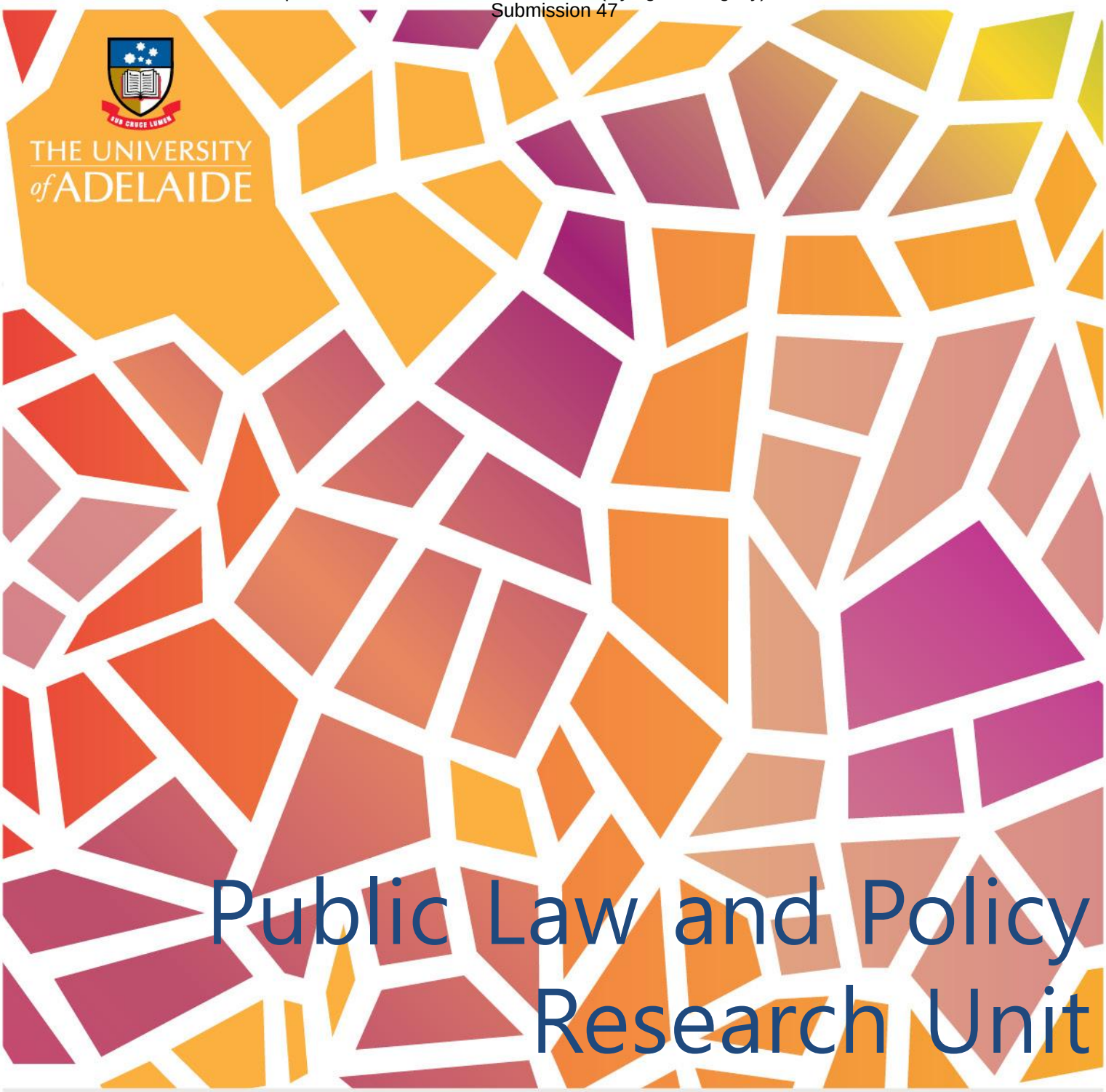

Public Law and Policy Research Unit

Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Medical Services (Dying with Dignity) Exposure Draft Bill 2014

