COMMONWEALTH OF AUSTRALIA

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SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008

WEDNESDAY, 16 APRIL 2008

SYDNEY

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Wednesday, 16 April 2008

Members: Senator Crossin *(Chair)*, Senator Barnett *(Deputy Chair)*, Senators Bartlett, Fisher, Hurley, Kirk, Marshall and Trood

Substitute members: Senator Hogg to replace Senator Hurley

Participating members: Senators Abetz, Adams, Allison, Bernardi, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, George Campbell, Chapman, Colbeck, Coonan, Cormann, Eggleston, Ellison, Fielding, Fierravanti-Wells, Fifield, Forshaw, Heffernan, Hogg, Humphries, Hurley, Hutchins, Johnston, Joyce, Kemp, Lightfoot, Lundy, Ian Macdonald, Sandy Macdonald, McEwen, McGauran, Mason, Milne, Minchin, Moore, Murray, Nash, Nettle, O'Brien, Parry, Patterson, Payne, Polley, Robert Ray, Ronaldson, Scullion, Siewert, Stephens, Sterle, Stott Despoja, Troeth, Watson, Webber and Wortley

Senators in attendance: Senators Crossin, Barnett, Bartlett, Bob Brown, Fielding, Hogg and Kirk

Terms of reference for the inquiry:

To inquire into and report on:

Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008

WITNESSES

Committee met at 1.43 pm

CHAIR (Senator Crossin)—This is the second hearing for the Senate Standing Committee on Legal and Constitutional Affairs and our inquiry into the Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008. The inquiry was referred to the committee by the Senate on 12 February 2008 for a reporting date of 23 June 2008. The bill is a private senator's bill introduced by Senator Bob Brown. It proposes to repeal the Euthanasia Laws Act 1997 to allow the Northern Territory, the Australian Capital Territory and Norfolk Island to make legislation for people who are terminally ill. The bill also aims to restore the Northern Territory Rights of the Terminally Ill Act 1995.

We have received in excess of 1,200 submissions for the inquiry. Most of these submissions have been authorised for publication and are available on the committee's website. I want to remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to the committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee.

We prefer all evidence to be given in public but under the Senate's resolutions, witnesses have the right to request to be heard in a private session—that is in camera—and we would hope, if you want to do that, you would let the secretariat know so that we have some prior warning. If a witness objects to answering a question, the witness should state the grounds upon which the objection is taken and the committee will determine whether it insists on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request of course can be made at any time.

[1.45 pm]

WILLIAMS, Professor George, Private capacity

Evidence was taken via teleconference—

CHAIR—Welcome. We have received submission No. 46 with the committee from the Gilbert and Tobin Centre of Public Law. Before I ask you to make a short opening statement, do you have any amendments or changes you want to make to that submission?

Prof. Williams—No.

CHAIR—I invite you to make a short opening statement and then we will go to questions.

Prof. Williams—The submission made to the committee was on behalf of myself and Dr Andrew Lynch, and in our submission we make no comment on the desirability or otherwise of laws dealing with euthanasia. Our submission is entirely dealing with issues of governance and dealing with the appropriateness of the Euthanasia Laws Act in removing some powers of self-governance from the Northern Territory, ACT and Norfolk Island.

My view is that the law is a bad law that was originally enacted, and it is appropriate to repeal that law through this bill now before the federal parliament. I believe it is a bad law because, firstly, it undermines self-government and it does so pre-emptively by removing power to pass law on a topic whether or not the law ultimately enacted is a good or bad law. It also undermines the ability of a body like the Legislative Assembly in the ACT to pass laws responsibly for its people. It undermines the democratic connection between people and their elected representatives and weakens, I think, democracy in each of the self-governing territories.

The second reason I think that the law should be repealed is that it discriminates against the territories. The law is enacted in a particular way that only applies to the three self-governing territories. No attempt is being made to enact a general law on the topic for the whole of Australia. It simply is in my view an opportunistic intervention in the affairs of self-governing territories to take advantage of a power that should not be available and to apply it in a way that effectively renders people in those self-governing territories as second-class citizens when it comes to their own self-governing relationships.

My view is that the Commonwealth does have the power to enact laws on a variety of topics and quite properly does intervene in affairs around Australia where it needs to enact laws in the national interest. That might be for environmental reasons, health reasons or other reasons, but I do not believe that power should be used as in a case such as this to pre-emptively deny power to pass laws generally on a topic. I think if the Commonwealth wishes to make a law dealing with the topic of euthanasia it should use its broad powers for the health system and in a variety of other areas to enact a law generally for the population.

The second matter that our submission deals with is what I would call a technical problem with the bill before the parliament. It is not a problem that goes to the heart of the legislation and is one that can be easily corrected. The problem is essentially that the bill works on the assumption that it is possible to retrospectively revive the Rights of the Terminally Ill Act 1995 in the Northern Territory but it is not clear that that is constitutionally possible. I have to say there is a great deal of doubt about this question and, for that reason, I think a better

course to avoid that doubt is to amend the bill so as to provide that the limitation in the self-government acts is repealed and thereby the ability to legislate in the future on topics of euthanasia is preserved and retained by those self-governing jurisdictions. That would mean that, instead of the Northern Territory law being revived, the Legislative Assembly there and in the other territories would be able to pass a new law, should they so wish. I think that is appropriate given the principles of democracy involved, given the time that has elapsed and also given the constitutional issues better than to attempt to revive something that may not be possible to do and it would certainly be inappropriate to leave practitioners and others in a situation where they may be unclear as to the legality of their actions.

CHAIR—Thank you. There is just you, isn't there? Dr Andrew Lynch is not there, is he?

Prof. Williams—That is correct. It is just me.

CHAIR—Thank you. I would like to ask you a question about evidence we had in Darwin on Monday. It was put to us that the Kevin Andrews bill inserted clause 50A into the Northern Territory (Self-Government) Act, which reinstated the right for the Northern Territory government to deal with this matter. Let's set aside whether or not the original Rights of the Terminally Ill Bill is repealed or squashed; let's go to the matter of the amendment to the self-government act. In your view, would there be any difference between laws relating to euthanasia passed by the Queensland or Victorian parliament as opposed to the Northern Territory parliament if section 50A was removed from the self-government act?

Prof. Williams—I think if you removed the limitation on the law-making ability of the Territory that would enable them to pass the same types of laws that the states can pass, and I think the appropriate course is to remove that limitation. The only thing you would make that subject to, of course, would be a general Commonwealth law that dealt with subject matter that, under section 109 of the Constitution, could override a territory or state law. But by repealing that provision from the self-government act you would simply be giving them the same powers of self-government as the states.

CHAIR—So a law that might consequently be enacted in the Northern Territory with regard to euthanasia would have the same legal standing as a law that might be passed here in New South Wales, for example?

Prof. Williams—Yes, as long as the Commonwealth had not pre-emptively acted in any other way. The only impediment to the territories passing laws like the laws of the states is the limitation within their self-government acts at the moment. If that is removed, the position would be equalised and they would be able to pass laws similar to the laws of the states. My view is that that is an appropriate outcome. I do not see why the powers of self-government in the territories should be any different from the those in the states, unless people want to make the argument that somehow people living in the territories are less educated, need parental guidance on a continuing basis from the Commonwealth or are unable to make laws on their own behalf in sensitive areas. I do not think that is true at all in this day and age. I think it is appropriate to equalise the situation so that the law-making powers are consistent across Australia.

CHAIR—Would it be possible to amend Bob Brown's bill to ensure that the Rights of the Terminally Ill Bill was not re-enacted or reactivated but that simply clause 50A of the self-government act was removed? Can you do one or the other, or do you have to do both?

Prof. Williams—You could certainly do the former suggestion, and in my view that is the preferable outcome. As I said in my submission, I think there are some potential dangers in attempting to revive the Rights of the Terminally Ill Act. I think the right course would be to remove the limitation in the self-government act prospectively, which would mean we would not be seeking to undo anything that was done in the past, including overriding the Rights of the Terminally Ill Act; we would simply be removing the limitation in a way that would enable the Territory, if it so wished, to enact legislation in the future. I think that is a better course and it would mean that the destiny of the Territory would be in its own hands, without having the 1995 act revived. Equally, the Commonwealth does have the capacity to, if it wishes, legislate generally in this area for the whole of Australia. That is the way the issue should be approached.

Senator BOB BROWN—Thanks, Professor Williams. That is very clear. There is one matter following on from Senator Crossin's question. If the bill were amended to remove section 50A of the Northern Territory (Self-Government) Act so that the override, so to speak, was removed and in future that territory and the other two territories, the ACT and Norfolk Island, could legislate on the matter of the rights of the terminally ill, the legislation that the Northern Territory passed in 1995 to enable euthanasia would still be there. Would that not raise a doubt about whether or not it was operative, should that be a matter that is left to the Northern Territory assembly to determine, or in your view would it be preferable for my bill in the Senate to be amended to remove doubt about whether or not the Northern Territory legislation is revived?

Prof. Williams—It is a good question. I think the best course always in this situation is to remove any doubt. I think it would be wise to remove section 50A and at the same time to make it clear that the Rights of the Terminally Ill Act (NT) was overwritten—that is just a historical fact by virtue of the Andrews legislation—and to indicate that the field is now clear should they so wish to enact perhaps even a law in identical terms to the 1995 legislation. Yes, I think it would be wise to amend the legislation—your bill essentially—to make it clear that the Rights of the Terminally Ill Act (NT) cannot be revived and has not been revived. Otherwise, in an area as sensitive as this, the last thing we want is legal debate about whether practitioners can be jailed under a law that nobody is quite sure still exists.

Senator BOB BROWN—Would you be so kind as to consider penning such an amendment to the bill that we could look at as a potential amendment if the committee were to take up that option?

Prof. Williams—Yes, I would be happy to do that. I am happy to put in a further submission to the committee that might just suggest a straightforward form of words to deal with this issue.

Senator BARNETT—Thank you for your submission; it is appreciated. Is it your opinion that item 2 of schedule 2 of the bill is definitely not sufficient to revive the Northern

Territory's Rights of the Terminally Ill Act, or is it that you are aware that you are not certain that it would do so?

Prof. Williams—It is the latter; it is a matter of a lack of certainty. There is no authority I can point you to which definitively answers the question as to whether a Commonwealth law can revive a territory law that it had previously overridden. The absence of authority means, I think, that the wiser course is not to leave this for judicial determination but to remove the uncertainty by just making sure it is not revived. It is possible that the matter could actually go either way. I think that in an area like this, dealing with euthanasia, it is best not to leave it where the outcome is unclear.

Senator BARNETT—All right. The Northern Territory government refers in its submission to section 8 of the Acts Interpretation Act 1901 and it says in part:

> Where an Act repeals in the whole or in part a former Act, then unless the contrary intention appears the repeal shall not:
>
> … … …
>
> (b) affect the previous operation of any Act so repealed ...

