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Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
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Canberra ACT 2600

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Dear Senate Standing Committee

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

Thank you for the opportunity to make a submission to this inquiry. The Sydney Centre for International Law is a leading research and policy centre on international law. This submission considers only the central question whether the Bill is compatible with Australia's international law obligations, in particular the duty to protect the 'right to life' under article 6(1) of the International Covenant on Civil and Political Rights (ICCPR):

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

The Terminally Ill (Euthanasia Laws Repeal) Bill 2008 (the Bill) seeks to repeal the *Euthanasia Laws Act 1997* (Cth), to re-effect the *Rights of the Terminally Ill Act 1995* (NT), and to permit the ACT and Norfolk Island to legislate for the terminally ill. The key international law issue is whether, by providing for the reinstatement of the *Rights of the Terminally Ill Act 1995* (NT) and thus the legalization of active voluntary euthanasia in the Northern Territory, Australia is adequately protecting the right to life.

The Scope of the Human Right to Life

International human rights law has not determined the question whether the right to life includes a correlative 'right to die', as, for instance, in the manner that freedom of religion has been interpreted to encompass the freedom *not* to have religious beliefs (UN Human Rights Committee, General Comment 22).

At international law, there is no absolute right to life as such (which might, for instance, rule out euthanasia in absolute terms), but rather a prohibition on the *arbitrary deprivation* of life:

The prohibition includes a duty on the State itself not to arbitrarily take life, which encompasses medical personnel working in public hospitals or for public authorities.

In addition, there is a positive obligation of protection on the State (exercised through its laws and institutions) to protect against arbitrary deprivations of life *by private actors*: see, eg, Kindler v Canada (UNHRC, 470/91); UNHRC, General Comment 6. Such actors would include those involved in any decision or conduct aimed at prematurely terminating life.

Euthanasia Is Not Necessarily an Arbitrary Deprivation of Life

A law permitting active voluntary euthanasia does not *prima facie* or automatically amount to a failure by the State to prevent an arbitrary deprivation of life by public or private actors (including the patient him or herself). The seminal 1997 report commissioned by the Human Rights and Equal Opportunity Commission, *Human Rights and Euthanasia*, concluded that, although described as 'inherent' in the relevant ICCPR provision, the right to life is not absolute and the right-bearer may choose to act contrary to that right. The sovereignty of the rights-bearer under article 6 of the ICCPR must be respected as far as possible by the law.

The critical question is whether the circumstances surrounding the taking of a life (including the decision-making process leading to it) render the killing *arbitrary*. In response to the partial legalisation of active voluntary euthanasia in the Netherlands, the UN Human Rights Committee observed that its role was not to condemn the law outright but to examine '*whether* the State party's obligations to ensure the right to life are being complied with.'

The UN Human Rights Committee made clear that the essential problem with the Netherlands laws was the difficulty of ensuring appropriate safeguards. The Committee recommended that the Netherlands review their laws not because of direct inconsistency with the ICCPR but rather on the question of the adequacy of their anti-abuse measures.

The State's duty to protect life is thus violated only when legislation is lacking altogether or when it is manifestly insufficient in ensuring any deprivation of life is not arbitrary. To that end, the quality of the substantive and procedural safeguards governing any decision to take life is decisive in evaluating whether a particular euthanasia law complies with the right to life. Euthanasia need not amount to an arbitrary deprivation of life where there is a compelling and demonstrably justifiable public policy interest in terminating life, accompanied by adequate protections against the abuse of any power to terminate life.

Indeed, even passive or involuntary euthanasia may be compatible with the duty not to arbitrarily deprive a person of life. In the United States, for example, it has been held that even passive or involuntary euthanasia, if occurring where 'there is no reasonable possibility of a person ever emerging from a comatose condition to a cognitive state'[1] need not amount to a violation of the right to life.

[1] *Quinlan* Supreme Court of New Jersey, 70 NJ 10, 355 A 2d 647 (1976) (United States of America)

Euthanasia in the Northern Territory

The key question is therefore whether the *Rights of the Terminally Ill Act 1995* (NT), by legalising active voluntary euthanasia, is manifestly insufficient in protecting the right to life. In our view, the kind of euthanasia legalised by the *Rights of the Terminally Ill Act 1995* (NT) does not amount to an arbitrary deprivation of life under article 6(1). It is accordingly within the Commonwealth Parliament's pwoer in fulfiling its duty to safeguard against the arbitrary deprivation of life to effectively reinstate the *Rights of the Terminally Ill Act 1995* (NT).

The *Rights of the Terminally Ill Act 1995* (NT) contains more comprehensive safeguards than the relevant Netherlands legislation noted above, and thus is more likely to be consistent with human rights law. The key issues are whether the act contains appropriate procedural measures to ensure the authenticity of consent, reliability and validity of a waiver of the right to life, the prevention of abuse and adequate protection of minors.