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Introduction

We thank the Committee for the opportunity to make a submission on the Medical Services (Dying with Dignity) Exposure Bill 2014 ('Dying with Dignity Bill'). We have restricted our submission to the constitutional issues that are raised by the proposed legislation. To be clear, we do not, in this submission, take a position as to the morality, humanity or otherwise of assisted and voluntary euthanasia, or the appropriateness of the proposed regulation of assisted and voluntary euthanasia, including the safeguards and requirements placed on medical practitioners who are willing to practice in this area as are proposed in this Bill. We leave those issues to others to address.

The Bill outlines its constitutional foundation in cls 6 and 7. Its authority purports to rest primarily upon the 'sickness and hospital benefits' and 'medical services' aspects of s 51 (xxiiiA) of the Constitution (and any other implied legislative power). As a fall-back position, which would provide for a narrower operation of the legislation, the Bill will rely upon the territories power (s 122 of the Constitution) and the 'corporations' power (s 51 (xx)).

An important aspect of the Bill is providing immunity to those practitioners willing to practice in this area from liability under other laws, including State criminal laws. This requires the Bill to create an inconsistency with the relevant State legislation under s 109 of the Constitution, thus rendering the State laws inoperative. In Part 5 a number of immunities are granted to medical practitioners who supply dying with dignity medical services. These provisions demonstrate that if the Bill is enacted and is found to be unconstitutional, there are serious consequences for an individual doctor involved. If the Bill is found to be valid but only on a narrow basis (for example, only in its operation in the Territories, or with respect to medical practitioners employed by constitutional corporations), other medical practitioners who had relied on the purported protections provided by Part 5 will find themselves liable for prosecution under criminal homicide legislation.

It is our submission that the Dying with Dignity Bill is likely to be wholly supported under s 51(xxiiiA) of the Constitution. There are strong arguments in the alternative that it is supported in part by the territories power (s 122) and the corporations power (s 51(xx)). To the extent that it is supported by these heads of power, it will render any inconsistent State legislation invalid.

Outline of constitution submission

The submission will deal with the following questions:

(a) the nature and scope of the 'benefits' and 'medical services' power;

(b) other constitutional powers, and

(c) the possible inconsistency with State and Territory legislation

The nature and scope the 'benefits' and 'medical services' power

At Federation the 'welfare state' was in its infancy. The inclusion of s 51 (xxiii) (the power to make laws for 'invalid and old-age pensions') was an attempt by framer James H Howe to give welfare powers to the federal government, which had 'a super vantage-ground which would enable it to deal effectively and comprehensively with the subject, which could not be done by the disunited efforts of the States.'[1] Unity would ensure those who moved across the country would still receive welfare rights and benefits.

The modern welfare state was a significant element of the post World War II reconstruction. In 1946 the Commonwealth Constitution was altered by referendum to insert s 51 (xxiiiA). The catalyst for that amendment was the High Court's decision in *Attorney-General (Vic) v Commonwealth*; *Ex rel Dale* ('*Pharmaceutical Benefits Case*'),[2] which held invalid parts of the *Pharmaceutical Benefits Act 1944* (Cth).

Section 51 (xxiiiA) gives the Parliament power to make laws with respect to:

> 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.

The section deals with 11 instances under which the Commonwealth may make 'provision'.[3] The Dying with Dignity Bill concerns only two: the provision of sickness and hospital benefits and medical services.

Since the insertion of the section there has been limited opportunity for the High Court to consider the meaning of the text. The validity of the Dying with Dignity Bill will turn upon whether a 'medical service' or 'sickness or hospital benefit' has been 'provided', and whether any regulation of or immunity granted to medical practitioners involved is incidental to that provision. There has been some discussion of what it means to 'provide' those benefits and services in contradistinction to simply regulating them. There has been some recent discussion of the 'benefit' aspect of the section in the High Court's decisions relating to the National School Chaplains' Program.[4] There has been very little discussion of what constitutes a 'medical service'.