So wasn't the effect of the Euthanasia Laws Act 1997 to amend each of the three territory self-government acts, and do you understand this provision to mean that simply repealing the Euthanasia Laws Act 1997 will not affect those amendments which will remain in place unless specifically amended?

Prof. Williams—That is correct, except for the fact of course that schedule 1, clause 2 has the 'avoid doubt' provision, which casts some uncertainty on that equation. It is the presence of clause 2 that, I think, causes the difficulty. It is a technical difficulty that can be fixed. Indeed, perhaps just simply deleting clause 2 might fix the problem and allow the Acts Interpretation Act to have its effect.

But it is not just a matter of the interaction of Commonwealth legislation. There is a deeper constitutional question here that goes beyond the Acts Interpretation Act and that is whether it even lies within the capacity of the Commonwealth parliament to ever revive a territory law that it has overridden. It goes to questions of the source of power, of sovereignty and of other matters. It is something that the High Court has dealt with in the analogous context of section 109, and it held in that context that section 109 does prevent certain state laws from being revived. It continues to be an area of academic and judicial debate. That is why my answer is a far more complex one than simply saying that the Acts Interpretation Act could solve the question.

Senator BARNETT—Finally, the Northern Territory Law Reform Committee, who put a submission to us and appeared before us in Darwin, suggested that item 2 of schedule 2 might actually invest the Rights of the Terminally Ill Act with a new status, as entrenched by the new Commonwealth law, in such a way that the NT Legislative Assembly may not be able to amend or repeal it on its own authority. I was wondering if you concur with that and do you see any merit in that opinion?

Prof. Williams—Yes, I can see merit in that argument. I am not sure that it is correct, because I cannot give you a definitive answer on any of these arguments in the absence of any

clear authority. You can look at this in two ways. One is that the Commonwealth is simply unable to revive; the other is that clause 2 has the effect of almost re-enacting it according to the suggestion that you have put to me. That is a possible interpretation. If that did happen, it might even take it out of the capacity of the assembly to deal with the law. I am not sure that it would go as far as that last point, but it is open and arguable. That is why all of these matters need to be clarified, in my view. If this bill is to proceed, then I do not think that you want any of these matters dealt with except in a crystal clear way.

Senator BARNETT—Indeed. Thank you.

Senator KIRK—Thank you very much for your submission, Professor Williams. As usual, it is extremely helpful to us. I want your comment in relation to some evidence that we received in Darwin from one of the witnesses. They suggested that, in view of the size of the Northern Territory Legislative Assembly—there are only 25 representatives there—and in the absence of a house of review in the Northern Territory, the power of the legislative assembly is somehow less than or inferior to that of state parliaments. That is a point that was made, and I would like to hear your comment in relation to that.

Prof. Williams—I am sure that you will get some very strong arguments back and forth between people living in states and territories about the quality of their government and the extent to which it is dependent upon the size of a legislature. The academic evidence is interesting. It often shows that there is a link between the quality of governance and the size of legislatures, but it has far more to do with the fact that, if you really want to have a fully functioning parliament that works as a parliament and is not simply dominated by the executive, you need a parliament of some hundreds. Once you get below a size of 150 or so, frankly, it does not make much difference in terms of how the legislature operates. For that reason, I do not think that the size of the legislature there casts any doubt upon their capacity for self-governance. In the same way, I would not cast any doubt on the capacity to govern of the Tasmanian parliament, another very small parliament by Australian standards. It comes down to the personalities and people involved.

However, I would make a more general point, which is alluded to in our submission. A number of the aspects of the self-government acts are unsatisfactory. They do not amount to the modern system of self-governance that we require in Australia. This is just one small aspect of a much larger problem. In the ACT, for example, this prevents them even changing the size of the legislature to deal with this type of issue without the Commonwealth's involvement. My view is that, with this marking the 20th anniversary of the ACT self-government legislation and the 30th anniversary for the Northern Territory—if it is not outside the remit of this inquiry—it would be appropriate to make a comment about the need to look generally at self-government arrangements with a view to reviewing them. Given that it is a special responsibility of the Commonwealth parliament under the Constitution, it may even be that this committee is the appropriate vehicle to do that. We should look at how we have travelled in the intervening decades to determine whether we can put the territories on to a more modern and more appropriate footing of government.

Senator KIRK—The absence of a house of review was also one of the points that was made by a witness. Could you comment?

Prof. Williams—Yes, I am happy to comment on that. You cannot answer these things too much in generalities, because if we took the absence of a house of review as being bad then Queensland is in a difficult position, because it only has one tier of government. Equally, you can look, for example, at the United Kingdom. It has the House of Lords, but that house does not have full powers of review. In Canada, their upper house is an appointed upper house and certainly does not operate as an effective house of review. In fact, the Senate is a very unusual chamber by world standards in operating as a house of review. If we set the test as to whether you had such a house with its absence indicating a lack of quality of self-government, you would be knocking out a number of parliaments around the world, including national parliaments which either do not have an upper house or do not have an effective upper house. I do not see that as a tenable argument. Clearly, the Northern Territory Legislative Assembly—and the ACT Legislative Assembly—is elected by democratic means after fair and free elections. It is a proper representative body of the people. It is a body, in my view, that could do with further reform. But, to be frank, the Australian parliament equally could do with significant further reform. I do not think that in either case that undermines the validity of those bodies to make laws responsibly on behalf of their constituents.

Senator KIRK—Thank you very much, Professor.

Senator BARTLETT—I understand the point that you are making about how territories in general should be able to have equivalent powers to states in regard to making laws affecting their citizens. You said in your submission that there is a legitimate role for the Commonwealth parliament to intervene genuinely in the national interest in regard to specific issues, but that should not extend to pre-emptively denying the capacity of any properly elected legislature at state or territory level. Can I get an indication of where the distinction lies there? Would I be right in saying that therefore you would not necessarily have seen a problem with the federal parliament deciding to legislate specifically to overturn the original Territory law and your problem is more with the fact that it has entirely removed their capacity to legislate into the future?

Prof. Williams—I would go a little further than that. Certainly the root problem with the Andrews legislation is the pre-emption and the fact that it removes the ability to make laws, even laws that may be eminently sensible and highly desirable and not even contentious in the area. I think it is really problematic and a very blunt instrument for dealing with a contentious social and political issue. Pre-emption is never a good idea and it is entirely inconsistent with good principles of democracy and self-governance. The next stage, as you suggest, is a law that might be targeted specifically at the territories that might have the effect of overriding a particular piece of legislation or a set of legislation. That is certainly much better than the Andrews law in that at least it would deal with a specific problem without overriding all future pieces of legislation, whatever their merits. That has its problems but it would certainly be a better outcome in specific cases. But I would prefer to go further than that again. I am also concerned about the, I suppose, opportunistic nature of being able to use powers that only exist over the territories to override particular laws of theirs where that cannot be done in more general terms. I am of the view that in our federation the Commonwealth has a proper role in making laws for the national interest, including in contentious areas like this, but that it should be enacting laws for the whole of Australia.

If the Commonwealth wants to enact a law on a topic like this, it should enact a law that equally applies to the states. If it is not prepared to do that, then you have to ask what the rationale is, if it is so important, when you are not prepared to enact a law for all Australians yet you are prepared to enact it for a particular territory. That for me just says that there is an option being taken; that the courage of their convictions does not go national, whereas it should. What I would have liked to have seen back with the Andrews legislation was a law that, if the Commonwealth so wished, set down a regime, or set down prohibitions generally, for the benefit of all Australians in this particular area to the limit of the Commonwealth's powers. In doing so, that would have affected current and future laws at the state and territory level and the Commonwealth would have assumed responsibility for the area instead of simply overriding a particular territory law and pre-emptively preventing the making of future laws by three self-governing jurisdictions.

Senator BARNETT—So does the Commonwealth have the powers?

Prof. Williams—Yes it does. I have to admit that there is some uncertainty here as well, but I think it is significant that this investigation was never undertaken. It should have been the first thing that was done. It should have been the first part of the public debate. If it had turned out that the Commonwealth could not do it, then that is where I would accept that you would look carefully at using the territories power to override those laws. But it is clearly a second-best option, not the primary option. The powers the Commonwealth might have looked to were, in particular, some of the international treaties that deal with these matters and that give very broad powers to the Commonwealth, especially over the right to life—for example, in treaties like the International Covenant on Civil and Political Rights. People have written about the possibilities of using that power to legislate in the area of euthanasia and I think that there is quite a good argument that you could, but equally the Commonwealth has very extensive powers over health, medicine and other matters. It is not shy of intervening in a range of matters where it wishes to or of using the full ambit of its financial and other powers. Given the capacity and ability it has shown in other areas, I would be very surprised if the Commonwealth could not get its way on a topic like this if it so wished.

CHAIR—Senator Hogg, is this a follow-up question on this matter?

Senator HOGG—It is a follow-up question on the previous statement, not to the answer that was just given to Senator Barnett. Am I to understand that what you are saying is that we should not be cherry picking issues that are of interest right around this country? Whether, for example, it is the Queensland, Western Australian or Territory legislature where these matters are pursued in the first instance, if they have a national perspective then they should be pursued in the national parliament.

Prof. Williams—The short answer to the initial part of the question is that the Commonwealth is constitutionally prohibited from cherry picking individual states. There is a prohibition on the Commonwealth discriminating or singling out states to deal with particular laws.

Senator HOGG—Sorry, I am not referring to the Commonwealth cherry picking, I am talking about, for instance, interest groups cherry picking which legislature they raise the

issue in, and that it is in the best interests of Australia that issues that have a national flavour to them should be considered at the national parliamentary level.

Prof. Williams—I would support that, but I would support both of the propositions. I would not use the term 'cherry picking'. I would call it federalism. I support our federal system, because I believe that there is a legitimate role to be played by state and territory parliaments to experiment, whether it be in economic matters, social matters or other matters. Those parliaments at the lower tier should take responsibility for the success or failure of their laws. If we remove that capacity, I think we remove the best argument for having a federal system in this country—that is diversity and moving ahead at different levels.

But I also do see the need to legislate nationally. I think, however, it is often a sensible course to see what emerges in the states—see what works, see what doesn't. Unless there is an overriding need to move immediately—on this matter, of course, views will differ about whether that need exists—when the national parliament does move, it should be enacting laws for all of Australia. It should not be responding by using its territories power in a way that it would not be using powers if it was the states taking the lead on an issue.

Another good example of this is the civil unions issue, where the Commonwealth has quite dramatic powers over the ACT but those powers do not exist to anywhere near that extent over Tasmania. I recognise differences of arguments about the schemes, but, if the ACT scheme had been enacted in Tasmania, I do not think we would be having anything like the debate that we are having over the ACT law at present.

