PERSONAL SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO THE RIGHTS OF THE TERMINALLY ILL (EUTHANASIA LAWS REPEAL) BILL 2008

FROM

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INTRODUCTION

There are 3 specific issues which need to be addressed by the Senate Committee in relation to the Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008.

What is the nature of the relationship between the Commonwealth Parliament and the Northern Territory?

What does the Rights of the Terminally Ill Act (NT) 1995 do?

What is the moral/philosophical issue involved in both the Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008 and in the Rights of the Terminally Ill Act (NT) 1997?

1. THE NATURE OF THE RELATIONSHIP BETWEEN THE COMMONWEALTH PARLIAMENT AND THE NORTHERN TERRITORY

No consideration of the Bill before the Senate can be commenced until there is a clear understanding of the relationship that exists under the Constitution between the Commonwealth and the Northern Territory.

The mere existence of a Northern Territory Parliament and the appearance of a self governing Northern Territory cannot hide the Constitutional fact that the control of the Northern Territory lies in the hands of the Commonwealth Parliament.

The Australian Constitution provides unambiguously in S.122 that the Commonwealth Parliament may make laws for the government of any territory.

Using its legislative power under S.122 the Commonwealth Parliament made a law allowing the Northern Territory to be self governing within the limits imposed by the Commonwealth Parliament.

The Commonwealth Parliament cannot make a law to set aside the government of any State nor can it make a law which simply removes from the power of a State legislative powers which have been given to the States by the Constitution.

Yet the Commonwealth Parliament can simply set aside the government of the Northern Territory or simply further restrict the legislative powers of the government of the Northern Territory.

A Territory, even the Northern Territory, is not a State and does not have the Constitutional powers and rights of a State.

The fact that the population of the Northern Territory are represented in both Houses of the Commonwealth Parliament, just as the populations of the States are, cannot be used to bolster any claim of rights by the Northern Territory government. In fact, the representation of the Northern Territory in the Commonwealth Parliament only exists because the Commonwealth Parliament allows it. All of the rights of the Northern Territory only exist at the whim of the Commonwealth Parliament.

This rather blunt assessment of the actual status of the Northern Territory Government and Parliament is not meant to demean the Northern Territory Government and Parliament but is intended to ensure that any consideration of the Bill before the Senate Committee is considered from the proper Constitutional basis.

The Northern Territory Government and Parliament have never been free to determine all issues pertaining to the government of the peoples of the Northern Territory.

The original Northern Territory Self Government Act placed a very specific limitation on the legislative power of the Northern Territory Parliament in relation to industrial relations. Recently the Commonwealth Parliament has specifically overridden several laws of the Northern Territory with the passage of the Northern Territory National Emergency Response Act 2007.

Even more importantly, the Northern Territory Self Government Act contains a very specific power in S.9 allowing the Commonwealth Government, acting through the Governor General, to disallow any law of the Northern Territory Parliament.

The Commonwealth Government can use its Executive power to get the Governor General to disallow a Northern Territory law but this disallowance has to occur within 6 months of the Northern Territory law having been made.

It is clear that the Commonwealth Government did not have to present to the Commonwealth Parliament the Euthanasia Laws Act 1997 to override the Northern Territory Rights of the Terminally Ill Act.

The Commonwealth Government could have achieved the same result of overriding the NT Rights of the Terminally Ill Act by simply disallowing it without the need for any debate in the Commonwealth Parliament.

The reality was, however, that in 1995 the Commonwealth Government was the Labour Government and in 1997 the Commonwealth Government was the Coalition Government.

The above discussion raises 2 very important issues.

Firstly, the object of the Bill is factually and Constitutionally wrong.

S.3 of the Bill provides:

> *"3 Object of Act*
> *The object of this Act is, in recognising the rights of the people of the Australian Capital Territory, the Northern Territory and Norfolk Island to make laws for the peace, order and good government of their territories, including the right to legislate for the terminally ill, to repeal the Euthanasia Laws Act 1997 which removed that right."*

In the proper Constitutional sense, the people of the ACT, NT and Norfolk Island do not, and have never had, "the right" to make laws for the peace, order and good government of their territories, including the right to legislate for the terminally ill.

