

Inquiry into the Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008

Senate Legal and Constitutional Affairs Committee

April 2008

Executive Summary

The Law Council supports the *Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008* introduced by Senator Bob Brown to repeal the *Euthanasia Laws Act 1997*.

The Law Council voiced its objections to the passage of the *Euthanasia Laws Act 1997* when it was originally considered by Parliament more than a decade ago. The Law Council submitted that the enactment of the *Euthanasia Laws Act*, the purpose of which was to override the *Rights of the Terminally Ill Act 1995 (NT)*, constituted an unnecessary interference by the Commonwealth Parliament in the internal affairs of the properly-elected Northern Territory (NT) government. Having passed the *Northern Territory (Self Government) Act 1978*, the Law Council submitted that the Commonwealth should not seek to derogate from that grant of self-government on a domestic issue.

The Law Council continues to maintain this position and, for this reason, supports the private members Bill introduced by Senator Bob Brown.

Ad hoc amendments to the law making powers of Territory Legislatures constitute an arbitrary interference in their democratic mandate and undermine the certainty that should exist for Territory citizens when their elected representatives pass a valid law.

In taking this position, the Law Council makes no judgement about the rights or wrongs of euthanasia, on which the Council does not have a position.

Background

The *Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008*, a private Senator's Bill introduced by Senator Bob Brown, proposes to repeal the *Euthanasia Laws Act 1997* to allow the NT, the Australian Capital Territory (ACT) and Norfolk Island to make legislation for people who are terminally ill. In his Second Reading Speech Senator explained the purpose of the Bill as follows:

This is a Bill for an Act to repeal the Euthanasia Laws Act 1997, through which the national parliament overturned the Northern Territory Rights of the Terminally Ill Act 1995. It restores the legitimacy of the Northern Territory legislation, which established the right of a terminally ill person to request assistance from a medically qualified person to voluntarily terminate his or her life in a humane manner, to allow for such assistance to be given in certain circumstances without legal impediment to the person rendering the assistance, to provide procedural protection against the possibility of the abuse of the rights recognised in this Act, and for related purposes. Additionally, my Bill will enable the Australian Capital Territory to introduce legislation for the rights of the terminally ill.

The *Euthanasia Laws Bill 1996* was introduced into Commonwealth Parliament on 9 September 1996 as a private Members Bill by Kevin Andrews. It was introduced in response to the enactment of the controversial *Rights of the Terminally Ill Act 1995 (NT)* which provided a statutory regime that made lawful, in certain circumstances, physician-assisted suicide and active voluntary euthanasia. The purpose of the Commonwealth Bill was to take away the power of the legislative assemblies of the NT,

the ACT and Norfolk Island to make laws which permit euthanasia. The Bill was passed in 1997.

The *Euthanasia Laws Act 1997* amended the *Northern Territory (Self-Government) Act 1978*, the *Australian Capital Territory (Self-Government) Act 1988* and the *Norfolk Island Act 1979* so as to prevent the territories from making 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 amendments did not prevent the Territories from making 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; and
- 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
- 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.

The *Euthanasia Laws Act 1997* made it clear that the *Rights of the Terminally Ill Act 1995 (NT)* had no force or effect as a law of the NT, except with regard to the lawfulness or validity of anything done in accordance therewith prior to the commencement of the Commonwealth Act.

When enacting the *Euthanasia Laws Act 1997*, the Commonwealth Parliament utilised its constitutional power to make laws in respect of the Australian Territories, provided for in section 122 of the Constitution.

Section 122 is not circumscribed by section 51 and effectively allows Commonwealth Parliament to amend or remove any of the legislative powers of the Territories, for example by making changes to legislation which established the framework and parameters of self-government.

The enactment of the *Euthanasia Laws Act 1997* was the first time the Commonwealth used its constitutional power in section 122 to override the laws of an elected parliament of an Australian Territory by revoking part of its legislative mandate.

Law Council’s position

The Law Council has no position on the rights or wrongs of euthanasia, which involves complex and often personal questions of morality.

