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Dear Secretary

Thank you for the invitation to make submissions to the Inquiry into the *Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008*. I note that the inquiry is restricted to the provisions of the Bill and is not a review of the merits of euthanasia legislation.

Background

The Northern Territory's *Rights of the Terminally Ill Act* was passed by the Legislative Assembly on 24 May 1995. The Administrator of the Territory assented to the Bill on 16 June 1995, and by gazette notice the Act came into effect on 1 July 1996.

The Act allows a competent adult suffering from a terminal illness to seek assistance from a medical practitioner to end his or her life. The legislation was created in accordance with due process. It followed extensive and considered debate, both in the public arena and in Parliament. Following a formal inquiry there were public education programs and ongoing consultation. That the Act was a valid law of the Northern Territory was confirmed by the Supreme Court in *Wake and Gondarra v Northern Territory* (1996) 109 NTR 1.

The Act has not been formally repealed and is still on the Territory statute books.

Notwithstanding the long established conventions of responsible self-government, the Commonwealth Parliament subsequently passed the *Euthanasia Laws Act 1997* (assented to 27 March 1997). This convention is that an outside body, including the Parliament that granted self-government, should not impose its will on the self-governing entity in respect of transferred matters, at least not without the consent of the institutions of that self-governing entity.

The *Euthanasia Laws Act 1997* (Cth) not only provided that the Territory's *Rights of the Terminally Ill Act* had no force or effect as a law of the Territory (except for things validly done under it before the Commonwealth Act commenced), but also that the self governing Territories of Norfolk Island, the Australian Capital Territory and the Northern Territory were prohibited in future from enacting legislation on the issue of euthanasia. That is, the legislative capacity of these bodies was amended so that they no longer had the power of enacting legislation on this subject matter, no matter what the emerging needs of the community.

The nature of the provisions of the *Euthanasia Laws Act 1997* to firstly strike down the Territory Act, and secondly to restrict self-governing capacity, become important in the context of the current inquiry.

The addendum to the first schedule of the *Euthanasia Laws Act 1997* provides as follows:

"For the avoidance of doubt, the enactment of the Legislative Assembly called the *Rights of the Terminally Ill Act 1995* has no force or effect as a law of the Territory, except as regards the lawfulness or validity of anything done in accordance therewith prior to the commencement of this Act".

The restriction on legislative capacity (in so far as it relates to the Northern Territory) was done by an amendment to the *Northern Territory (Self-Government) Act 1978* (Cth); which inserted a new subdivision:

"50A Laws Concerning euthanasia

- (1) Subject to this section the power of the Legislative Assembly conferred by section 6 in relation to the making of laws does not extend to the making of laws which permit or have the effect of permitting (whether subject to conditions or not) the form of intentionally killing of another called euthanasia (which includes mercy killing) or the assisting of a person to terminate his or her life."

It is the Northern Territory's understanding that the impact of the *Euthanasia Laws Act* on the Territory's *Rights of the Terminally Ill Act* is that the Territory Act only continues in force and effect for the purpose of preserving the lawfulness and validity of actions done under it prior to 27 March 1997. Other than in this regard, the Territory is of the view that the Commonwealth Act has the same effect as if it repealed the Territory Act.

The status of the Territory Act and its self-governing capacity will remain in this state unless and until there is subsequent Commonwealth legislation to the contrary. That brings the discussion to the intent and effectiveness of the *Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008*, which is the subject of this current inquiry.

Terms of the Bill

The objective of the Bill is to recognise the rights of the people of the Northern Territory (and other self-governing Territories) to make laws in regard to the terminally ill, and to repeal the *Euthanasia Laws Act 1997*.

It seeks to do this by repealing each Act specified in the schedule of the Bill. The only Act listed is the *Euthanasia Laws Act 1997*.

Sub-clause 2 of the schedule provides:

“To avoid doubt, the enactment of the Legislative Assembly of the Northern Territory called the *Rights of the Terminally Ill Act 1995* has the same effect after the commencement of this Act as it had before the commencement of the *Euthanasia Laws Act 1997*.”