Senator BARTLETT—I have a final question following up on the general principle you have stated about self-governance and the territories. My understanding is that currently the Northern Territory is explicitly and specifically prohibited from legislating in areas regarding land rights, uranium mining and also a couple of national parks—quite significant ones: Uluru and Kata Tjuta in particular and the handing back of the rock to the traditional owners. Would it be your view, on the basis of principle—not on policy merit but on principle—that the Territory government should be given those powers as well?

Prof. Williams—I think you need a clear delineation as to what the Territory is meant to cover and what the Commonwealth is meant to cover. Particularly if there are negotiations over statehood, for example, you may well find certain things reserved to the Commonwealth because they are of a national interest, but they are equally things that are reserved to the Commonwealth anyway in some cases under the Australian Constitution. In general, I take the view that you should not be excising subject matters from territory jurisdiction or state jurisdiction. The better way is for the Commonwealth to exercise its powers over a matter for the whole of Australia. If they are matters—environmental disputes are good examples—where they may fall within the bounds of only one state but have a much larger national or international significance, I support the capacity of the Commonwealth to intervene in those matters. But it needs to be done in the proper way and in a way that justifies it on a national basis—not, again, by unilaterally picking out areas that should not be the subject of territory or state laws.

Senator BARTLETT—At least in part, as I understand it, the Northern Territory intervention, as it is colloquially known, into Aboriginal communities last year was

specifically done only in the Territory because it was able to be easily done because of the territory powers. Does that raise the same sorts of concerns with you?

Prof. Williams—I have fewer concerns, I would have to say, in that area, because I think that is one area in which obviously an argument was put that it may have occurred within the Territory, but they are issues of national significance relating to Indigenous peoples. It is also an area where the Commonwealth has quite direct responsibility by virtue of the 1967 referendum. Also, in my view, the Commonwealth has the power to intervene in the states, if it should wish to do so, on similar grounds using that power. I would categorise that as an area where the Howard government argued it was in the national interest to do so—that is simply where the problem arose—but it did not do so by pre-emptively removing power. So long as governments are equally willing to use the power on similar terms if similar issues arise, then I think on a matter of principle you can justify addressing problems as they emerge.

Senator BARTLETT—Thank you.

Senator FIELDING—Professor Williams, I notice in your submission that you say you are only commenting on the principle of whether the Commonwealth should override territory laws. But is it possible to comment on such a matter without considering the consequence of the bill, which may be a euthanasia law in the Northern Territory? Can cause and effect be neatly quarantined from each other?

Prof. Williams—That is a good question, but inevitably they have to be if lawmaking is approached on a principles basis. Important values like the rule of law, democracy and other things that we obviously regard as fundamental to our system of government do mean that principles need to be given attention even though, as you say, there can certainly be a cause and effect involved. Here I would be fortified by the fact that, firstly, my submission is that the 1995 legislation in any event should not be revived. Secondly, I recognise that if the Commonwealth believes that it has legitimate interests in this area it should seek to use the full extent of its powers to pass a law for the whole country. I am not saying that the Commonwealth should abdicate responsibility, if it believes it should be involved; I am simply saying that it is really inappropriate to undermine self-governance and to render citizens unable to properly express their views through their legislature by pre-emptive action, or what I call opportunistic action, in focusing particularly on territories in a way that has not occurred with the states.

Senator FIELDING—On that point, the Euthanasia Laws Act 1997, which this bill is designed to repeal, does not mean the Northern Territory (Self-Government) Act, which is legislation made by the Australian parliament—so I am just wondering. Really, the parliament has the right to make amendments to this legislation whether you think it appropriate or not. Isn't it just the power of the parliament to exercise what it sees as necessary? In other words, the act was made by the Australian parliament to start with.

Prof. Williams—I certainly agree that there is no doubt that the Australian parliament has the power to do this, and the power to continue to pass laws for territory matters in quite a specific or even discriminatory way, but I do not think that makes it right. There are many examples, particularly within the Commonwealth, where self-government has been granted to nations and to sub-national bodies where it has been quickly recognised that even though the

power to continue to intervene exists it should not be applied because to do so is inconsistent with basic democratic principles. A good example of that is our own Constitution. Section 59 reserves the power on a continuing basis, to this day, for the Queen to disallow any law passed by the federal parliament of Australia. That power exists—it is stated in black and white—but I do not think anyone would regard it as a right, in this day and age, to exercise that power because Australia is a self-governing independent nation and we no longer believe it is appropriate that Britain should exercise that sort of authority over laws made by our properly elected parliament. This is a very similar issue with the territories. We need to move beyond, if you like, the recognition we have a power and to exercise it responsibly and appropriately and in a way that is actually consistent with self-government, maturity and democracy in those jurisdictions. If not, we have to ask: what is the point of granting self-government if we are simply going to intervene in an opportunistic way and do so in a way that is actually inconsistent with the very concept of self-government and independent democracy in those jurisdictions?

Senator BOB BROWN—I have two quick questions. The first one is this: in your view can the Northern Territory legislation be revived by legislation in the federal parliament?

Prof. Williams—I think more likely than not the answer is yes, it can be revived, but as I have indicated I am not certain of that view. My view is that the better course is not to attempt to revive it for fear that, if it went to court and a prosecution or another matter arose, somebody who relied upon it in matters of life and death could find themselves relying on a statute that does not actually exist. I think it is quite likely that it can be done but I am just not certain enough to think it is a wise course.

Senator BOB BROWN—Secondly, can you see some merit, therefore, in amending this bill so that it is not enacted within six months of it passing the parliament, so that the Territory legislature could look at its position and determine whether or not it was going to bring in a rescission bill or be ready to revive the 1995 legislation?

Prof. Williams—I think the best course is just to remove the limitation and, as I have said, to indicate that the Territory law is not revived by the Commonwealth. But I think that would leave open the possibilities that you say. The thing that should then happen is that the Territory assembly should meet and determine whether it itself wants to pass an act in exactly the same terms, which would amount to reviving it. It may decide not to act or to enact something in different terms. Of course, if the Territory were to proceed on that basis to enact any legislation, it may be quite appropriate for the Commonwealth parliament to be asking questions about whether the national interest is involved and whether it itself should get involved in the debate. That is the way it normally works in this country, except by virtue of these special territory powers, and I think that is the appropriate course.

Senator BOB BROWN—Thank you.

CHAIR—Thank you, Professor Williams, for your submission and for making yourself available to appear before the committee today. It is much appreciated.

[2.20 pm]

BRENNAN, Father Frank Tenison, Private capacity

CHAIR—Welcome, Professor Brennan, to our committee hearing. Do you have any comments to make on the capacity in which you appear?

Father Brennan—I am Professor of Law at the Australian Catholic University, and a Jesuit priest.

CHAIR—You have lodged a submission with us which has been numbered 428. Before I invite you to make a short opening statement, do you want to amend or alter that submission in any way?

Father Brennan—No, but I will, during the course of the proceedings, table three articles from the *Lancet*.

CHAIR—I now invite you to make a short opening statement and then we will go to questions.

Father Brennan—It is very heartening to be back appearing before a Senate committee when the government of the day does not control the Senate because I think in a country like Australia where we do not have a bill of rights deliberative democracy is greatly enhanced when there is the possibility of discussion about legislation when the government of the day does not control the Senate. So I think this is a heartening opportunity to review not only government legislation but also legislation which, in this instance, has come forward from Senator Brown.

You will see from my submission that in this case the committee process has helped to highlight the inadequacy of the bill with regard to both process and substance. I will say a word on process. You will have seen the submission from the Northern Territory government, which states:

> 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.

Whatever our views on euthanasia, everyone would be agreed that what we are trying to do here is get right the principles of federalism, and to have legislation at a Commonwealth level coming forward with this sort of observation from the Northern Territory government highlights a problem.

In terms of the substance, the key issue, I think, as a lawyer, has been highlighted nicely by Professor Williams. It is to do with the doubt and the uncertainty of the ongoing status of the Rights of the Terminally Ill Act of the Northern Territory if any sort of Commonwealth legislation is passed. The submissions of the Northern Territory government, the Northern Territory Law Reform Committee, the Gilbert and Tobin Centre of Public Law and the Law Council of Australia are sufficient to highlight that there is a lot of doubt and complexity here. Everyone is agreed, no matter what their view on euthanasia, that there has to be absolute certainty about the law that applies for doctors and patients in these circumstances. I further note that the submission of the Northern Territory government says that it retains serious

concerns about the bill and its effectiveness, that the bill is poorly drafted, that it would be imprudent to act on the presumption that the Northern Territory law would revive, and that there is a lack of certainty and a lack of clarity.

So I suggest to the committee that we need to separate out three separate issues. The first is the long held aspiration of many people, particularly in the Northern Territory but also in the ACT and perhaps even Norfolk Island—who knows?—to move towards statehood. That is a worthy aspiration but I do not think it is to be dealt with in legislation of this sort. For example, the Northern Territory (Self-Government) Act speaks of the power of the Legislative Assembly to make laws for peace, order and good government, whereas this bill speaks of the right of the people to make those laws. Jurisprudentially that is a very different situation. The Northern Territory government in its submission has asked that the bill be replaced by a bill granting statehood to the Northern Territory. Well, if that is what we are going to debate it would have to be a very different sort of discussion than one on a piece of euthanasia legislation.

It seems to me that the second issue is: what is the full panoply of self-government powers to be given to the territories, particularly in relation to big national questions or issues which impact on the nation as a whole? It seems to me that the issue is: to what extent do we want to allow the territories to legislate in novel ways where the states do not?

The third question is on euthanasia, and I think that is a fairly simple issue on euthanasia, and it is to ask, as I say in my submission: what has changed in 10 years? In terms of what has changed, if you look at the United States, Oregon is still the only state which has euthanasia. Since the Commonwealth exercise the US Supreme Court has said there is no right to euthanasia. Lord Joffe's United Kingdom legislation has gone down, and we have had very clear statements from the medical authorities in the United Kingdom and a quite eloquent submission here from the AMA. So it would seem to me that on balance nothing has changed or, if anything, the anti-euthanasia case is probably slightly strengthened if we look at developments in equivalent jurisdictions.

So the question is: what is to be done here? In terms of the practical issue, my substantive disagreement with Professor Williams is this. We are agreed that there is doubt and ambiguity here which has to be avoided. The only way to avoid it—it has to be faced—is that the Northern Territory legislature would first of all have to formally repeal the Rights of the Terminally Ill Act. You would have to start with a tabula rasa. Yes, you could say that theoretically the Commonwealth parliament, if it were so minded, could formally repeal the Rights of the Terminally Ill Act, but once again for reasons of federalism there is a lot to be said against that. It would seem to me that in order to move towards clarity there would first of all have to be the formal repeal of the Rights of the Terminally Ill Act by the Northern Territory legislature.