However, the Law Council is opposed to unwarranted and inappropriate interference with the legislative powers of Australia’s self-governing Territories.

When the Commonwealth *Euthanasia Laws Bill* was being considered by Commonwealth Parliament, the Law Council of Australia voiced its opposition to the Commonwealth overriding laws passed by the elected parliament of the NT.

The Law Council was of the view that although the Commonwealth clearly had the constitutional power to enact the *Euthanasia Laws Act*, to do so constituted an unnecessary interference in the internal affairs of another properly-elected government. Having passed the *Northern Territory (Self Government) Act 1978*, the Law Council submitted that the Commonwealth should not seek to derogate from that grant of self-government in a domestic issue.

The Law Council continues to maintain this position and, for this reason, supports the private members Bill introduced by Senator Bob Brown.

In support of the *Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008*, the Law Council reiterates the following concerns with the Commonwealth overriding legislation passed by an elected government of an Australia Territory:

- The Commonwealth Parliament has invested the Australian Territories with the power of self government. Although this power is not absolute and the Commonwealth retains the constitutional power to make laws in respect of the Territories, strong convention has developed against revoking powers granted to subordinate legislatures.

At the time the *Euthanasia Laws Act* was being debated by Parliament it was often pointed out that the Commonwealth retains a largely unfettered power to disallow or override Territory legislation. It was argued that the existence of this power is in itself evidence of an intention on the part of both the drafters of the Constitution, and the Parliaments which subsequently passed the self-government Acts, to confer an ongoing responsibility on the Commonwealth to supervise the governance of the Territories and a corresponding power to intervene when deemed appropriate.

These sorts of arguments, namely that the existence of a power manifests an expectation that it will be exercised, ignore the role of convention in Australia's legal order.

Convention operates to ensure that powers, often conferred in general terms which imply few limitations, are nonetheless exercised with certainty and consistency.

For example, section 59 of the Australian Constitution provides that "*the Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.*" However, convention dictates that the Queen does not intervene in or override the legislative powers of the Australian parliament. This provision has become obsolete.

This is fortunate because if the ongoing validity of Commonwealth laws remained in doubt for a period of twelve months after assent, lest the law did not find favour with the Queen, then uncertainty would prevail. The successful passage of a Bill through Parliament would no longer signal the end of debate. Those sections of the Australian, or even broader Commonwealth community unsatisfied with the outcome of the parliamentary process could take their case to the Queen.

Similarly in this case, the established convention against revoking powers granted to subordinate legislatures delivers Territorians stability and certainty, notwithstanding that their legislatures are creatures of Commonwealth statute and therefore always vulnerable to direct Commonwealth intervention.

Territorians elect representatives to their local assemblies in the expectation that those representatives will make laws for the peace, order and good governance of their communities within the parameters of the law making powers afforded them by the self-government Acts. It is an affront to the democratic process in which Territorians participate if legislation lawfully passed by their elected representatives is rendered invalid by the operation of Commonwealth laws, which are not of general application, but which are exclusively targeted at the Territories for the express purpose of interfering in their legislative processes.

(It is noted that the undemocratic nature of this intervention is compounded by the fact that Territorians do not enjoy equal representation with their State counterparts in the Commonwealth parliament. While the ACT and NT are represented by just two Senators each, each State, regardless of size, is represented by twelve Senators.)

- Under the Constitution, the Commonwealth Parliament has the power to make laws of national application on a broad range of topics. Provided Commonwealth laws are within power, they take precedence over State or Territory laws on the same subject matter and render the State or Territory law invalid to the extent of any inconsistency. If the Commonwealth Parliament believed that euthanasia was an appropriate subject for Commonwealth legislation then it should have explored ways that the Commonwealth could have passed laws of national application, rather than singling-out the Territories.

