration of any inconsistent Commonwealth law and then enter back into force upon its removal...while repeal of the Commonwealth Act in its entirety restores that legislative capacity [to legalise euthanasia] to the territories for future use, it cannot (at least not without some clearer expression than found in the draft provision) retrospectively reinstate that power to the Northern Territory so that its 1995 Act was, albeit inoperative, still sustained by legislative power of the NT Assembly between 1997 and now.²²

Would passage of this Bill fundamentally alter anything?

Passage of this Bill would return to the legislative assemblies of the ACT, NT and Norfolk Island the power to make laws with respect to euthanasia should they choose to do so. However, in this respect it should be noted that though there have been several previous attempts, legislation legalising euthanasia has to date not successfully secured passage in any other Australian

viewed 26 October 2010,

http://www.aph.gov.au/Senate/committee/legcon_ctte/terminally_ill/submissions/G_T_Law_QoN.pdf

20. **Proposed clause 2 of Schedule 1.**

21. There is a possibility that it was simply rendered inoperative due to it being inconsistent with a law of a paramount legislature—that is, the Commonwealth parliament. **Proposed clause 2 of Schedule 2** appears to maintain an inconsistency to prevent revival of the RTI Act.

22. University of NSW Gilbert + Tobin Centre of Public Law, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008*, 27 March 2008, viewed 26 October 2010, http://www.aph.gov.au/Senate/committee/legcon_ctte/terminally_ill/submissions/sub46.pdf

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.

jurisdiction.²³ It should also be noted that currently none of the Territories are agitating or advocating laws in this field.

If an Australian territory secured passage of a law that legalised euthanasia such a law could of course still be overridden and the legislative mandate revoked should it be the will of the federal Parliament under section 122 of the Commonwealth Constitution to do so. The Euthanasia Laws Act has now set a precedent in this respect. This will only ever change if a referendum to change section 122 of the Constitution were to succeed.²⁴

It is also significant to note that the laws of the ACT, the NT and Norfolk Island may also be disallowed by the Commonwealth Governor-General.²⁵ In this respect, the Howard Government relied upon section 35 of the *Australian Capital Territory (Self-Government) Act 1988* to veto the ACT's *Civil Union Act 2006*.²⁶ As noted by the Law Council of Australia:

In June 2006 the ACT's *Civil Unions Act* was disallowed by the Government (*sic*) General, acting on advice of the Commonwealth Government. The basis for the Commonwealth Government's intervention was the assertion that the ACT law, which allowed for couples including same sex couples to register a civil union, compromised the unique status of marriage. Although little explanation was given, in the view of the Commonwealth, this assertion was clearly sufficient to establish "particularly compelling circumstances" ... This disallowance was said to be the first time in Australian history an unelected representative of the Queen acted to disallow a law passed by an elected parliament. As ACT Chief Minister Jon Stanhope stated:

"[T]he overturning of the Civil Unions Act by the Governor-General, at the behest of the federal executive, was an intervention so significant historically that it has fundamentally challenged our assumptions about Australian democracy."²⁷

In this regard, it is relevant to note that Senator Brown has also recently re-introduced another Private Senator's Bill, the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010.²⁸ The object of this Bill is to 'remove the

23. For an overview of other jurisdictions' attempts to legislate for active voluntary euthanasia and assisted suicide see: L Bartels and M Otlowski, *op. cit.*, pp. 540—543.

24. See chapter VIII of the Commonwealth Constitution.

25. See section 9 of the *Northern Territory (Self-Government) Act 1978*; section 35 of the *Australian Capital Territory (Self-Government) Act 1988*; section 23 of the *Norfolk Island Act 1979*. See also: Attorney-General's Department, Senate Legal and Constitutional Affairs Committee, *Inquiry into Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008*, Answers to Questions on notice, 9 May 2008, viewed 26 October 2010, http://www.aph.gov.au/senate/committee/legcon_ctte/terminally_ill/submissions/ADG_QoN.pdf

26. T Blackshield and G Williams, *op. cit.*, p.235.

27. J Stanhope (Chief Minister of the ACT), 'A mandate to legislate?', Speech made at Melbourne University, 5 October 2006, cited in Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Committee, *Inquiry into Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008*, April 2008, viewed 26 October 2010, http://www.aph.gov.au/Senate/committee/legcon_ctte/terminally_ill/submissions/sub442.pdf

28. The Bills homepage for the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010 is available at:

Governor-General's power to disallow or amend any Act of the Legislative Assembly for the Australian Capital Territory and to ensure that the Legislative Assembly has exclusive legislative authority and responsibility for making laws for the Australian Capital Territory'.²⁹ No similar bill has been advanced for the NT or Norfolk Island.