Secondly, I would wonder why there would be any need for the Senate to proceed with this bill at all, and if there is, down the track, to be consideration because, for example, a state within the federation has decided to move towards euthanasia and therefore it would be thought appropriate then to give the territories the power to make those laws, there would have to be, particularly in the Northern Territory, much more attentive listening to Aboriginal voices on this issue, if and when it is to be legislated in jurisdictions such as the Northern

Territory, with a large Aboriginal community. I took the opportunity this morning to have discussions with Richard Trudgeon—who would be known to members of the committee—the author of *Why Warriors Lie Down and Die*, and the Reverend Ken Minyipirriwuy Garrawurra of the Aboriginal Resource and Development Service in Nhulunbuy. The Reverend Minyipirriwuy pointed out that the Aboriginal concern, at least in his community, has been a perception that all the equipment in hospitals should be there to help us. When the education campaign was held with the original euthanasia legislation they in the end had to say, 'Please, do not come and show us those monitors.' The end result is that people who do not have English as their first language go into the Darwin Casuarina hospital thinking that every monitor there is one which could kill them. The sort of education which would be required in remote Aboriginal communities is very great. I have an article from the *Lancet* which Dr Collins and I wrote on that some years ago.

The final observation I would make is that if we had moved towards clarity in terms of, first of all, formal repeal of the Rights of the Terminally Ill Act and, secondly, no granting of the legislative power to the territories unless and until a state parliament in Australia has so legislated, then, thirdly, there would be a need for the Northern Territory legislature in reconsidering the legislation to of course revise the Rights of the Terminally Ill Act in accordance with the medical opinions that have been tended, including the article by Kissane, Street and Nitschke himself that appeared in the *Lancet* saying there are clear limitations of the gate-keeping roles of the medical specialists and psychiatrists in the ROTI legislation.

In conclusion, I would say any re-enactment, even a legally certain re-enactment, of ROTI would be an irresponsible legislative action, not the sort to be expected from a national house of review like the Australian Senate where the government does not control the floor of the house. I am very happy to take any questions.

Senator FIELDING—Thank you for the submission and the opening statement. Would you explain a bit further to the committee why you think it is appropriate for the Commonwealth to override Territory laws on euthanasia? The law this bill would override has been described by the Gilbert and Tobin Centre of Public Law as being 'inconsistent with basic principles of democracy'. Are you able to elaborate?

Father Brennan—As you would have seen from my original submission 10 years ago, which I have revised here, I am one of the view that generally territories should be allowed to exercise the same law-making power as states. I set down what I saw as fairly clear criteria and rare circumstances for exceptions: where no state has similarly legislated, where the territory law is a grave departure from the law in all equivalent countries, where the territory law impacts on the national social fabric outside the territory and where the territory law has been enacted without sufficient regard for the risks and added burdens to its own more vulnerable citizens, especially Aborigines. I, and I think the parliament also, was of the view 10 years ago that those criteria had been fulfilled.

What I would ask now in terms of those criteria is: what has changed in the last 10 years? No other state in the US except Oregon still has euthanasia, in the UK it has gone down, the US Supreme Court has said there is no right and, most importantly, there has been no legislation by any state in the Commonwealth to legislate for euthanasia. I readily concede that, if there were a state in the Commonwealth which had legislated for euthanasia, I think it

would be highly inappropriate for the Commonwealth parliament to say, 'We would not permit the territories to do this,' except in the circumstances of the Northern Territory I would want to insist as an Australian citizen that there be requisite measures taken to ensure that Aboriginal people in remote communities were not disadvantaged.

Forget the evidence of worthies like me; go back to the evidence of people like Chips Mackinolty, who said 10 years ago, 'Look, even if it were said to be the right sort of legislation, this is the wrong jurisdiction because Aboriginal people will still be afraid to go to hospital if doctors have the power to euthanase.' As a nation we have made a commitment. We say we want to reduce the gap in life expectancy. No-one could argue that we would be reducing the gap in life expectancy for Aboriginal Australians in the Northern Territory by introducing euthanasia laws which once again would entail a fear to approach hospitals.

Senator FIELDING—You mentioned a few international places. Would you tell us about international inquiries into euthanasia—for example, by the New York State task force and the UK House of Lords—and why those inquiries found against euthanasia?

Father Brennan—I have set those all out in my submission of 10 years ago. I must confess I have not, in preparation for this committee, gone through and revised all of what has been said by those committees so I could only refer to the quotes that I have there. Basically, the decisions that those committees came to were that it is always conceded that there is a margin of appreciation between a doctor and patients, but the question is: if you have legislation, how will that impact on the most vulnerable of your citizens and how will it impact on the doctor-patient relationship? I think those reports are still in good standing and that in terms of the doctor-patient relationship we should take very seriously what we have seen from the British Medical Association, the Australian Medical Association and the Royal College of General Practitioners.

Senator FIELDING—As a professor and a lawyer, do you think there is a way to draft so-called 'safe' euthanasia law where only people who want to be killed will be given a lethal injection? Is the Northern Territory law, which is intended to be resurrected by this bill, a safe law?

Father Brennan—I think that is more a question for the doctors than the lawyers and that is why I would refer to articles in the *Lancet.* You will recall that the key article was written by Drs Kissane, Street and Nitschke himself and I found most enlightening Dr Kissane's further follow-up in the *Lancet* of March 1999 where he said:

> The development of a therapeutic alliance rather than a single assessment session is critical to the management of depression and cannot be achieved by a gatekeeping role for the psychiatrist, as occurred under the Northern Territory's euthanasia legislation.

I, as a layman, not being a doctor, take that to be an indication that, 10 years on, whatever our views about the morality of euthanasia, if we wanted to design a good euthanasia law we would not simply repeat the Rights of the Terminally Ill Act.

Senator BARTLETT—I have one question, given the time. It is going back to your submission of 10 years ago, but I think it is the same question now. You said:

> Legalised active euthanasia requires every dying person to consider questions like, 'Should I end my life now so my estate can educate the grandchildren rather than providing me with nursing care?'

I will reframe that. As was pointed out in our hearings in Darwin, people now certainly have, if not a legal right, the capacity to end their life, should they choose, and it is not illegal for them to do so. Isn't it arguable that legalised active euthanasia gives people who ask themselves that question anyway the opportunity to be able to end their life in a more dignified and pain-free way? Wouldn't it be fair to say that that is the sort of question a lot of people ask themselves in any case, whether there are euthanasia laws or not, and the aim of the euthanasia laws is more to ensure that those that answer 'yes' have a more stress-free pathway to achieving it?

Father Brennan—Yes, but all I would say in relation to the complexity of these issues is: why in Australia would we make the transition to a wholesale change of the euthanasia regime through a Senate committee process now which is more concerned about federalism issues than the substance of these sorts of questions?

Senator BARTLETT—If we want to re-examine the whole euthanasia debate with everything then let's do it in a holistic way.

Father Brennan—Right. I would not quite subscribe to Professor Williams's view that the Commonwealth parliament would be possessed of sufficient power and also political will to take on these sorts of questions. Basically, in Australia these are state type issues, and I think that you would expect in Australia that they would be worked through in a number of states at the one time if there was a sufficient change of community sentiment and understanding in relation to these issues. Where, for example, in the UK, such a bill has just gone down after very exhaustive discussion, once again, I would be very suspicious about a process simply trying to resurrect the Northern Territory legislation.

Senator HOGG—My question goes to an issue that I raised with a witness in Darwin on Monday, and I would like your view on it. You listed a number of things that have changed since 1997—and I was actually one of the people in the parliament at that stage. I want to ask for your view of the intersection of this debate with the major debate that has taken place in the federal government on human embryonic stem cell research and the cures that will arise are out of that, many of which are to alleviate the distress, the pain and the symptoms of some quite callous diseases, to say the least. Surely, that is another changed circumstance that has taken place in that time and, whilst the cures are not necessarily manifest today, they are promised to be manifest in the future—I do not know how far. How would a bill such as this being revived operate in intersection with a facility such as the availability of stem cells, which would act as the cure for many of the diseases that people are seeking relief from through euthanasia?

Father Brennan—At this stage I would not see any ready point of intersection in that, as we know, to date there have been no cures developed out of embryonic stem cell research.

Senator HOGG—I accept that, but there must be some sort of intersection in the future if this bill is revived and if there comes about, let us say, a cure for cancer and that cure is a transplant of a stem cell or—I am not a medical person—however it might take place. Where does this leave the matter of choice between something that is a positive in one sense, and that is a cure, and something that I personally see as a negative, and that is being able to euthanase

as the alternative? It just seems to me that they are completely at odds in the way in which our society is heading.

Father Brennan—Yes, I would concede that you could readily see a difference in moral perspective in the two pieces of legislation. But I suppose in terms of outcomes what I would be left with is the slightly trite human observation: we are all going to die of something. So, even if there be a stem cell cure for my particular disease of the moment, there is going to be something which is going to be my cause of death and therefore there is going to be a need for everyone at some stage to have an appropriate regime in place in the social circumstances where there is a proper relationship between doctor and patient and where the patient can make a self-determining decision.

Senator KIRK—Thank you for your submission. I want to follow up on the point you make on the first page about the circumstances in which the Commonwealth can overrule a territory law. I am assuming you are talking about that general power under section 122.

Father Brennan—Yes.

Senator KIRK—In your view, as you say here, it is only in very rare circumstances, and you outline those circumstances. I take it that you are saying that euthanasia is one of those examples. Are you able to give us some other examples of when you think it would be appropriate for the Commonwealth to intervene to override a territory law and the sorts of subject matters you have in mind?

Father Brennan—It is a slightly abstract question. We can go back to the discussion we heard with Professor Williams. It seems to me that the relevant issue is: given that these are small legislatures of territories—which then could be the smallest of the states if they ever became states, but are presently simply legislatures of territories—to what extent do we want to permit them nationally to become social laboratories for experimentation on different sorts of social and moral perspectives on issues? One of the things about US jurisprudence is that often when the US Supreme Court holds its hand it says: 'We've got 50 states out there and they are all their own sorts of social laboratories. They can give something a go and then, eventually, we might make a determination on whether or not there is a constitutional right.'

My own view when it comes to issues like, say, the two that we have had lately—euthanasia or same-sex marriage—is that, given that the society we have is a national society, it is wrong for these small legislatures to view themselves as social laboratories for trying different sorts of moral and social answers which are out of kilter with those of the states generally. Where there is an ongoing case for distinctive legislation would be, for example, in the Northern Territory in the case of the Aboriginal land rights act. It may be that, over time, with the developments in native title there will be seen to be a case for just a broad national approach, but at the moment I think that is one instance where it is still justified to maintain such a law.