For example, if the Commonwealth was concerned that laws legalising euthanasia were in contravention of Australia's international human rights obligations, it could have sought to use the external affairs power to enact a law giving effect to these international obligations. It would then be up to the courts to adjudicate whether Australia's international human rights obligations in fact prohibit the practice of euthanasia and whether the NT law was invalid in light of the Commonwealth Act giving effect to those obligations. (The Law Council acknowledges that whether the NT law contravened Australia's international human rights obligations is by no means a straight forward question, and there is every likelihood that the matter would not have been resolved in the Commonwealth's favour. Nonetheless, if the Commonwealth chooses to invoke human rights argument in support of an intervention in the domestic affairs of a Territory, then it ought to be prepared to properly test those arguments.)

At the time it was also suggested that the Commonwealth might have used its appropriations powers to limit remunerations to doctors acting under the NT scheme or could have explored the option of withdrawing the Medicare provider numbers of those doctors.¹

Ultimately, it may well be that the Commonwealth does not have the power to pass national legislation which definitively outlaws euthanasia. However, to the extent

¹Senate Legal and Constitutional Legislation Committee; Report on the Euthanasia Laws Bill 1996, March 1997 at Paragraph 3.45

that this is the case, it should not be used to justify discriminatory and piecemeal legislation which simply singles out the Territories.

- The Commonwealth's interference in the Territories' law making powers, via the *Euthanasia Laws Act* was arbitrary and ad hoc.

Some principled arguments were advanced to justify the legislation but ultimately these arguments were not reflected in the *Euthanasia Laws Act*, which was only directed at usurping the authority of the territory legislatures on a single topical issue.

For example, at the time the *Euthanasia Laws Act* was being debated it was argued that the Commonwealth should intervene to override the NT law because:

- the NT law brought Australia into disrepute at an international level and contravened basic notions of human rights;
- the NT law affected all Australians, given that any one could choose to travel to the NT to avail themselves of the NT regime; and
- the NT law was impacting adversely aboriginal health because widespread misunderstanding about the operation of the law meant that Aboriginal people were afraid to access health services, lest they be involuntarily euthanised.

Although, these were the 'principled' arguments advanced, the *Euthanasia Laws Act* was not crafted so as to address these concerns in an equally principled way.

For example, in response to the first concern about the violation of rights and damage to Australia's international reputation, it was not suggested that the self-government Acts should be amended, without specific reference to euthanasia, but simply to prevent the Territories making laws which were inconsistent with Australia's obligations under international human rights treaties.

It would, perhaps, have been hypocritical of the Commonwealth Parliament to have constrained the Territory legislatures in this way – given that the Commonwealth Parliament does not regard itself bound to legislate in accordance with Australia's human rights treaty obligations. Further, as discussed above, it is far from clear that such an amendment would have invalidated the NT law because the position on euthanasia at international law remains unclear.

Nonetheless, if human rights and Australia's international reputation was genuinely the principled basis for Commonwealth interference, then such an amendment would have been a more appropriate form of intervention than a one-off removal of powers in relation to euthanasia.

In response to the second concern, namely that the effect of law extended beyond the NT, it was not suggested that the self-government Acts should be amended simply to prevent the Territories making laws which allow for the intentional killing or assisted suicide of a person not resident in the NT. Again, if the extra-territorial impact of the legislation was genuinely the principled basis for Commonwealth

interference, then such an amendment would have been a more appropriate form of intervention.

Finally, in response to the third concern, namely the impact of the law on the indigenous population, it was not suggested that the Commonwealth should explore how it might be able legislate using the 'race power' in the Constitution to moderate the effect of the law on indigenous people, without overriding the law generally. Nor was it suggested that, given the smaller and different nature of the indigenous populations in the ACT and Norfolk Island, no interference in their lawmaking powers was warranted on the basis of this concern.

The Law Council is not advocating for the Commonwealth to adopt any of the three courses outlined above. The Law Council raises these points simply to demonstrate that, while many reasons were advanced for why the Commonwealth should intervene to override the *Rights of the Terminally Ill Act 1995 (NT)*, none of these reasons mask the fact that the *Euthanasia Laws Act* represents an ad hoc decision on the part of the Commonwealth parliament, made against arbitrary criteria, to interfere with the legislative mandate of the Australian Territories on a random issue.