The Bill asserts a "right" which does not exist.

The Bill asserts that by repealing a specific Commonwealth Act that a "right" which does not exist will be restored.

The Bill is founded on such a fundamental misunderstanding as to the relationship between the Commonwealth Parliament and the several Territories that the Bill should be rejected.

Secondly, I note the submission made by Dr Andrew Lynch and Professor George Williams of the Gilbert Tobin Centre of Public Law (Submission 46) in which they draw attention to the status of the Rights of the Terminally Ill Act (NT) 1995.

I do not disagree with that part of their submission.

As they properly conclude, there is real doubt that the Rights of the Terminally Ill Act (NT) 1995 can be revived simply be repealing the Euthanasia Laws Repeal Act (Cwth) 1997

This alone is sufficient reason for the Senate to reject the Bill.

It is poor law making in the extreme if the Commonwealth Parliament repeals one of its own laws which currently operates with certainty of outcome and replaces the Commonwealth law with a uncertain and potentially inoperable Northern Territory law.

Legal certainty should not be replaced by legal uncertainty!

Thirdly, if the passage of the Bill did lead to the revival of the Rights of the Terminally Ill Act (NT) then a significant change to the Bill is needed.

The Northern Territory Self Government Act is always predicated upon the Commonwealth Government having the power to act through the Governor General to disallow a new law of the Northern Territory and the Bill should have recognized this and incorporated a provision in relation to a revived Northern Territory law.

The Bill should replicate the provisions of S.9 of the Northern Territory Self Government Act so as to allow the Commonwealth Government to disallow the Rights of the Terminally Ill Act (NT) 1995 (if it can be revived) if the Commonwealth Parliament repeals the Euthanasia Laws Act (Cwth) 1997.

If the Bill is to proceed to debate in both the Senate and the House of Representatives, then the Bill must be amended.

S.3 of the Bill should be amended to accurately reflect the fact that the “right” to self government is subject to the will of the Commonwealth parliament and to the provisions of the Northern Territory Self Government Act.

A new S.3A should be inserted into the Bill as follows:

> *3A. Section 9 of the Northern Territory (Self Government) Act 1978 applies to the Rights of the Terminally Ill Act (NT) 1995 as if the reference to “the Administrators assent” was a reference to the date of assent of this Act.*

2. THE RIGHTS OF THE TERMINALLY ILL ACT (NT) 1995.

No debate on the proposed repeal of the Rights of the Terminally Ill Act (NT) 1995 should occur unless there is a clear understanding as to what that law will do or permit to be done if that law is allowed to operate.

What the Rights of the Terminally Ill Act (NT) 1995 allows or permits is determined by its structure.

The broad purpose of the Rights of the Terminally Ill Act (NT) 1995 is to permit the euthanizing or controlled killing of persons who request to be killed in circumstances

where they are in suffering and facing imminent death due to the course of some disease or illness.

The Rights of the Terminally Ill Act (NT) 1995 provides as its Long Title that it is:

> *"An Act to confirm 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 abuse of the rights recognised by this Act; and for related purposes."*

The Rights of the Terminally Ill Act (NT) 1995 does not appear to meet its objectives as set out in its long title.

One of the philosophical and moral arguments raised in relation to any euthanasia law is the "slippery slope" argument.

In the case of the Rights of the Terminally Ill Act (NT) 1995 it appears that there is not much of a "slippery slope" left as the Act itself provides such a flexible approach to euthanasia that what many opponents of euthanasia would regard as part of the "slippery slope" are actually already contained in this Act.

An analysis of the Act reveals this.

The Rights of the Terminally Ill Act (NT) 1995 permits euthanasia in the circumstances set out in S.4:

> *4. Request for assistance to voluntarily terminate life*
>
> *A patient who, in the course of a terminal illness, is experiencing pain, suffering and/or distress to an extent unacceptable to the patient, may request the patient's medical practitioner to assist the patient to terminate the patient's life.*

The elements of S.4 are:

> There is a person known as 'the patient'
> The patient has to have a 'terminal illness'
> The patient must be experiencing one or more of the following: 'pain', 'suffering', 'distress'.
> The patient must form the view that the pain, suffering, distress is unacceptable
> The patient may request the patient's medical practitioner for assistance to end the patients life.