Alternatively, the Federal Parliament could seek to nationally legislate on the issue of euthanasia though there is some uncertainty as to whether it has the power to do so. Section 51 of the Commonwealth Constitution does not reserve any power to the Commonwealth to make laws in relation to health. According to Williams and Darke, there are three main heads of power under which the Commonwealth might seek to make such a law: the external affairs power, the corporations power and the races power.³⁰ Other commentators suggest that it is far from clear that the Federal Parliament lacks the constitutional power to pass a national law prohibiting or permitting euthanasia. These commentators suggest in addition to Williams and Darke, the implied nationhood power under which a law relating to euthanasia could be made.³¹

If the Commonwealth were to enact legislation any state law which was inconsistent with a law of the Commonwealth would be invalid to the extent of the inconsistency under section 109 of the Constitution. Though the self-governing territories are not subject to section 109 of the Constitution, an equivalent provision in the *Australian Capital Territory (Self-Government) Act 1988* applies.³² While the Northern Territory (self-government) Act is silent on this point, Blackshield and Williams are of the view that:

... a similar result would probably follow from clause 5 of the Constitution, which extends the binding effect of Commonwealth laws to the "people... of every part of the Commonwealth". In any event, the result has been held to follow from the doctrine of "paramountcy".³³

Voluntary Euthanasia

At present, no Australian state or territory has a law which permits voluntary euthanasia but Queensland is reportedly the only Australian jurisdiction never to have considered such legislation.³⁴

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs769%22>

29. Proposed clause 4 of the Australian Capital Territory (Self-Government) Amendment (Disallowance and Amendment Power of the Commonwealth) Bill 2010.

30. G Williams and M Darke, 'Euthanasia laws and the Australian Constitution', *University of New South Wales Law Journal*, vol. 20, no. 3, 1997, p. 662.

31. N Cica, *Constitutional arguments against removing the Territories' power to make laws permitting euthanasia*, Research note, no.33, 1996-97, Parliamentary Library, Canberra 1997, viewed 23 September 2010, <http://www.aph.gov.au/library/pubs/RN/1996-97/97rn33.htm>

32. Section 28 of the *Australian Capital Territory (Self-Government) Act 1988*.

33. T Blackshield and G Williams, *Australian constitutional law and theory: commentary and materials*, fifth edn, Federation Press, Annandale, 2010, p. 235.

34. L Bartels and M Otlowski, op. cit., p. 533.

Numerous Bills have been introduced at the state and territory level but none have been successfully passed, since the Northern Territory's RTI Act.³⁵

In contrast, Belgium and the Netherlands have legalised voluntary euthanasia under certain conditions. In addition:

and in the United States, the States of Oregon and Washington have laws permitting assisted suicide, and the laws in Switzerland are permissive of assisted suicide, provided that the person assisting is acting altruistically and not out of self-interest.³⁶

It is beyond the scope of this bills digest to provide a full discussion of arguments for and against euthanasia. For further information see:³⁷

- L Bartels and M Otlowski, [A right to die? Euthanasia and the law in Australia](#), *Journal of Law and Medicine*, 2010, pp. 550—554
- I Ireland, [Choice, quality of life and self-control: summary arguments in support of Euthanasia](#), Research note, no. 12, 1996-97
- I Ireland, [The Sanctity of Life: Summary Arguments Opposing Euthanasia](#), Research note, no. 13, 1996-97
- Senate Committee on Legal and Constitutional Affairs, [Rights of the Terminally Ill \(Euthanasia Laws Repeal\) Bill 2008](#), chapter 4, June 2008, pp. 33-60