The *Human Rights and Euthanasia* report concluded that the *Rights of the Terminally Ill Act 1995* (NT) meets these strict criteria, primarily because as a permissive statutory regime it requires that the voluntary euthanasia be at the request of the terminally ill person through a detailed, clear waiver construction. The complex system of safeguards also comprehensively addresses Human Rights Committee concerns by actively seeking to prevent any 'routinization' of euthanasia procedures and restricting its application to extreme cases.

The relevant protections and safeguards in the Northern Territory legislation include the overriding principle of voluntariness, mental capacity, a minimum threshold of pain and suffering, the exhaustion of medical treatment options, consideration of palliative care options, the provision of information, consideration of the impact on the patient's family, and 'cooling off' periods, among others. The **Appendix** summarises the key safeguards in the Northern Territory legislation. In this relevant situation of active voluntary euthanasia, such laws also give effect to the sovereign will of the rights-holder who decides to terminate life.

The *Human Rights and Euthanasia* report cautiously concluded that, when these principles are applied to the *Rights of the Terminally Ill Act 1995* (NT), 'the legislation does not violate Art 6(1) ICCPR given its very limited scope and extensive statutory safeguards.' In our view, the Bill may legitimately reactivate the *Rights of the Terminally Ill Act 1995* (NT) without infringing on Australia's obligations under international human rights law.

It might be noted, in contrast, that the UK House of Lords Select Committee did "not think it is possible to set secure limits on voluntary euthanasia. It would be impossible to frame safeguards against non-voluntary euthanasia if voluntary euthanasia were to be legalised."

Euthanasia in the ACT and Norfolk Island

The Bill would permit the ACT and Norfolk Island to legislate to provide for euthanasia. Neither of those jurisdictions has previously enacted such legislation. If such legislation is subsequently enacted, their provisions would need to be reviewed to ensure that the procedures for euthanasia in those jurisdictions do not enable the arbitrary deprivation of life, in breach of Australia's international obligations.

To avoid such uncertainty arising as different jurisdictions legislate, one solution is for Commonwealth legislation to be enacted to specify the minimum safeguards which would be necessary in order for Australia to comply with its obligation to protect the right to life. Such

framework legislation could permit variation in State and Territory euthanasia laws as long as such laws remained above the floor laid by the federal legislation.

In our view, the Commonwealth would possess the power to legislate in even in respect of the States pursuant to the external affairs power in the Commonwealth Constitution, since such a law would be reasonably appropriate and adapted to fulfilling Australia's international treaty obligation to positively safeguard the right to life under article 6 of the ICCPR.

Finally, it must be noted that this submission concerns the general compatibility of the Bill and its effect on Australia's obligation to protect the right to life. This submission acknowledges that individual cases of euthanasia may nonetheless give rise to potential failures by Australia to protect life, in cases where, for instance, the appropriate supervision and enforcement of the ideal statutory safeguards and procedures are not forthcoming.

Yours sincerely

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Appendix: Northern Territory Euthanasia Safeguards

Firstly, the *Rights of the Terminally Ill Act 1995* (NT) seeks to guarantee that all parties, including the patient and medical staff, participate in the process *voluntarily*.

- Section 5 provides that medical practitioners may refuse to provide assistance at any time and for any reason, and shall be protected from threats from the patient or professional organisations.
- Section 4 provides that the patient's request to end their life must be made voluntarily in a signed statement.
- Section 7(1) (i) (j) (k) seek to guarantee the voluntary nature of the request by requiring the participation of three medical practitioners each with over five years of experience in the witnessing of the signed request, with the aid of an interpreter when the practitioners and patient do not share the same first language.
- To ensure that the patient is mentally competent to make the request voluntarily, section 7(1)(a) requires the patient to be over eighteen years of age and sections 7(1) (h) and (k) require that two medical practitioners are satisfied, on reasonable grounds, that the patient is competent to make the decision and has done so freely.
- To ensure that these requirements are met sections 12, 13 and 14 require that appropriate records of all relevant documents are retained.
- Section 10 allows the patient to rescind their request at any time and in any manner.
- Sections 11, 18 and 19 make it an offence to improperly influence a patient's request for the purpose of receiving financial benefit, and that a will shall be invalid to the extent that it is affected by the making of a request for assistance.

The *Rights of the Terminally Ill Act 1995* (NT) also seeks to ensure that the patient only makes their request after due consideration of all the relevant factors:

- The patient must be terminally ill and experiencing unacceptable suffering, as defined in section 4.
- The patient must have been informed about palliative care options available to them. Any treatment reasonably available to the patient must be confined to the relief of pain, suffering or distress (section 7(1)(b)(iii),
- Section 7(1)(g) requires the patient to have considered possible implications of their request on their family.
- Section 7 stipulates that there must be two 'cooling off' periods of a total of nine days between the first request to the doctor and the actual provision of assistance.