It is the ad hoc and arbitrary nature of the Commonwealth's interference in the democratic rights of Territorians which renders the Commonwealth's actions particularly damaging and exacerbates the ensuing uncertainty for Territory legislatures.

Experience since the passage of the *Euthanasia Laws Act* has only served to underline this point.

Two examples of the Commonwealth's approach to Territory legislation since 1997 demonstrate that the Commonwealth has no consistent, transparent criteria for intervention in the law-making powers of the Territories. These examples suggest that populist political agendas, rather than any objectively assessed national interest criteria, guide the Commonwealth's decision as to whether or how to intervene.

Example One: The Commonwealth Parliament opted not to intervene to override NT laws providing for a harsh mandatory sentencing regime, despite clear evidence that the regime was having a disproportionate impact on the indigenous population and breached Australia's obligations under the *International Covenant on Civil and Political Rights*, the *Convention on Elimination of Racial Discrimination* and the *Convention on the Rights of the Child*. At the time a press release issued by the then Attorney-General, the Hon Daryl Williams, stated that: "*Generally, the Government does not seek to intrude into areas which are traditionally matter of State and Territory responsibility unless there are particularly compelling circumstances.*"²

² Between 1999 and 2001 the Commonwealth Government made a number of public statements urging Western Australia and the Northern Territory to review their mandatory sentencing laws. In April 2000 the Prime Minister and the Chief Minister of the Northern Territory entered into an agreement whereby the Northern Territory introduced a range of measures to lessen the impact of mandatory sentencing on juveniles in exchange for Commonwealth funding for a number of measures including diversionary programs for juveniles

Example Two: In June 2006 the ACT's *Civil Unions Act* was disallowed by the Government 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 enter into and 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".

Under the Constitution, the Commonwealth Parliament has power to make laws with respect to marriage. However, on this occasion, the Commonwealth Government did not assert that any existing Commonwealth law made under that head of power was inconsistent with and therefore prevailed over and invalidated the ACT law. Neither did the Commonwealth Parliament seek to rely on its marriage power to pass a new law of national application which would override the ACT law and any similar State law that might emerge in the future.

The ACT law was simply disallowed.

This disallowance was said to be the first time in Australian history that an unelected representative of the Queen acted to disallow a law passed by an elected parliament.³ 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."*⁴

Based on these examples, it is clear that Territorians currently live with a degree of uncertainty, unsure of when and how the Commonwealth may seek to intervene in and override the actions of their democratically elected representatives.

This is an entirely unsatisfactory state of affairs in a stable, democratic country committed to the rule of law and open and transparent government.

Concluding remarks

The Law Council supports the repeal of the *Euthanasia Laws Act 1997 (Cth)*.

The Law Council has had the benefit of reading the submission of the Gilbert + Tobin Centre for Public Law on the current Bill. The Law Council agrees that whether or not the repeal of that Act by the current Bill would have the effect of reviving the *Rights of the Terminally ill Act 1995 (NT)* or whether it would simply restore the power of the NT assembly to legislate anew is unclear.

in the Northern Territory. In October 2001, following a change of government in the Northern Territory, the Northern Territory Legislative Assembly passed legislation which repealed mandatory sentencing of juveniles and adult property offenders: *Juvenile Justice Amendment Act (No2) 2001* and *Sentencing Amendment Act (No 3) 2001*.

³ Jon Stanhope, Chief Minister of the ACT, 'A mandate to legislate?', Speech at Melbourne University, Lecture in Honour of Sir Anthony Mason, 5 October 2006.

⁴ Jon Stanhope, Chief Minister of the ACT, 'A mandate to legislate?', Speech at Melbourne University, Lecture in Honour of Sir Anthony Mason, 5 October 2006.

The Law Council has not had the opportunity to seek advice on whether there is any statutory formulation which might be included in the Bill to establish, beyond doubt, that the effect of the Bill is to revive the *Rights of the Terminally ill Act 1995 (NT)*.

Obviously, as is suggested in the submission of Gilbert + Tobin Centre for Public Law, the most certain path would be for the NT Assembly to re-enact the 1995 legislation, if indeed it still reflects the will of the majority of the Assembly.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.