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27 March 2008

Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Secretary

Inquiry into the Rights of the Terminally Ill (Euthanasia Law Repeal) Bill 2008

Thank you for the invitation to make a submission to this inquiry.

We make no comment in this submission on the desirability or otherwise of laws on the topic of euthanasia. Our submission is limited only to the point of whether it is appropriate to repeal the *Euthanasia Laws Act 1997* (Cth) and the legal consequences of doing so for the *Rights of the Terminally Ill Act 1995* (NT).

The Repeal of *Euthanasia Laws Act 1997* (Cth)

At the time of its enactment, one of us analysed the *Euthanasia Laws Act 1997* in an article entitled "Euthanasia Laws and the Australian Constitution" (1997) 20 *University of New South Wales Law Journal* 647 (co-authored by Matthew Darke and George Williams). That paper concluded that the Act was bad law in that it discriminated against the territories and weakened self-government in those jurisdictions. It further concluded that the law may have a serious long-term impact on the Australian Capital Territory in particular which, unlike the Northern Territory, appears unable ever to escape the affects of the Act because it cannot become a State.

Both authors of this submission hold to those views. The *Euthanasia Laws Act 1997* should be repealed because it is inappropriate that the Commonwealth Parliament remove power pre-emptively from any self-governing jurisdiction within Australia. The law is inconsistent with basic principles of democracy and indeed with the very concept of self-government in the Australian Territories. It is also inappropriate to treat democratic rights within the Territories in a way that undermines them to a far greater extent than in the States.

This is not to deny the proper role of the Commonwealth Parliament to govern for all Australians. Where issues arise within a Territory or a State there can be a legitimate role for the Commonwealth Parliament to intervene generally in the national interest, for example with regard to environmental or other issues. This is recognised by section 109 of the Constitution. However, this should not extend to pre-emptively denying the capacity of any properly elected legislature to make the best laws for its citizens.

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The repeal of this law should be only one part of modernising the systems of governments of the Territories. The Self-Government Acts of the ACT and the Northern Territory are long overdue for review, irrespective of whether this bill is passed.

The Status of the *Rights of the Terminally Ill Act 1995* (NT)

There is, however, a deficiency in the present Bill which requires further consideration. Schedule 1 of the Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008 states:

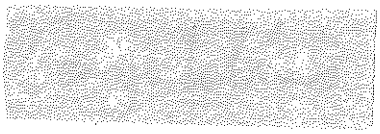
> To avoid doubt, the enactment of the Legislative Assembly of the Northern Territory called the *Rights of the Terminally Ill Act 1995* has the same effect after the commencement of this Act as it had before the commencement of the *Euthanasia Laws Act 1997*.

Essentially, this provision aims to confirm that the Territory's 1995 Act is returned to full operative force simply by repeal of the inconsistent Commonwealth legislation. In doing so, it attempts to replicate the operation of section 109 of the Commonwealth Constitution in respect of State laws which automatically revive upon removal of inconsistent Commonwealth legislation. However, 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 (see generally G Carney, *The Constitutional Systems of the Australian States and Territories* (2006) at 429-30). This is because, unlike State Parliaments whose laws are supported by independent legislative power, the power of the legislatures of self-governing territories is *itself* subject to the vicissitudes of the exercise of Commonwealth power.

This is particularly so in respect of the effect of the *Euthanasia Laws Act 1997* (Cth) upon the *Rights of the Terminally Ill Act 1995* (NT) since the former not only overrode the latter but also removed the legislative ability of all self-governing territories to legalise euthanasia. While repeal of the Commonwealth Act in its entirety restores that legislative capacity to the territories for future use, it cannot (at least not without some clearer expression than found in the draft provision) retrospectively reinstate that power to the Northern Territory so that its 1995 Act was, albeit inoperative, still sustained by legislative power of the NT Assembly between 1997 and now.

In short, there are strong grounds for suggesting that item 2 of Schedule 1 is insufficient to revive the *Rights of the Terminally Ill Act 1995* (NT). The rights of individuals and interests at stake are too important to allow uncertainty on this score. The Northern Territory's Legislative Assembly should be advised to re-enact the 1995 legislation if it wishes to do so in order to ensure it is valid and operative after the Commonwealth Parliament passes this bill.

Yours sincerely



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