Effectiveness of the Bill

The questions that need to be examined are:

- Whether the *Rights of the Terminally Ill Act 1995* (NT) is capable of having some prospective legal operation in the Territory and, or
- Whether the Bill in its current form is capable of reviving the Territory legislation.

While the Northern Territory has seen legal advice to the effect that the current Bill, if passed, would operate to reinstate the *Rights of the Terminally Ill Act* as a valid law of the Territory, it retains serious concerns about the Bill, and its effectiveness.

This advice relies on an interpretation of the intent of the Bill and S.8 of the *Acts Interpretation Act 1901* (Cth), which provides that where an Act repeals a former Act, then unless a contrary intention appears, the repeal does not revive anything not in force or existing at the time when the repeal takes effect.

Schedule 1 of the current Bill provides that the whole of the *Euthanasia Laws Act 1997* is repealed. The intention would appear to be that this would repeal S.50A of the *Self Government Act*. If this is correct, it would remove the restriction on the Territory's future capacity to legislate in regard to euthanasia, but would not of itself revive the *Rights of the Terminally Ill Act*. Presumably this is why the Bill contains the avoidance of doubt provision in item 2 of schedule 1 regarding the revival of the Territory Act.

It is the Territory's submission that the Bill is poorly drafted and does not provide a sufficiently clear and express indication of intention; relying as it does on a series of implied consequences.

In addition to this uncertainty, alternative views have been voiced expressing doubt as to the legal capacity to revive a spent Act that is not in force or currently existing.

In this regard the Territory draws your attention to the submission by the Gilbert + Tobin Centre of Public Law to this inquiry dated 27 March 2008, which states in part:

“ ... there is significant judicial and academic opinion which suggests that laws made by Territory legislatures are not merely suspended or dormant for the duration of any inconsistent Commonwealth law and then enter back into force upon its removal ...”

To provide certainty that the legislative capacity of the Territory is restored in future, the Northern Territory suggests that it is necessary to clearly and expressly repeal S. 50A of the *Northern Territory (Self-Government) Act 1978*.

To a large extent the correct legal interpretation is not the issue here. The problem is the lack of certainty and the lack of clarity in combination with this particular subject matter.

The Northern Territory's response to these issues is clear; they should be put beyond doubt

Consequences of Uncertainty

In this difficult and complex area it is highly undesirable to have any legal uncertainty or doubt. The law on criminal liability is already complicated enough. To add any uncertainty into the, at times, emotional stress of terminal illness is unacceptable.

Serious consequences would flow if someone relied on the protections provided by the Territory's *Rights of the Terminally Ill Act*, only to find after the event that in fact the Act had not been revived. It would clearly be imprudent to act on the basis that the Territory legislation had been revived by the provisions of the current Bill.

Concluding Comments

- The passage of the *Euthanasia Laws Act 1997* (Cth) was a fundamental, and unwarranted attack on the democratic rights of the people of the Northern Territory.
- In principle, the Northern Territory would welcome the removal of the limitation on its self-governing capacity; however it is not clear that the current Bill would achieve the outcome of removing this limitation.
- This is not a subject matter that sits well with legal uncertainty and confusion. The inadequacy of the Bill, and the uncertainty it creates, demonstrates the inappropriateness of Commonwealth Parliament pursuing Territory related issues without consultation with the Northern Territory.
- Both the erosion of the principles of self-government and the lack of consultation further entrench the inferior constitutional position of Australian citizens residing in Territories. Both provide powerful support for the desirability of the Northern Territory becoming a state with the same legislative capacity as the original States.
- To provide certainty in regard to the future legislative capacity of the Northern Territory generally, the Territory is of the firm view that the current Bill should not proceed, and instead be replaced by a Bill granting Statehood to the Northern Territory.

Yours sincerely



PAUL HENDERSON

11 APR 2008