Senator KIRK—If a state were to legislate to enact identical legislation to what was in the Northern Territory—the 1995 act—then, according to your argument, from that point on the territories would have authority to legislate in the same area.

Father Brennan—In terms of political morality, I am readily conceding that point. If, for example, New South Wales were to legislate tomorrow for euthanasia then I would say that in

terms of political morality the territories should be given the power to make equivalent type laws. Having said that, I would say in relation to the Northern Territory on euthanasia—and I would not say this in relation to the ACT or Norfolk Island—that, given that we saw with the inquiries 10 years ago that euthanasia does impact very much on the consciousness of Aborigines in remote communities in the Northern Territory, I think there would still be an argument to say that if the Northern Territory legislature were going to legislate in a way which we thought had not sufficiently considered the perspective and the aspirations of Aborigines then there would still be a national responsibility and it could properly be exercised. And to those who bleated that it was an invasion of Northern Territory civil powers I would say: hang on, we have a national crisis in terms of Aboriginal health and that is something which should enjoy a national priority.

Senator KIRK—So if it were to occur in the ACT under those circumstances, you would say that would not be a problem, I am assuming, because there is not the same Indigenous impact in the ACT.

Father Brennan—That is right. I am saying that if, say, New South Wales, Queensland and Victoria had legislated for euthanasia, to say that the ACT should not be permitted to pass a law equivalently would be a wrong argument in terms of political morality.

Senator KIRK—And you do not have any sort of legal authority or anything for these propositions that you are putting forward? There is no constitutional basis for your arguments?

Father Brennan—No; they are self-invented. They are propositions of political morality or political philosophy, not of constitutional law.

ACTING CHAIR (Senator Barnett)—I had a couple of questions to follow up that line of argument. Wouldn't the fact that the Northern Territory legislation does not have a residency requirement and allows people from Victoria, New South Wales and anywhere in the country to go there and be euthanased create implications for the nation as a whole, and isn't it therefore a national issue in that regard?

Father Brennan—Sure, and that is one of the criteria I have set down.

ACTING CHAIR—You said in response to a question from Senator Fielding that the UK has gone down. Can you please clarify what that means for us?

Father Brennan—Lord Joffe's Assisted Dying for the Terminally Ill Bill was defeated recently in the House of Lords.

ACTING CHAIR—Did I gather correctly from your earlier statements in response to Senator Fielding that there has been no further expansion of the euthanasia laws and arrangements around the world? Is that your understanding? What is your view on that?

Father Brennan—There may have been some change in Belgium or elsewhere. But, in terms of the Western common-law jurisdictions with which we normally compare ourselves, there has either been no change or, insofar as there has been a change since 1996-97, the US Supreme Court has said there is no constitutional right, the House of Lords has defeated a bill and there has been no state in addition to Oregon adopting euthanasia laws in the United States.

ACTING CHAIR—Finally, you said in your submission that this legislation would do nothing to close the appalling 17-year gap in life expectancy. In terms of the impact on Aboriginal health, would you say that it would have a negative effect?

Father Brennan—Yes.

ACTING CHAIR—Can you say that categorically?

Father Brennan—I can say it categorically.

ACTING CHAIR—How would you support that?

Father Brennan—I say it categorically in the following way. In the Northern Territory there are still a significant number of remote Aboriginal communities. We know from the education campaigns that were conducted 10 years ago that there were a lot of Aboriginal people on remote communities who said, 'Look, if you bring in a euthanasia law where a doctor has the power to administer an injection then we will be afraid to go to hospital.' I have done no research since then, but I know of those fears anecdotally. As recently as this morning I was speaking by phone to people in Nhulunbuy, and they made the point: 'We're in Nhulunbuy; we're not in Darwin. We weren't able to give evidence to the committee et cetera, but we would be terrified to go to hospital if we thought that doctors could still do this.' In Nhulunbuy, as I understand it, during the education campaign they brought out monitors to show them and in the end they had to say, 'Don't show them these monitors because there's now a misapprehension among people that, if you go into the hospital and you see a monitor, that is the machine the doctor can use to kill you.' To those of us for whom English is our first language and to doctors of the same ethnicity and racial identity as ourselves, these might not seem to be rational concerns. They are very rational concerns of Aboriginal people in remote Aboriginal communities in the Northern Territory. That is why in response to Senator Kirk I made the point that I think there is an added burden to be discharged in the Northern Territory before you move towards a voluntary euthanasia law.

ACTING CHAIR—Thank you very much, Father Brennan. In light of the time, if you have any further evidence other than anecdotal evidence or any anecdotal evidence you want to leave with the committee or forward to the committee in that regard, it would be most welcome.

Senator BOB BROWN—I have just one more question. Father Brennan, you said that the territories ought not to be able to view themselves as social laboratories. What evidence do you have that they do that?

Father Brennan—I am not saying that they do. What I was doing—and I am sorry if that causes any discourtesy—was adopting a phrase which is common in the discussion in the United States, particularly in the US Supreme Court jurisprudence, where they say that the states can be social laboratories. My concern was that here in Australia, where you have small jurisdictional units, there might be a political desire for social experimentation which would not be able to thrive in the same way in the larger state jurisdictions.

Senator BOB BROWN—And you do not accept that the people in the Northern Territory should have the same rights as the people of New South Wales or Tasmania when it comes to legislating for their own wellbeing or their own interests.

Father Brennan—At this stage I do not accept that in relation to something like euthanasia.

ACTING CHAIR—Thank you, Senator Brown. Father Brennan, thanks very much for appearing before the committee today.

Father Brennan—Thank you.

[2.51 pm]

LEAF, Dr David, Private capacity

ACTING CHAIR—Welcome, Dr Leaf. Please state the capacity in which you appear.

Dr Leaf—I am a medical practitioner and I appear purely as a private individual.

ACTING CHAIR—Thank you. You have lodged submission No. 57. Do you wish to make any amendments or alterations to that submission?

Dr Leaf—No.

ACTING CHAIR—We now invite you to make a short opening statement, after which we will ask senators to ask some questions. Thank you.

Dr Leaf—Thank you, Mr Chair. I would like to bring my perspective—I am a primary care physician, a GP of 10 years experience but now specialising in emergency medicine—to this committee. I am grateful to the committee for giving me that opportunity. It is something I have waited many years to do. In my time as a country GP I saw many deaths as a result of terminal illness. Indeed, as I said in my submission, at any one time in my practice I had one or two patients at that stage of their illness. So I feel I have a very acute coal-face experience of these people and their families—and also of myself, as a doctor treating them.

The patients who are at this stage really just seek an option. In my opinion, the majority of patients who are facing this terminal stage of illness just want the option of whether to participate in voluntary euthanasia, where they have some control over what is going to happen to their lives, or, frequently, they would elect not to participate in that action as well. One of the options I would like to have as a doctor treating these people is the option to offer them voluntary euthanasia. In the same way that they can have an operation or elect to go down the palliative care route, they would like to have options.

I would like it to be noted that the term 'voluntary euthanasia' should also mean that it is voluntary for the doctor. I acknowledge that there are some doctors who would not feel comfortable in participating in that. That is their right, and I would seek to protect that. Equally, it is my right, I feel, to say that I would be comfortable to have that to offer my patients, should they so desire—after sufficient screening and sufficient counselling, and ruling out other conditions that would prejudice their ability to make a competent decision. Therefore I do not support voluntary euthanasia for people in the following circumstances: children, the demented and people who are unable to make cognitively healthy decisions.

In my submission you will see that the first patient case report that I documented—the patient Ian—is a very good example of that. He was a bright, healthy, calm, not depressed, not in shock man who faced the diagnosis of mesothelioma, which is a horrendous disease. He nursed his own father for some months before his father died of the same illness. He read around it. He knew about it. He faced it. And when I told him that that was what his diagnosis was, some time later, after reflection, he said to me: 'Dr Leaf, I need you to help me. At this time, I would like you to help me die.'

The current position in New South Wales, as I am sure you are aware, is that it would be illegal for me to do that. I told him that. Nevertheless, I said to him, 'I will do everything I possibly can to relieve your suffering.' Unfortunately, my promise was not fulfilled. Due to the circumstances of the disease and the treatment, there was failure of palliative care. There was failure of the pain clinic. There was failure of radiotherapy. The man died in horrible pain. I will have to live with that. However, as a professional, you move on. I would like to say that palliative care is like any other medical specialty: it does not always have the answers. I do not know any medical specialty that can achieve its desired ends in 100 per cent of cases. Ian was a good example of that. Just as psychiatry, surgery, general practice and all specialties have their limits, palliative care has its limits. In that case, patients should be given the option, in my opinion, to pursue another course such as voluntary euthanasia.

I would like to ask the committee to be very careful about considering that the AMA voices the opinions of the majority of doctors. It does not. I associate with hundreds of doctors each week and I do not know anyone who is a member of the AMA. Whilst it is a doctor's right to be a member, I was horrified when I read the AMA submission and I would like to make a couple of points about it. First of all, the AMA does not represent all doctors, and very few doctors that I know are members. I do not know what the studies would say about membership across the country but the AMA is not reflective, in my opinion, of current medical opinion. One of the AMA's chief problems with the voluntary euthanasia bill is that it changes the therapeutic relationship between a doctor and the patient. I do not believe this to be the case. I would say, based on what I have said already, that it would enhance some doctors' relationships with their patients. It would give them another option, and people are looking for options at this stage. I think the term the AMA used, that it is 'protecting' patients from pursuing voluntary euthanasia, is an unacceptably paternalistic view of the world. What are we protecting them from? Are we protecting them from several months of agony and misery? No, we are not. If the AMA had its way we would be promoting the patients' departure into that terrible journey. By having voluntary euthanasia as an option, I think you are protecting your patients from going down that path.

That leads me to a point about what many of these patients will say to you, and that is that death is not the worst outcome for them at times like this. That is an unusual thing to say, but it is what many doctors and many patients will say at this stage. Non-medical people sometimes find that a little difficult to understand. But, if you are like my patient Ian, who was a bright, intelligent man, and you are subject to daily incurable pain, loss of dignity, immobility and being a burden to your family, to many such patients that is a worse outcome than quietly passing away at a time of their own choosing in a painless manner.

I have made the point that voluntary euthanasia should be voluntary and I would like to reiterate that. I do not support it in the case of children or the demented or those who are cognitively impaired. I think that rigorous screening should be applied to people who look to have voluntary euthanasia and I would not support its use in patients who are clinically depressed. I would like to point out, because there was something said earlier that makes me bring up this point, that there is a difference between being clinically depressed and being unhappy. For example, there are many people who are in prison who are unhappy that they are in prison but they are not clinically depressed. Many of these patients are very unhappy

that they have got their disease but they are not depressed. There are some patients who are unhappy and depressed, of course, and the capacity of those people to make a decision about voluntary euthanasia would be impaired, and I support that that condition be treated at the time. If they then are not depressed and choose to have voluntary euthanasia, then so be it. I think that people who apply for voluntary euthanasia should have their case notes scrutinised by a number of medical specialists to avoid any doubt in people's minds that these people are indeed in a terminal phase of illness.