1 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, 1901 edition, 1976 reprint) 612.
2 (1945) 71 CLR 237.
3 *British Medical Association v Commonwealth* (1949) 79 CLR 201, 259 (Dixon J).
4 See *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth (No 2)* [2014] HCA 23; (2014) 88 ALJR 701.

'Provision'

It has been emphasised that the power is one to make *provision for* the items listed in the section, *not* laws regulating the items outright.[5] In *British Medical Association v Commonwealth*, Latham CJ observed:

> The power is not a power to make laws with respect to e.g. pharmaceutical benefits and medical services. It is a power to make laws with respect to *the provision of* such benefits and services. A power to make laws with respect to medical services might well be held to be a power which would authorize a law providing for the complete control of medical services rendered by any person to any other person and so would enable the legislature to control the practice of the medical profession completely or to such less extent as Parliament might think proper … But the actual power is a power to make laws not with respect to pharmaceutical benefits or with respect to medical services etc., but with respect to the *provision* of such benefits and services.[6]

As Karen Wheelwright explains, the purpose of s 51(xxiiiA) has been interpreted:

> to enable the Commonwealth *itself* to provide the services and benefits which s 51(xxiiiA) mentions. Parliament cannot require, or proscribe, the provision of allowances, benefits or services by others, such as pharmacists, doctors or hospitals, or the states. It follows that the Commonwealth lacks direct power to regulate the private delivery of health services.'[7]

However, Peter Hanks explains that some regulation of these benefits and services may be achieved as incidental to ensuring that programs delivered at public expense through the private sector operate efficiently.[8] The Commonwealth may regulate services to the public provided by private practitioners who agree to participate in a federally funded scheme.

Part 3 of the Dying with Dignity Bill provides for the payment of medical practitioners who have provided a dying with dignity medical service under the legislation. The payment is made by the Commonwealth in accordance with the fees set in the regulations. Payment by the Commonwealth for the services is taken as full payment for those services. While the Dying with Dignity Bill is concerned with the regulation of dying with dignity medical services provided by private practitioners or those working in State public hospitals, it is regulating only those services that are wholly federally funded, and only those practitioners who agree to participate in the scheme. We would therefore submit that this aspect of the power is satisfied.

The next question is whether the provision of a dying with dignity medical service is a 'medical service' or 'sickness or hospital benefit' within the meaning of s 51 (xxiiiA). The meaning of

5 *British Medical Association v Commonwealth* (1949) 79 CLR 201, 260 (Dixon J); see also Gibbs J in *General Practitioners Society of Australia v Commonwealth* (1980) 145 CLR 532, 557; *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271, 279.

6 *British Medical Association v Commonwealth* (1949) 79 CLR 201, 242-3.

7 Karen Wheelwright, 'Commonwealth and State Powers in Health – A Constitutional Diagnosis' (1995) 21 *Monash University Law Review* 53, 59.

8 Peter Hanks, *Constitutional Law in Australia* (2nd ed, Butterworths, 1996) 451.

these terms within the Constitution has had little direct consideration. They will, of course, be informed by general principles of constitutional interpretation.

Medical services

Much discussion of the 'medical services' aspect of the power has focused upon the limitation upon the Commonwealth in respect to the authorization of 'any form of civil conscription'.[9] In *Wong v Commonwealth*,[10] members of the High Court considered the origins and meaning of 'civil conscription' with s 51 (xxiiiA). The Court confirmed that, as with the general principles of constitutional interpretation, the historical context, but not the original intent of the individuals involved, will be of assistance in deriving the meaning of the words of the Constitution. Undoubtedly the origin of the insertion of s 51(xxiiiA) of the Constitution was to facilitate the provision of pharmaceutical and medical services by the Commonwealth as they were understood immediately after World War II.