Key provisions

The objects of the Bill are stated in **proposed clause 3**:

(a) to recognise the rights of the legislative assemblies of the Australian Capital Territory, the Northern Territory and Norfolk Island to make laws for the peace, order and good government of

35. For example, In NSW, Greens Ian Cohen MLC introduced the following Private Member's Bills: Rights of the Terminally Ill Bill 2001; Voluntary Euthanasia Trial (Referendum) Bill 2002; Rights of the Terminally Ill Bill 2003; Voluntary Euthanasia Trial (Referendum) Bill 2003. In WA Greens MLC Robin Chapple introduced the Voluntary Euthanasia Bill 2002 and Voluntary Euthanasia Bill 2010. In Tasmania, Greens MLA Nick McKim introduced the Dying with Dignity Bill 2009. According to George Williams, Bills to legalise active voluntary euthanasia have also been introduced and rejected by the parliaments of South Australia and the Australian Capital Territory: G Williams and M Darke, *op. cit.*, p. 649.

36. L Bartels and M Otlowski, *op. cit.*, p. 534.

37. L Bartels and M Otlowski, *A right to die? Euthanasia and the law in Australia*, 2010, 17 JLM 532, pp. 550—554, viewed 25 October 2010, http://parlinfo.aph.gov.au/parlinfo/download/library/jrnart/HYZV6/upload_binary/hyzv60.pdf; I Ireland, *Choice, quality of life and self-control: summary arguments in support of Euthanasia*, Research note, no. 12, 1996-97, viewed 19 October 2010, <http://www.aph.gov.au/library/pubs/rn/1996-97/97rn12.htm>; I Ireland, *The sanctity of life: summary arguments opposing Euthanasia*, Research note, no. 13, 1996-97, viewed 19 October 2010, <http://www.aph.gov.au/library/pubs/rn/1996-97/97rn13.htm>; Senate Committee on Legal and Constitutional Affairs, *Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008*, chapter 4, June 2008, pp. 33-60, viewed 19 October 2010, http://www.aph.gov.au/Senate/committee/legcon_ctte/terminally_ill/report/index.htm

their territories, including the right to legislate for voluntary euthanasia; and (b) to repeal the Euthanasia Laws Act 1997 which removed that right to legislate for voluntary euthanasia.

Schedule 1 amends the Northern Territory, Australian Capital Territory, and Norfolk Island self-government Acts by repealing the sections that restrict the respective Legislative Assemblies to make laws 'which permit or have the effect of permitting (whether subject to conditions or not) the form of intentional killing of another called euthanasia (which includes mercy killing) or the assisting of a person to terminate his or her life'.³⁸ Schedule 1 also repeals the sections in the three self-government Acts which state that each Legislative Assembly has the power to make laws with respect to:

- (a) the withdrawal or withholding of medical or surgical measures for prolonging the life of a patient but not so as to permit the intentional killing of the patient; and
- (b) medical treatment in the provision of palliative care to a dying patient, but not so as to permit the intentional killing of the patient; and
- (c) the appointment of an agent by a patient who is authorised to make decisions about the withdrawal or withholding of treatment; and
- (d) the repealing of legal sanctions against attempted suicide.³⁹

Though it may appear superfluous to repeal the relevant provisions of the Territories' respective self-government Acts in addition to the Euthanasia Laws Act, this amendment was recommended by the Chair of the Senate Committee inquiring into the 2008 Bill to remove any possible uncertainty surrounding the intention of the 2008 Bill. As a representative of the Northern Territory Government told the Senate Committee:

The intention of the bill would appear to be that section 50A of the Northern Territory (Self-Government) Act is to be repealed. But the bill does not say that directly or explicitly. It goes about the matter in a somewhat roundabout way. To get to the outcome that section 50A of the Northern Territory (Self-Government) Act is repealed, you have to come to a view as to the intention of the proposed legislation and then you have to have a legal interpretation of the Commonwealth Acts Interpretation Act to determine the outcome. Why the proposed legislation cannot simply say, 'Section 50A of the Northern Territory (Self-Government) Act is hereby repealed,' is beyond us.⁴⁰

Schedule 2 repeals the Euthanasia Laws Act in its entirety. **Item 2** clarifies that the RTI Act has no force or effect as a law of the Territory, except for any action that was done in accordance with the

38. *Northern Territory (Self-Government) Act 1978* (Cth), subsection 50A (1), *Australian Capital Territory (Self-Government) Act 1988* (Cth), subsections 23(1A) and *Norfolk Island Act 1979* (Cth) paragraph 19(2)(d).