Finally, with the chair's indulgence, I would like to dedicate my submission to my father, Alfred, who passed away last Friday. He was a passionate advocate of voluntary euthanasia and, unfortunately, in his final days he lost the capacity to choose that. I would like to quote a line from his favourite poem by Dylan Thomas, *Do Not Go Gentle Into That Good Night*:

Though wise men at their end know dark is right.

For me that epitomises what these patients are feeling at a time when they are facing such a horrible disease.

Senator HOGG—You mentioned that you thought the patients should have sufficient screening and counselling. What do you mean by 'sufficient screening and counselling'?

Dr Leaf—If you are going for an operation, let us say a hip replacement, in theory what should happen—although it does not always—is that all the doctors participating in that operation and other practitioners such as nurses should talk to you and make sure that you understand what is going to happen to you. So in the case of someone who is terminally ill, it has to be very clear that there is—and there is a term for it that escapes me at the moment—acknowledgment, that there is comprehension and that there is the ability to recall at a later date what has been explained to them about the course of their illness, what their likely options are, what is most likely going to happen to them, what voluntary euthanasia means, what the process might be, what the implications for their family might be and also what the implications are if they do not participate in that. This is the same type of counselling, for obviously a different subject matter, that we give to women facing termination; to people facing any kind of medical procedure. I would like in the case of people facing this that they are screened—that they are not depressed, not cognitively impaired, not under duress—and that that it is carefully done and recorded and that they understand what is going on with their own bodies, which they own, and what the implications are of what they are seeking to do. Once that is out of the way, when we are sure of all that, then they should be able to proceed. Does that answer your question?

Senator HOGG—It does to a certain extent, except that I just wonder how this can be done objectively in the case of a person who will be assisting the person to end their life. Are you advocating that? That is what I am also trying to find out.

Dr Leaf—No.

Senator HOGG—You are not.

Dr Leaf—No. I do not think that that person who is going to assist in the procedure should be doing that. I think that could be seen as a conflict of interest. It just comes down to the mechanics of how it is done. I am aware that in the Netherlands a medical panel assesses it and then someone else, possibly of the patient's choosing, is given the green light, as it were,

to carry out the procedure as and when the patient wants. So I see a parallel with other medical procedures that we do to patients and this.

Senator HOGG—Is clinical depression readily recognised by those who are not necessarily trained in that area?

Dr Leaf—It frequently is not, and that is a trap. Clinical depression is said to affect 60 to 70 per cent at a conservative estimate of the entire population, which probably means some people in this room at some stage in their lives have had it. Clinical depression can be quite elusive; it can present in many different ways. So I think people who are specialists in that area of detecting it, like any other disease, should be given the ability to screen these people for it, because it can affect the person's decision making.

Senator HOGG—Are these people readily available?

Dr Leaf—Yes, they are called psychiatrists.

Senator HOGG—I understand that, but I mean are they readily available to participate in this sort of process?

Dr Leaf—That would be something that would have to be asked to the college of psychiatry, I would assume. They seem to find them in the Netherlands.

Senator BOB BROWN—Thank you, Dr Leaf, for coming and presenting these particular cases. It has been put to us that palliative care can in fact meet the dilemmas faced by people who request that their lives be shortened because they are miserable, and that if you talk to such people—in fact, unpack what it is that is worrying them—they will assent to taking the palliative care direction. What is your opinion on that?

Dr Leaf—I agree, and in the majority of cases that is the case. And there are many things that people fear about the process that is going to occur. Pain is only one of them. I am not suggesting the abolition of the specialty of palliative care; I would very much support it. But there are a minority of patients, and they are the ones we are here to talk about today, in whom the pathway of palliative care is not what they choose, for whatever reason. If it is a misguided idea or lack of education about the specialty then that needs to be corrected. But if it is with informed consent; if they know what the idea of palliative care is about, and they do not wish to pursue it, or frequently they cannot pursue it for whatever reason then this should be the next option. I am glad you brought that up, Senator Brown.

My patient, Ian, who I told you about, was offered palliative care; in fact he had palliative care for some time. But when I said it failed him, their best efforts did not match his pain, and he was still quite competent and lucid. In rural Australia there is a lack of access to good palliative care. The other thing that is quite important that a lot of these patients will say is that at the time where palliative care is their chief carer, they do not want to go there. They do not want to be at a stage where they are immobile, they have a lack of dignity, someone else is cleaning them up several times a day. Even though they might be out of pain, they do not want to be at the stage where a palliative care team, doctors, nurses and GPs, are looking after them. So in that sense palliative care, like any other specialty, is not for everyone, and those are the people that we are talking about today.

Senator BOB BROWN—You cited your patient Klaus, who had prostate cancer and was, to put it mildly, in an undignified position. Can you as a practising physician, think of any way in which he could have had his misery obviated through palliative care?

Dr Leaf—No. There was no way known, and I will go one step further: the high dose morphine and a drug called Midazolam, which is related to valium, that he was being prescribed to calm himself, did not work. The nurses and the palliative care physician who were supervising his care with me—because he was under me; I was the chief carer in my hospital—were unwilling to increase the dose above what I thought was necessary because they thought it would kill him. In palliative care—and this is not just with one case; I still see this today in my emergency department—there is a reluctance for some palliative care physicians and nurses to increase the dose of medication sufficiently to relieve what is clearly a suffering patient because they think it will bring the end to the patient, which it will in some cases. So that is another reason why palliative care is not for everyone. Does that answer your question?

Senator BOB BROWN—Yes, it does. Is there a problem that as you increase the medication to obviate pain you reduce the mental awareness and faculties of the person who is subject to that treatment?

Dr Leaf—Of course. Morphine is a central nervous system depressant, as is Midazolam, which is another favoured drug and which is related to Valium. So what you are doing effectively is heavily sedating the person and at the same time making them more vulnerable to other complications such as pneumonia, bed sores, incontinence, clots—you name it. Frequently, that is the final event with these people.

Senator BOB BROWN—Does morphine sometimes have the side effect of the person having nightmares?

Dr Leaf—Yes, it does.

Senator BOB BROWN—In other words, the terrors?

Dr Leaf—The terrors, yes. And so does codeine, which is related to it and which is another drug favoured by palliative care physicians.

Senator FIELDING—Previously, you mentioned regional areas and palliative care. Was your concern over the limits of palliative care partly because your patient was in a rural area, 70 kilometres out from the nearest service; and is there a case for increasing the availability of palliative care to rural and regional areas?

Dr Leaf—Absolutely. In Ian's case he chose to remain at his home, and the professor of palliative care who was liaising with me on Ian's case said, 'Look, David, there's nothing we can do unless this man wants to come to hospital.' Ian's choice was therefore to go to hospital 70 kilometres away in Newcastle or to stay in his own home, and Ian chose to do that. You could argue that that was the price that he paid; however, that is his right. I thought that the palliative care person that I was talking to was not really giving me a lot of assistance in this circumstance, and he was able to send nursing teams out so he had access to palliative care. There was nothing else that, in my opinion, he could have had if he had gone to hospital. I could have prescribed any drug that this professor wanted and administered it in any way,

shape or form. So in this instance, I do not think extra palliative care would have helped. However, in other rural areas that I have worked in there is a distinct lack of many services, and palliative care is but one of them. So there is a good case for increasing palliative care, but it is not the only answer, and that is why I am here today.

I wish to make another point—this is not in relation to what you are asking, Senator. Professor Brennan mentioned Aboriginal concerns about doctors having the right to terminate patients' lives. I worked for a year in East Timor, and the Timorese word for hospital means 'place of death', which, though rather gloomy, is analogous to what Professor Brennan was talking about. Clearly, that is just an educational, cultural and language issue. I do not think that that should stop us from pursuing this course. It needs to be explained to all patients, whether they are Aboriginal or not, that voluntary euthanasia is voluntary, bar no-one.

Senator BARTLETT—Given the time, I have one question. I gained the impression from your written submission that you think it is not ideal that the palliative care in your region is at a Catholic hospital. Is that the case?

Dr Leaf—Given my experience, I was concerned that their ability to control a patient's pain to a level that I thought was acceptable was governed by alternative views at the core of what they were doing.

Senator BARTLETT—In the example you give—of Ian, I think—it seems more like a failure in pain management. In the submission, you say he was comfortable and lucid for his final three weeks. It was actually feasible to manage his pain.

Dr Leaf—That is right. For some reason, three, four or five years down the line, I can still remember the doses. I wanted to increase the dose from 760 milligrams of morphine over a 24-hour period to 880 milligrams, which is one more vial. That is a very small increase. I met an absolute brick wall from the palliative care team at all levels. In fact, the dose that controlled his pain beautifully for three weeks was 1,500 milligrams over a 24-hour period. He did not need any increases on that. For a good part of that period he was actually lucid. So I was concerned about their motivation at that stage.

Senator BARNETT—Firstly, Dr Leaf, my sympathies on the passing of your father last week. Just to clarify a few things: are you a doctor practising in New South Wales?

Dr Leaf—I am.

Senator BARNETT—You said in your submission that the Andrews bill stops you doing your job. How is that?

Dr Leaf—Because I am not able to give people the option.

Senator BARNETT—I am not sure whether you are aware but the Andrews bill related only to the Northern Territory, the ACT and the territories. What has that got to do with you doing your job in New South Wales?

Dr Leaf—I think we all realise that if voluntary euthanasia becomes legal in the Northern Territory then it is not just going to be Territorians who seek it—unless there is a provision saying that people must live there for a period of time. I am aware—and Dr John Elliott is an example of this—that people will travel across the world to make themselves—

Senator BARNETT—That is what I wanted clarity on. So you would consider offering your patients the option of moving to the Northern Territory and accessing euthanasia in the Northern Territory?

Dr Leaf—Yes. I would have to be very careful about how I did that. I would get advice, should it be legal at the time, from a medical defence union. But I think it is a reasonable thing to say, 'Look, it is not legal in this state and I am not allowed to do it but it is available in other states.'

Senator BARNETT—In terms of the criteria that you would apply for euthanasia—and I just want to clarify what you said earlier and what is in your submission—somebody needs to be an adult and they need to be of sound mind.

Dr Leaf—Yes.

Senator BARNETT—Is that it? Dr Nitschke put that view to us in the Northern Territory: that they must be an adult and of sound mind. And that was it; there were no other criteria. What are your criteria?

Dr Leaf—That they are not under duress. As much as can be determined, that needs to be the case. I am aware of a number of cases in New South Wales where elderly patients were taken advantage of by people—some were relatives, some were not—who sought financial gain from the person's passing. As much as can be determined that needs to be avoided.