However, the meaning of 'medical services' is not limited to our understanding of them as of that date. As the Court noted in *Grain Pool of WA v Commonwealth*,[11] (when considering the meaning of 'patent' in s 51(xviii)) it is not appropriate to limit the meaning of words in the Constitution to that which would have been accepted at the time of Federation. Citing previous authority the Court stated:

> These words do not suggest, and what follows in these reasons does not give effect to, any notion that the boundaries of the power conferred by s 51(xviii) are to be ascertained solely by identifying what in 1900 would have been treated as a copyright, patent, design or trade mark.[12]

As is well known the words of the Constitution are to be construed 'with all the generality which the words used admit'.[13] While it is a constitutional phrase, the meaning of 'medical services' must be informed by the dynamic nature of the medical practice. The power would include, for instance, the application of existing medical knowledge to clinical situations and the assessment of the wellbeing and capacity of a patient. The regulation of a medical service has extended to the keeping of records and reporting of procedures.[14] In short, many of the requirements within the Bill as to assessing the mental capacity of a patient, the terminal nature of their illness and the administration of pharmaceuticals are arguably within the scope of the section.

However, there is a question as to whether the taking of a deliberate action to end the life of an individual can constitute a 'medical service' within the meaning of s 51(xxiiiA). There are obvious moral and professional objections that can be raised against the provision of a service that is designed to end a patient's life, rather than to heal, preserve or relieve pain and suffering. However, from a purely constitutional standpoint, there is no obvious inference to be

9 See, eg, *Wong v Commonwealth* (2009) 236 CLR 573.
10 (2009) 236 CLR 573.
11 (2000) 202 CLR 479.
12 Ibid 496.
13 Ibid 492, citing *R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225-6.
14 *Pharmaceutical Benefits Case* (1945) 71 CLR 237.

drawn that the meaning of 'medical service' is solely limited to the preservation of life. Indeed, apart from the prohibition on civil conscription, the Parliament is free to legislate within the broad scope of the power.

Sickness and hospital benefits

Even if dying with dignity medical services are not 'medical services' within the meaning of s 51(xxiiiA), the Dying with Dignity Bill may be supported by another aspect of s 51(xxiiiA): the provision of 'sickness and hospital benefits'. The meaning of 'benefit' that has commanded support within the High Court was first outlined by McTiernan J in *British Medical Association v Commonwealth*.[15] He stated that:

> The material aid given pursuant to a scheme to provide for human wants is commonly described by the word 'benefit.' When this word is applied to that subject matter it signifies a pecuniary aid, service, attendance or commodity made available for human beings under legislation designed to promote social welfare or security: the word is also applied to such aids made available through a benefit society to members or their dependants. The word 'benefits' in par (xxiiiA) has a corresponding or similar meaning.[16]

In *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth*,[17] payments by the Commonwealth to private nursing homes, calculated on the basis of the number of days each patient was in care, were held to be 'sickness and hospital benefits' within the meaning of s 51(xxiiiA).

In *Williams v Commonwealth (No 2)*, the Court considered the issue in the context of whether the provision of funding to a chaplaincy provider to provide chaplaincy services to students and the wider school community constituted a 'benefit to students'. Looking at the different elements of the power, Crennan J stated that:

> Each of the 11 grants of power in s 51(xxiiiA), whether described by reference to 'allowances', 'pensions', 'child endowment', 'benefits' or 'services', involves an entitlement of persons to money, goods or services provided, or underwritten, by the federal government.[18]

Having regard to the various kinds of 'benefit' named in s 51(xxiiiA) – unemployment, pharmaceutical, sickness and hospital benefits as well as benefits to students – French CJ, Hayne, Kiefel, Bell and Keane JJ in *Williams v Commonwealth (No 2)* found that 'benefits' in s 51(xxiiiA) refers to:

> the provision of aid to or for individuals for human wants arising as a consequence of the several occasions identified: being unemployed, needing pharmaceutical items such as drugs or medical appliances, being sick, needing the services of a hospital, or, as is relevant to this case, being a student. The benefits are occasioned by and directed to the

15 (1949) 79 CLR 201.
16 Ibid 279.
17 (1987) 162 CLR 271.
18 *Williams v Commonwealth* [2014] HCA 23, (2014) 88 ALJR 701 [109].