39. *Northern Territory (Self-Government) Act 1978* (Cth), subsection 50A(2), *Australian Capital Territory (Self-Government) Act 1988* (Cth), subsections 23(1B) and *Norfolk Island Act 1979* (Cth), section 19(2A).

40. *Committee Hansard*, 14 April 2008, p. 2 as cited in Senate Standing Committee on Legal and Constitutional Affairs, *Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008* [Provisions], op. cit., p. 27.

RTI Act prior to the commencement of the Euthanasia Laws Act. This proposed amendment is designed to remove any uncertainty as to whether the Northern Territory's RTI Act would be revived, as Senator Brown's 2008 Bill proposed to do.⁴¹ For further information about the possible legal ramifications flowing from this proposed statutory formulation, see discussion under 'main issues'.

Concluding comments

In 1997 the federal parliament passed Kevin Andrews' private member's Bill to remove the power of the legislative assemblies of the ACT, NT and Norfolk Island to make laws with respect to voluntary euthanasia. Now, some thirteen years later, the parliament is being called upon to consider whether these legislative assemblies should have this power restored. As the name of the Bill suggests, this Bill is essentially about restoring territory rights but it is also about potentially restoring the rights of the terminally ill and it is Senator Brown's advocacy in this respect that has undeniably driven this Bill and its predecessors.

As Bartels and Otlowski astutely observe '...it should be recognised that the euthanasia debate is in many respects indeterminable and intractable: it is a controversial subject on which many people hold strong views. It is therefore unlikely that a resolution of the debate can ever be reached which will meet with universal approval'.⁴² That is the arguable basis why this Bill will be determined by a conscience vote.

If this Bill passes and the prohibition on making laws with respect to euthanasia is removed, it remains to be seen whether the current territory governments would introduce and be able to secure passage of legislation to legalise voluntary euthanasia. Though they will have the power to do so (just like their State counterparts), any such legislation may again be overridden by virtue of section 122 of the Commonwealth Constitution or be disallowed by the Commonwealth Governor-General. Unlike 13 years ago—precedents now exist for both types of direct federal intervention. Alternatively, the Government could indirectly intervene by enacting a federal law with respect to euthanasia and thereby override any inconsistent territory (and State) law legalising euthanasia.

41. For a discussion of this issue in the context of the Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008 (which sought to revive the RTI Act) see: Senate Legal and Constitutional Affairs Committee, *op. cit.*, pp. 25—26.

42. L Bartels and M Otlowski, *op. cit.*, p. 550.

© Commonwealth of Australia 2010

This work is copyright. Except to the extent of uses permitted by the Copyright Act 1968, no person may reproduce or transmit any part of this work by any process without the prior written consent of the Parliamentary Librarian. This requirement does not apply to members of the Parliament of Australia acting in the course of their official duties.

Disclaimer: Bills Digests are prepared to support the work of the Australian Parliament. They are produced under time and resource constraints and aim to be available in time for debate in the Chambers. The views expressed in Bills Digests do not reflect an official position of the Australian Parliamentary Library, nor do they constitute professional legal opinion. Bills Digests reflect the relevant legislation as introduced and do not canvass subsequent amendments or developments. Other sources should be consulted to determine the official status of the Bill.

Feedback is welcome and may be provided to: web.library@aph.gov.au. Any concerns or complaints should be directed to the Parliamentary Librarian. Parliamentary Library staff are available to discuss the contents of publications with Senators and Members and their staff. To access this service, clients may contact the author or the Library's Central Enquiry Point for referral.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2678.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.