Senator BARNETT—Any other conditions?

Dr Leaf—Sound mind covers depression. That is all I can think of at the moment.

Senator BARNETT—No problem. You mentioned depression and clinical depression, and that a person suffering those conditions should not be allowed to proceed. You mentioned somebody who was unhappy but not clinically depressed. Under your criteria a person who is unhappy, but an adult of sound mind, should have the right to access euthanasia?

Dr Leaf—Yes.

CHAIR—Dr Leaf, that is all the questions we have for you. Thank you very much for your time today and for putting a submission to us. It is appreciated.

Dr Leaf—Thank you.

[3.21 pm]

CORBELL, Mr Simon, Attorney-General, Australian Capital Territory Government

Evidence was taken via teleconference—

CHAIR—Welcome, Minister Corbell, to this hearing of the Senate Legal and Constitutional Affairs Committee. We have your submission. We received it this afternoon, so we have not had a chance to allocate it a number or put it on the website. Before you make a short opening statement, do you need to amend or change your submission?

Mr Corbell—No, it is fine as it is. It is quite a brief submission, and there is nothing I need to add to it.

CHAIR—I invite you to make a short opening statement and when you have finished we will go to questions.

Mr Corbell—Thank you for the opportunity to present to you this afternoon. I want to speak to you very briefly about the government's position in relation to this bill that the committee is considering. The ACT supports the Rights of the Terminally Ill (Euthanasia Laws Repeal) Bill 2008 because the ACT believes the bill will enable the people of the territory to determine their own path in relation to this issue. The introduction of section 23 and 23(1A) to the Australian Capital Territory (Self-Government) Act 1988 by the Euthanasia Laws Act 1997 removed our capacity to permit voluntary euthanasia. While the ACT government will not necessarily move to make laws to legalise voluntary euthanasia, the issue at stake is the constitutional right of this government to make laws for the governance of the people of the Australian Capital Territory.

It is probably worth reflecting that in the early years of Federation the ACT was selected for the seat of government of the Commonwealth; however, after more than six decades of hosting the national government, the people of Canberra were charged in 1989 with self-government. The people of the territory are responsible, through their elected representatives, for their own governance and for ensuring the future of a growing and prosperous community. The people of the territory are a community which values fairness and diversity and which strives to provide opportunities equally to all of its citizens.

The plenary grant of power which is given to the territory through the self-government act recognises the democratic right of the people of the territory through their elected representatives to govern the territory and to make laws for it. Members of the ACT parliament are elected by free elections on the basis of policies made known to the electorate, and have debated and passed a great many laws since self-government was granted. Today, I think it is very important to stress that only the elected members of the ACT Legislative Assembly can claim a legitimate mandate to represent the views of the people of the territory. It is a direct attack on the democratic principle for others without such a mandate to substitute their own views for the views of those elected to represent the people of the ACT. Obviously, currently the ACT does not have the constitutional capacity to commit voluntary euthanasia following the parliament's support for the Euthanasia Laws Bill 1997, which limits the power of the assembly under section 23 of the ACT (Self-Government) Act.

It is probably worth highlighting some history. In June 1997, an independent member of the assembly introduced the Euthanasia Referendum Bill into the assembly. The purpose of the bill was to allow the conduct of a referendum in relation to questions about voluntary active euthanasia. The questions that were to be put, should this bill have been passed, were:

1. Do you believe that voluntary active euthanasia should be permitted by law?

2. Do you support the following statement?

The people of the ACT call on the Commonwealth Parliament to restore to the ACT Legislative Assembly the power to make laws with respect to voluntary active euthanasia.

The assembly did not pass this bill at the time, principally on the basis that the referendum was not considered the appropriate mechanism in the circumstances. But all the members in debating that bill agreed that the Andrews bill, as it was known, was an affront to the ACT's status as a self-governing entity. Therefore, Senator Brown's bill, which proposes the repeal of this act, would again see the assembly having the capacity to enact laws around the issue of euthanasia as it sees fit. The government supports the bill in its current form.

As the territory's Attorney-General, I strongly believe that the power vested in the assembly under section 22 of the self-government act, to make laws for the peace, order and good government of the territory, should extend to all areas of law for the territory. The removal of sections 23(1A) and 23(1B) of the ACT (Self-Government) Act does not necessarily mean that the elected representatives of the ACT would immediately move to enact euthanasia laws. It would, however, simply enable the people of the territory to determine their own path in relation to this issue, and that is the democratic way.

The issue of euthanasia is, of course, not the only issue on which the ACT has been forced to defend its right of self-determination. Members will, I am sure, be aware of the issue of the disallowance of the Civil Unions Act in 2006. The ACT government continues to put its case to the federal government in relation to this issue, but as yet we have no reassurance that we will not see legislation in relation to this matter also overturned. The method that was used to quash the Civil Unions Act is particularly notable for its anti-democratic character. The previous federal government utilised section 35 of the self-government act, which provides that the Governor-General may, by legislative instrument, disallow an enactment within six months after it is made. This same section also gives the Governor-General the power to:

... within 6 months after an enactment is made, recommend to the Assembly any amendments of the enactment, or of any other enactment, that the Governor-General considers to be desirable as a result of considering the enactment.

These provisions leave—and I would like to quote Professor George Williams on this matter:

Canberra's system of government with several features more akin to a 19th century colonial possession than a modern Australian territory.

These provisions, in the ACT government's view, leave the government of the ACT vulnerable to the whim of the Commonwealth executive, are antidemocratic and anachronistic. There is already a considerable democratic deficit endured by citizens of the ACT. The ACT has only two senators in the federal parliament. States of a similar size such as Tasmania have 12. In referendums we are not counted when the question of whether a majority of states have voted yes is considered.

We believe that the self-government act should be amended to remove the power of the Commonwealth executive to recommend the disallowance of territory laws. Constitutionally, the Commonwealth parliament might assert its rights to make laws that are in contradiction with the democratic aspirations of the people of the ACT. However, we do not believe that such powers need to be explicitly stated in the ACT (Self-Government) Act. Your deliberations today on this issue are very important for the ACT. We welcome the opportunity to make this submission and I would be very happy to answer any questions that you, Madam Chair, or other senators may have. Thank you very much.

CHAIR—Thank you, Minister. The Northern Territory legislation, the Rights of the Terminally Ill Bill, was challenged and it was found to be a bill which the Territory parliament could in fact legislate for. It has been put to us in Darwin by the Northern Territory Law Reform Commission that this current debate we are having is more a matter of policy rather than a matter of constitutionality and territories rights. What is your view about that?

Mr Corbell—I would not agree with that assessment. The Andrews act is quite explicit: it prohibits the territories from making laws in relation to euthanasia. It is quite an explicit provision in that regard. It is quite clear that any bill introduced into the ACT Legislative Assembly which proposed to provide for voluntary euthanasia would have no effect and no status and if passed by the assembly would have no legal standing. So I do not quite understand the position that those other witnesses make. I am not privy to their evidence, I have not seen their evidence, but based on what you say I could not agree with it.

CHAIR—You might have misunderstood what I was asking. If you set aside the issue of euthanasia, the policy issue of whether the territories should be able to legislate in this way in respect of euthanasia—in other words, if the issue was not euthanasia—then is this more a matter of territories' rights and the elected assemblies of the territories being able to determine their own legislative program, essentially?

Mr Corbell—Absolutely. There is no doubt in my mind about that. Whether it is euthanasia, whether it is some other legislative reform which may cause discomfort for members of the federal parliament or not, the issue is that it is up to the territories to determine their policy settings on these matters. It may be that the territories choose not to legislate for euthanasia, and that is probably the position here in the ACT. I think at this stage it would be unlikely that any member of the current assembly would seek to legislate for voluntary euthanasia. But the point is that it is up to the elected representatives in this jurisdiction to decide whether or not that is appropriate, in the same way that state parliaments can already do so.

Senator BARTLETT—The Andrews act prohibits the ACT from legislating in any way on anything to do with euthanasia. Are there any other areas at the moment where the ACT is constrained in what it can legislate on?

Mr Corbell—The self-government act outlines a couple of areas. They are quite limited. Primarily, the one that comes most immediately to mind is the power in relation to legislation that governs the activities of the Australian Federal Police. The self-government act is quite clear that we cannot make law as relates to the operations of the Australian Federal Police, even though they provide policing services here in the territory, so that is one limitation. We

are limited in relation to industrial relations matters and we are also limited in relation to another matter dealing with the framework of self-government itself—for example, the assembly cannot legislate on any increase in the number of elected representatives. We need to seek the agreement of the Commonwealth government in that regard. So there are a number of other areas where we are limited or restricted, and those are matters that the government is currently actively pursuing with the federal government. We believe there is no rationale, for example, to prohibit the territory determining how many elected representatives within the ACT Legislative Assembly it should have. That should be a matter determined by the Legislative Assembly itself. We see no reason why that constraint, for example, should be in place. There are a number of others. What I have provided to you is not exhaustive, but they are probably some of the more obvious ones.

Senator BARNETT—Thanks very much, Mr Corbell. Are you a lawyer?

Mr Corbell—No, I am not.

Senator BARNETT—But you are the Attorney-General?

Mr Corbell—Indeed I am.

Senator BARNETT—Have you taken advice from your department and would your department have considered carefully the advice given to you, the letter and the submission you have made to this committee?

Mr Corbell—Yes, my department has been involved.

Senator BARNETT—And they would consider carefully the submission that has been made by you?

Mr Corbell—Yes.

Senator BARNETT—You have indicated that you support the bill in its current form. I draw your attention to page 3 of the submission from the Northern Territory government where it says:

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 ..."

It goes on to say:

The problem is the lack of certainty and the lack of clarity in combination with this particular subject matter.

Do you want to reflect on the submission of the Northern Territory or could you?

Mr Corbell—Thank you for the question. I am not familiar with the Northern Territory's submission; I do not have it in front of me. I would say that the Northern Territory is probably

best placed to comment on issues about whether or not the passage of this bill would revive the legislation in the Northern Territory. That situation does not apply to the ACT in that there was no legislation made which was subsequently overturned in relation to euthanasia by the Andrews act. So I think it is probably best for me to leave those technical issues to the Northern Territory.

The ACT's position is that it is simply inappropriate for the Commonwealth parliament to determine a policy setting that is only relevant to the people of the Australian Capital Territory. Senator Brown's bill restores to the territory the ability to legislate as the territory deems fit on the issue of euthanasia. That is entirely consistent with the grant of self-government to the territory, and that is why we support the bill. In terms of whether or not it revives the Northern Territory's legislation, the Northern Territory is better placed to consider that point than the ACT. The ACT is not in the same position as the Northern Territory in that regard.