The definition of "terminal illness" is rather open ended. The Act defines both "illness" and "terminal illness" and when combined the definition of terminal illness is:

> *"in relation to a patient, means an illness, including an injury or degeneration of mental faculties or degeneration of physical faculties, which, in reasonable medical judgement will, in the normal course, without the application of extraordinary measures or of treatment unacceptable to the patient, result in the death of the patient."*

Illness includes a mere degeneration of physical faculties.

In other words getting old is an illness for the purposes of the Rights of the Terminally Ill Act (NT) 1995.

The illness has to, in reasonable medical judgment, lead in its normal course to death, if only ordinary measures are applied or alternatively if only treatment acceptable to the patient is used.

Getting old will clearly result in death.

The illness must be causing either severe pain or severe suffering to the patient. As suffering is not pain then getting old could clearly cause severe suffering to a person who doesn't want to put up with the physical degeneration associated with getting old.

What society may consider as growing old gracefully would on the structure of the Rights of the Terminally Ill Act (NT) 1995 be sufficient to permit euthanasia to be performed on a person who did not want to grow old gracefully.

The only checks and balances on the right to be euthanized are set out in S.7 of the Rights of the Terminally Ill Act (NT) 1995.

The checks and balances in S.7 are illusory in any real sense.

To comply with S.7 in a manner which gives to the patient what they want is easy.

The patient selects, as their medical practitioner, a person who supports an open slather approach to euthanasia.

The patient and their medical practitioner then find another medical practitioner and a qualified psychiatrist both of whom support an open slather approach to euthanasia, who act as the check on the patient's medical practitioner and on the patient's state of mind and perceptions.

With the 3 persons in place it then becomes relatively straightforward to get the right ticks in the right boxes to determine that getting old will definitely lead to death and that getting old can cause severe suffering to a person and that a person who doesn't want to get old can request to be killed.

The trouble with this scenario is that the physical degeneration associated with getting old has certainly set in by early adulthood and from then on it's all downhill until we die.

Euthanasia under the Rights of the Terminally Ill Act (NT) 1995 would be permitted to be carried out on a normally healthy person who claims that they are severely suffering from the mere fact of getting older.

The Second Reading Speech of Senator Brown appears to ignore the real operation of the Rights of the Terminally Ill Act (NT) 1995.

There is also a weakness in the structure of S.4 and S.7.

Under S.4 a patient may make a request to a medical practitioner for euthanizing because the patient is experiencing "distress" from the terminal illness but under S.7 "distress" is not one of the factors that either the medical practitioner or the psychiatrist is allowed to take into account in assessing the request.

A critical defect of the Rights of the Terminally Ill Act (NT) 1995 is that there is no need for anyone other than proponents of euthanasia to be involved in the process of assessing the claims of the patient and the conduct of the medical practitioners and psychiatrists.

If the Rights of the Terminally Ill Act (NT) 1995 had any intention of being something other than an open slather on euthanasia then the Act should have contained a requirement for a **contradictor** to be involved.

The legal notion of a contradictor is a person who has the role of arguing against a case when there is no naturally occurring opposing party.

The absence of such a role within the Rights of the Terminally Ill Act (NT) 1995 is a powerful argument against allowing the Act to operate.

Another aspect of the Rights of the Terminally Ill Act (NT) 1995 is the impact that the Act has on health care providers through the operation of S.20 which provides:

> *20. Immunities*
>
> *"(2) A professional organisation or association or health care provider shall not subject a person to censure, discipline, suspension, loss of licence, certificate or other authority to practice, loss of privilege, loss of membership or other penalty for anything that, in good faith and without negligence, was done or refused to be done by the person and which may under this Act lawfully be done or refused to be done.".*

An illustration of the operation of S.20 is as follows:

> A NT hospital is run by a Church group and operates on the basis that it will not practice euthanasia.
>
> The hospital employs Dr AB who, as part of his contract, agrees not to engage in euthanizing people either at or away from the hospital.
>
> Dr AB subsequently engages in euthanizing people under the Rights of the Terminally Ill Act (NT) 1995.
>
> S.20 of the Rights of the Terminally Ill Act (NT) 1995 prevents the Church run hospital from taking any action against Dr AB.
>
> S.20 of the Rights of the Terminally Ill Act (NT) 1995 ignores the fact that Dr AB could cause tremendous damage to the Church run hospital and ignores and overrides any rights the hospital may have.

