

Old Admiralty House,  
68 the Esplanade, Darwin NT 0800

**Postal address** GPO Box 1535

Darwin NT 0801

**Tel** (08) 8935 7653

**Fax** (08) 8935 7662

**Email** lawreformcommittee.doj@nt.gov.au

**Our ref** 20080648

Your ref

Mr Peter Hallahan  
Secretary  
Senate Standing Committee on  
Legal and Constitutional Affairs  
Department of the Senate  
Parliament House  
CANBERRA ACT 2600

Dear Mr Hallahan

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

Thank you for your letter on behalf of the abovementioned committee ("the Senate Committee") requesting that the Northern Territory Law Reform Committee ("NTLRC") make a submission to the Senate Committee concerning the Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008 ("the Bill").

The NTLRC does wish to make submissions on this matter.

Before doing so it wishes to inform the Senate Committee that the NTLRC is a body drawn from the legal profession of the Northern Territory, basically to advise the Attorney-General of any legislation or projected legislation which he may refer to it, to examine and report back. As such it is an independent body speaking only for itself. It does not purport to represent the views either of the legal profession or the Government.

Secondly, in examining legislation or projected legislation, it confines itself to matters of law, i.e. what the legal effect of such legislation may be, what effect it might have on other existing legislation, whether the legislation is within constitutional power, and such matters. It does not consider social or political questions arising out of the legislation.

It follows that, whether or not individual members of the NTLRC have views on the desirability or otherwise of euthanasia, such views are irrelevant to the submissions required by the Senate Committee. The NTLRC takes the Senate as inquiring into the legal and constitutional meaning and consequences of the Bill not its policy. Our submissions proceed on this basis.

### **The removal of a restriction on legislative power**

It is apparent from the Bill that its primary aim is to recognise the right of the legislatures of the three named Territories to have unrestricted power to make laws for the peace, order and good government of those Territories. It is in recognition of this right that the restrictions imposed on those legislatures by the *Euthanasia Laws Act 1997 (Cth)* are sought to be removed by the Bill.

The NTLRC agrees the Northern Territory Legislative Assembly should have unrestricted plenary legislative power and it supports the primary aim of the Bill for this reason. Until all restrictions such as those imposed by the *Euthanasia Laws Act 1997 (Cth)* are removed, the Territory will continue to be something less than a fully-fledged democracy.

To emphasise this, we point out that the *Euthanasia Laws Act 1997 (Cth)* was passed on the basis that the Federal Parliament disapproved of the policy of the NT Act. The clear implication is that, if any of the three named Territories passes legislation of which the Federal Parliament disapproves, the Federal Parliament will take away its power to do so. Such interference with the policy of a self-governing legislature is a direct contradiction of self-government.

We draw attention to the Preamble of the *Northern Territory (Self-Government) Act 1978 (Cth)*, which states, so far as relevant: -

“And Whereas the Parliament considers it desirable ...to confer self-government on the Territory...”

In our respectful submission the only proper question to be asked, once the Territory Parliament has passed the legislation was:

Did the Territory have the power to do so, or did it not have the power?

If it did have the power, then it was not for the Federal Parliament to remove it. If it did not have the power, that was a matter for a Court, and ultimately the High Court so to declare. As we mention subsequently, that proper course was taken, until interrupted by the Federal legislation.

### **The scope of the legislative power of the Legislative Assembly**

Opponents of the *Rights of the Terminally Ill Act 1995 (NT)* raised a question as to whether the Assembly had the power to pass the *Rights of the Terminally Ill Act 1995 (NT)* on 24 May 1995. The question was raised by the case of *Wake v Northern Territory of Australia* (1996) 5 NTLR 170 (“Wake v NTA”). The Full Court of the Supreme Court of the Northern Territory considered various sections of the *Northern Territory (Self-Government) Act 1978 (Cth)* and concluded, by majority, that the Northern Territory Parliament did have the power.

The plaintiffs applied for special leave to appeal to the High Court. The High Court adjourned this application on the 15 November 1996 to await the outcome of the Euthanasia Laws Bill 1997 in Federal Parliament, taking from the Northern Territory Parliament the power to make such legislation. This federal bill became law and no further action was taken in relation to the High Court application.

It follows that there still remains the possibility that if the present federal bill is passed into law, the power of the Northern Territory Parliament to enact it may still be challenged. Those wishing to do so would be encouraged by the fact that the decision of *Wake v NTA* was not unanimous. There was a strong dissenting opinion by Angel J.

Nevertheless, the NTRLRC considers, with respect, that the view of the majority of the Full Court of the Supreme Court of the Northern Territory (namely Martin CJ and Mildren J) was correct, and although it is always presumptuous to predict a decision of the High Court, our respectful opinion is that they would uphold the decision of the majority.

### **Item 2 of the Schedule to the Bill**

The NTLRC envisages a couple of difficulties in relation to the inclusion of Item 2 of the Schedule to the Bill.

First, it is reasonably apparent that the purpose of Item 2 is to meet the argument that the repeal of the *Euthanasia Laws Act 1997* (Cth) without more would be insufficient to ensure the revival of the Act. The argument could be made that the repugnancy of the Territory Act to the federal *Euthanasia Laws Act 1997* (Cth) whilst it was in force, had the effect of rendering the Territory Act null and void. It would not have been held in mere suspension pending the repeal of the Commonwealth statute.

It is the view of the NTLRC that the Bill should do no more than simply repeal the *Euthanasia Laws Act 1997* (Cth) and then leave it to the Northern Territory Legislative Assembly as a mature legislature to decide whether to re-enact (so as to remove any doubt regarding its validity) or repeal the Act. The decision whether the Act should again come into operation properly belongs to the Territory Assembly not the Commonwealth Parliament.

Secondly, Item 2 has the potential to provide the basis for an argument that the Act would be invested with a Federal character that it did not possess prior to the commencement of the *Euthanasia Laws Act 1997* (Cth) or would not possess following the mere repeal of that Act. There is a real danger of the Act becoming entrenched and thus leaving the Assembly powerless to amend or repeal it, should it want to do so once the Bill becomes law. Item 2 of the Schedule should therefore be removed.

Yours sincerely

A large black rectangular redaction box covering the signature of Austin Asche QC.

Austin Asche QC  
President and Chair  
07 April 2008