> identified circumstances. In the usual case, the assistance will be a form of material aid to relieve against consequences associated with the identified circumstances.[19]

Is providing a dying with dignity medical service the provision of a 'sickness or hospital benefit' to the person? 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.

The 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. We are of the view that the procedures contemplated by the Bill are arguably within the scope of s 51(xxiiiA).

Other constitutional powers

Corporations power

Clause 7(2) of the Dying with Dignity Bill provides that, without prejudice to the effect of the Act apart from this section, the Act will have 'the effect it would have if its operation were, by express provision, confined to a medical practitioner employed by a constitutional corporation.'

Parliament's power to make laws with respect to foreign, trading and financial corporations under s 51(xx) of the Constitution extends, relevantly, to:

> the regulation of the *activities, functions*, relationships and business of a [foreign, trading or financial corporation] ... and, in respect of those matters, to the regulation of the conduct of *those through whom it acts*, *its employees* and shareholders …[20]

Clauses 10-15 of the Dying with Dignity Bill regulate, in detail, the manner in which medical practitioners may provide dying with dignity medical services. If, relying on cl 7(2), this is read as applying only to medical practitioners working for constitutional corporations, it is arguable that these provisions regulate the conduct of those corporations' employees, in relation to the activities and functions of corporations. However, the argument for validity would be stronger if cl 7(2) were amended to read:

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

Some medical practitioners may be employed by a constitutional corporation but provide dying with dignity medical services in a different capacity – for example, while acting for a different employer who is not a constitutional corporation. The corporations power is unlikely to

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19 Ibid [46].

20 *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346 at 375 [83], quoted in *New South Wales v Commonwealth* ('*Work Choices Case*') (2006) 229 CLR 1 at 114 [178] (emphasis added).

support a law regulating activities of employees of constitutional corporations if those activities are not connected to the activities, functions, business or relationships of corporations.[21] If this amendment is made, it is likely the Dying with Dignity Bill would be supported by s 51(xx), insofar as it applies to medical practitioners acting in the course of their employment by constitutional corporations.

In the recent case of *Williams v Commonwealth (No 2)*,[22] the High Court appeared to take a slightly narrower approach to the corporations power than had previously been the case, emphasising the need for a law supported by s 51(xx) to regulate or permit acts by or on behalf of corporations.[23] Even allowing for a narrower approach, the Dying with Dignity Bill (if amended as suggested above) appears within power: it regulates the manner in which medical practitioners, acting on behalf of constitutional corporations, perform certain activities.

One area of uncertainty for this aspect of the Dying with Dignity Bill is whether corporations providing medical services can be considered trading or financial corporations within the meaning of s 51(xx). This issue does not affect the validity of the law, but does affect the scope of its operation. On the current state of the law, a trading or financial corporation is one that engages in substantial trading or financial activities.[24] On this view, many (though not all) corporations that provide medical services will qualify as trading or financial corporations even though they may have benevolent purposes.[25] It must be noted that, in recent cases, the High Court has expressly left open the question of whether the principles governing the meaning of 'trading and financial corporations' should be reconsidered.[26] If the focus of these principles were to shift from the *activities* in which corporations engage to the *purpose* for which they are formed, it is possible that many corporations providing medical services will no longer qualify as trading or financial corporations. This would narrow the operation of the Dying with Dignity Bill. At present, however, this is only speculation.