The two fundamental flaws identified above in relation to the Rights of the Terminally Ill Act (NT) 1995 should be sufficient to convince the Senate not to support the Bill.

3. THE MORAL/PHILOSOPHICAL ISSUE INVOLVED IN BOTH THE RIGHTS OF THE TERMINALLY ILL (EUTHANASIA LAWS REPEAL) BILL 2008 AND IN THE RIGHTS OF THE TERMINALLY ILL ACT (NT) 1997.

As part of the preparation of this submission I downloaded and read the first 104 submissions on the Committees website. At the time I did so there were only 104 submissions. As I am now concluding this submission, I find that there are 373

submissions and I presume the number will grow before the cut off date for submissions on the 9th April.

I am opposed to any form of euthanasia even though as a young teenager I watched my mother die a slow and painful death at home from stomach cancer and as an adult I watched my father slowly die from lung cancer.

Notwithstanding the large number of submissions to this Committee, the moral/philosophical debate around euthanasia simply cannot take place in the Parliament using this Bill as the vehicle.

If the Commonwealth Parliament wishes to express a view on the issue of euthanasia then a proper debate needs to take place in which the core question is: Should euthanasia be permitted at law?

The debate around the proposed repeal of the Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008 is not an effective debate about euthanasia. The technical legal questions raised in this and other submissions makes clear that many members of the Commonwealth Parliament can effectively hide their views on euthanasia.

Even opponents of the Euthanasia Laws Repeal Act 1997 would have to admit that that Act generated a real and substantial debate in Parliament over the issue of euthanasia.

A similar debate on the question of policy should occur rather than use this Bill.

I note that in my field of work the Senate has conducted numerous Committee Inquiries into specific Bills relating to Workplace Relations but that these all suffer from the same difficulty, namely they must address the specifics of the Bill. When the issue of Workplace Agreements had not been, and could not be properly addressed in the context of any one of the many Workplace Relations Bills, a special Senate Committee Inquiry was conducted into Workplace Agreements.

A similar approach can be taken to the euthanasia debate.

The need for an extensive and intensive Senate Committee Inquiry into euthanasia will allow a proper opportunity to the Senate to examine in depth:

- the large amount of international literature on euthanasia;
- the actual operation of laws in other countries permitting, controlling or prohibiting euthanasia;
- the social impact of those laws;
- the underlying moral/philosophical positions of the proponents and adversaries of euthanasia;
- the state of public opinion and the relationship between public opinion and legislative action; and
- the numerous other complex issues relating to euthanasia.

Finally, I note that in the context of this Bill there are plans for public hearings to be held in Darwin and Sydney only.

This alone is a very strong argument for the rejection the Bill and for ensuring that any debate within the Parliament on the issue of euthanasia is conducted in a way

which not only addresses the fundamental policy/philosophical issues but does so in a manner which allows the various views presented in written submissions to be added to in oral submissions at public hearings which should be held in every State and Territory.

As I live in Melbourne, I am effectively disenfranchised from attending the Senate Committee public hearings unless the Government paid my way.

I note that in one of the Workplace Relations Act Amendment Bill matters which was before a Senate Committee, that the former Government did pay the travel costs of some of its supporters to attend and present at a public hearing.

I somewhat doubt that the current Government will want to pay my travel costs to Sydney or Darwin but if such financial assistance is available, I would be glad of an opportunity to attend the public hearings.

I thank the Committee for the opportunity to make a submission on this matter.

A Postcript

From an email sent to me today (8 April).

MY LIVING WILL

Last night my wife and I were sitting in the den and I said to her,

> 'I never want to live in a vegetative state, dependent on some machine and fluids from a bottle to keep me alive. That would be no quality of life at all, If that ever happens, just pull the plug.'

So she got up, unplugged the computer, and threw out my wine.

She can be such a bitch sometimes!