Subject to these caveats, our submission is that the Dying with Dignity Bill is likely to be supported by s 51(xx) to the extent that it applies to the activities of medical practitioners acting in the course of their employment by constitutional corporations.

Territories power

The territories power (s 122) provides the Commonwealth with a broad legislative power in the Territory. It is generally unlimited by the grants of legislative power in ss 51 and 52. As such, the Dying with Dignity Bill, in so far as it extends to the Territories, would easily rely on this power.

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21 See *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 369 (McHugh J).

22 [2014] HCA 23; (2014) 88 ALJR 701.

23 Ibid [50].

24 *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.

25 See, eg, *E v Australian Red Cross Society* (1991) 27 FCR 310, 340-5.

26 *Work Choices Case* (2006) 229 CLR 1, 75 [58]; *Williams v Commonwealth (No 2)* [2014] HCA 23; (2014) 88 ALJR 701, [51].

Section 109

Section 109 of the Constitution provides:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the extent of the inconsistency, be invalid.

To ensure that practitioners providing dying with dignity services are not pursued or prosecuted under State legislation prohibiting the procedure, the Dying with Dignity Bill must create an inconsistency with this State legislation. Clauses 24 and 25 state:

> **24 Immunity from civil, criminal and disciplinary actions**
>
> No civil, criminal or disciplinary action lies, and proceedings must not be brought, against a person in relation to an act done, or omitted to be done, if the act is done, or omitted to be done, by the person:
>
> (a) in good faith; and
>
> (b) for the purposes of this Act; and
>
> (c) in accordance with this Act.
>
> **25 Certain acts and omissions are not offences**
>
> An act done, or omitted to be done, does not constitute an offence against a law of the Commonwealth, a State or a Territory if the act is done, or omitted to be done:
>
> (a) in good faith; and
>
> (b) for the purposes of this Act; and
>
> (c) in accordance with this Act

There is some early authority from the High Court that the Commonwealth Parliament cannot 'create' or 'manufacture' inconsistency with State laws.[27] However, more recent High Court authority has held that, provided there is a connection to a head of legislative power, a provision that is also directed at creating an inconsistency with State legislation will be valid.[28] Therefore, provided that there is a sufficient connection to the heads of power discussed above, cls 25 and 25 of the Bill would not be invalid simply because they are directed at creating an immunity from State legislation.

However, there is also some doubt as to whether the power to provide benefits and services in s 51(xxiiiA) can be used by the Commonwealth to displace, under s 109, social welfare programs provided by the States.[29] Whether this is indeed the case does not need to be decided

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27 See further George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law & Theory* (6th ed, 2014) 311.

28 See, eg, *Airlines of NSW v NSW (No 2) (Second Airlines Case)* (1965) 113 CLR 54; *Bayside City Council v Telstra Corporation Ltd* (2004) 216 595 and *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1.

29 See, eg, *British Medical Association v Commonwealth* (1949) 79 CLR 201, 244 (Latham CJ) and 260(Dixon J).

to determine whether the Dying with Dignity Bill displaces the necessary State legislation. This is because the State legislation that is displaced by the Dying with Dignity Bill is not legislation that concurrently provides social welfare programs. Rather, it is State legislation that prohibits particular services. We therefore submit that Commonwealth legislation that removes liability imposed by State legislation for the federally funded provision of medical services, or the receipt of sickness or hospital benefits, would be within the scope of s 51(xxiiiA).

Insofar as the Dying with Dignity Bill is supported by the corporations power, cls 24 and 25 are likely to be within power because they are incidental to the regulation of activities performed by medical practitioners on behalf of corporations.

Conclusion

It is our submission that the Dying with Dignity Bill is likely to be wholly supported under s 51(xxiiiA) of the Constitution. There are strong arguments in the alternative that it is supported in part by the territories power and s 51(xx). To the extent that it is supported by these heads of power, it will render any inconsistent State legislation invalid.