Senator BOB BROWN—You may have missed it but earlier on the view was expressed that small states in the United States are sometimes viewed as potential social laboratories, and there is concern about that. Do you in any way see the ACT as a social laboratory?

Mr Corbell—That commentary is made from time to time in the media and elsewhere. The ACT does not view itself as a social laboratory, but I think it is fair to say the ACT does consider itself to be a progressive jurisdiction. Whether it has been a Labor or a Liberal administration, it has always tended to be more progressive on a range of social policy matters. You can speculate as to why that is the case, but that is traditionally how the ACT as a community has viewed itself.

The important point to make is that the rationale for federation is meant to provide for a diversity of legislative activity that suits the needs of the individual regions represented by the states and territories in the federation. One of the strengths of the federation model is that it provides for innovation in a national context which can be used by states and territories to explore whether or not an approach adopted in one jurisdiction is appropriate in others or indeed on a national basis. I think it is one of the strengths of the federation model that states and territories are able to legislate to meet the needs of their particular jurisdiction. The difficulty we have is that we are limited in what we can do in a number of areas—particularly as it relates to euthanasia, as it relates to a number of issues I previously commented on and as it has related to the issue of civil unions, which the Commonwealth has chosen to override previously.

Senator BOB BROWN—I thank you for, inter alia, drawing our attention to the fact that the ACT assembly is unable under the provision of self-government to legislate to alter its size. I did not know that. That is of course something that the state legislatures can do.

Mr Corbell—And even the Northern Territory Legislative Assembly is able to determine its own size. It is quite odd that it is believed the Northern Territory as a self-governing territory can determine their number of elected representatives but the ACT cannot. This is a matter that I am pursuing with my counterparts in the federal government.

Can I take the opportunity to make the point that we accept as a territory that there are certain constitutional limits on our activities. The Constitution is clear on the powers of the

federal parliament as it relates to territories. Whilst we believe that it would be desirable for those hindrances or restrictions to be removed in the constitutional framework, we also recognise that that is unlikely, at least in the short term or even in the medium term. But there needs to be greater respect given to the territories to determine their own affairs. We believe that the provisions that exist in self-government acts that seek to prohibit certain matters from being considered by territory legislatures are inconsistent with the view that self-government can occur in a mature and considered way by those jurisdictions. The provisions in the self-government acts that prohibit territories from considering these types of matters should simply not exist. If there is a question about whether it is appropriate for a territory to legislate, the Commonwealth should be able to rely on its constitutional power without making it explicit in self-government legislation. That is clearly what this bill seeks to achieve.

CHAIR—Thank you for your submission today and for making yourself available to appear before the committee. It is much appreciated.

Mr Corbell—Thank you.

[3.45 pm]

POLLARD, Dr Brian James, Private capacity

ACTING CHAIR (Senator Barnett)—Welcome. Is there anything you wish to add about the capacity in which you appear?

Dr Pollard—I am appearing in a personal capacity. I am a retired doctor who was both an anaesthetist and a palliative care physician.

ACTING CHAIR—We have your submission, which is numbered 47. Do you wish to make any amendments or alterations to your submission before we ask you to make an opening statement?

Dr Pollard—Yes, I do. On page six, about three-quarters of the way down the page, there is a sentence that starts: 'As there was no practising psychiatrist in the NT at the time ...' That is obviously not true. When I wrote that I had in mind that there was no qualified palliative care doctor in the Northern Territory, but I wrote 'psychiatrist'. So that is out.

ACTING CHAIR—I now ask you to make a short opening statement, after which we will allow senators to ask questions.

Dr Pollard—Since the passage of this bill would presumably activate the Northern Territory bill—and I have heard the discussion about that; it may or may not be so, but I will precede on the understanding that it is so—I thought that the Senate should understand the content of the Northern Territory bill that they would be liberating. I wish to address the content of that bill and I will come at it in somewhat different ways. I will start with the question of human rights because the title of the bill was 'Rights of the Terminally Ill'. Human rights are not well understood by lots of people. They hear 'the right to life' and 'the sanctity of life' and they often associate those terms with a religious connotation. So I want to just mention something about the Universal Declaration of Human Rights of the United Nations which was promulgated in 1948. That was three years after the end of World War II, and the nations were considering the widespread callous abrogation and suppression of human rights that had occurred so recently and so widely. They decided to draw up a list of fundamental human rights so that there would be an objective list for people always to refer to and in the hope that such abuses of human rights would not occur again.

I have for each member of the committee some quotations. One of the sheets refers to the preamble in the Universal Declaration of Human Rights.

ACTING CHAIR—We have that, and we thank you for it. Please proceed.

Dr Pollard—It reads:

> ... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ...

I just want to say that 'dignity' there means 'worth' or 'value', so it refers to the value of human life. 'Inalienable' refers to the fact that these rights may not be given away or taken away. The rights that are referred to in this document are called 'fundamental rights.' I briefly categorise a fundamental right as a right which is owned by every person in the community

and which requires the respect of every other person in the community. The preamble goes on a little later to say:

... human rights should be protected by the rule of law,

… … …

... Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

In the body of the document, of which there are about 40 articles, it says:

Article 1

All human beings are born free and equal in dignity and rights.

… … …

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind ...

… … …

Article 3

Everyone has the right to life, liberty and security of person.

… … …

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law.

I would like the members of the committee to keep those in mind as we proceed.

ACTING CHAIR—Dr Pollard, I draw your attention to the fact that some of the senators would like to ask you some questions. Please continue with your opening statement and then we will move to questions.

Dr Pollard—I recognise that. This is my opening statement. In the eighties and nineties, euthanasia was becoming a more and more common topic. Certain governments set up committees of inquiry in order to investigate what the consequences of legalising euthanasia might be. I have here the reports of the five committees of inquiry that I made reference to in my paper. Three of those were unanimous and two were by majority. One of the unanimous ones was from the House of Lords. All of those committees contained people who were in favour of euthanasia. The 14 members from the House of Lords committee decided that they could not see a way by which this could be safely done. The New York State task force consisted of 25 people and the committee of the parliament of Tasmania contained five people. The Tasmanian committee, though small, had the unique property that, of the five members who were appointed, four were initially in favour of euthanasia but the committee decided five out of five. The members who were in favour of euthanasia might have retained their views about the social utility of it, but they said you could not legalise it, and they gave their reasons. Committee members have a one-page extract from each of those universal reports to refer to.

I would like to look in detail at the Northern Territory bill, and I will do that if you wish. I would also like the opportunity to talk about non-voluntary euthanasia and the situation in the Netherlands.

CHAIR—Dr Pollard, do you want us to go to questions? The issue about the Northern Territory bill might come up in our questions to you, so we might do that first.

Dr Pollard—Yes.

Senator FIELDING—Thanks, Dr Pollard. I do not know whether you have had a chance to, but you may have read some of the cases detailed by Dr Leaf earlier today.

Dr Pollard—Yes, I have.

Senator FIELDING—Can you make an assessment of those cases as a palliative care practitioner?

Dr Pollard—Yes. I do not have them here before me, but I think it was the man with the prostatic cancer who was cared for by the palliative care team in conjunction with Dr Leaf at home. Just from reading on paper I really cannot go into too much detail, because we get just one version of this, but I can see that there were breaches of the principles of palliative care there. I realise that general practitioners do not see a broad spectrum of difficult cases of dying people. They present very challenging problems for even specialist palliative care units. Sometimes those patients can only be best managed in the unit, not at home. Those cases were really quite extreme, but they were not different from the sorts of things that palliative care departments have to deal with on a fairly regular basis.

I do not make any great claim that palliative care is universally and always successful. It is more successful than other people—at least it ought to be and, in my experience, almost invariably is. I did not ever encounter, in five years of this work, any patient for whom we ran out of options. I had patients who would say to me early on, 'I want you to know that I'm in favour of euthanasia,' and I would say to them, 'Okay. You let me know when you reckon things are out of control, and we'll talk about it.' Nobody ever had the opportunity or wanted to raise it with me thereafter. The people who asked me for euthanasia were the families, the distressed relatives. They had their distress even after the patient had been made comfortable, and they would say: 'Look: see how he is suffering.' But he was not suffering any longer; they were. So there is a not a black-and-white set of areas in palliative care.

Pain is not always an easy concept to understand. I can remember a patient who came in in a lot of pain and very angry about things that had been going on his life beforehand—poor handling by doctor after doctor—and he needed an enormous amount of morphine to control his pain. In the palliative care unit, he started to settle. The doctors were different—they were listening, responding, giving him what he wanted, making him feel that he was welcome. His anxiety and his anger began to dissipate, and as that happened his need for the morphine and his level of pain intensity dropped and dropped, down to quite ordinary levels. I have also seen another patient in my experience with the same phenomenon. So it is not just 'pain equals morphine'. A lot of other things go on in the psyche of these patients, and these are the things that can be attended to by good palliative care staff, which are almost always lacking in the home environment.

Senator FIELDING—Would you agree that compassion is not helping someone have a lethal injection but, instead, is working to address a patient's fear, pain, depression or loneliness? How does palliative care do that?

Dr Pollard—Address their psyche?

Senator FIELDING—Yes.

Dr Pollard—By making them welcome. By communicating well with them, telling them what you are doing, why you are doing it and why you need their cooperation. You involve the family in everything that is going on, because when a person is terminally ill it is not just the person, it is the whole family that are involved, and you all need to move along on the same levels of understanding. It is not always possible to bring this about, but it is that sort of thing—it is the whole environment. Sometimes you need a whole lot of other people also involved in the team. It is not just a doctor and a nurse and a patient. Whatever else is going on, you may need other people to come in and contribute their advice and help also.

Senator FIELDING—You mentioned the Netherlands. How did euthanasia operate in the Netherlands or the Northern Territory, when it was allowed there?

Dr Pollard—They are not comparable. You say the Netherlands or the Northern Territory but they are poles apart. Which would you like me to address?

Senator FIELDING—Start with the Netherlands.

Dr Pollard—It is quite complex. I note that many submissions have been made to this committee which refer to the Netherlands and say that euthanasia there is under good control. I could talk a great deal about the Netherlands but I will just refer to something which first became apparent in the Netherlands when the Remmelink report came out which described 2000-odd cases of euthanasia in 1990. To their astonishment they found that there were also 1,000 cases of death from the doctor without the patient's consent, half of the number of the so-called voluntary euthanasia cases. This floored them and they did not know what to do about it. They still have not come to terms with that. They do not use the words 'non-voluntary euthanasia'. They do not call it murder, which is what it is by their law. So they have adopted an acronym, LAWER—life-terminating acts without explicit request. That is now discussed as one of the options within terminal care. To this day the Dutch have never faced that. In 1999 an article was published in the *Journal of Medical Ethics* by an ethicist from the Lindeboom Institute for Medical Ethics in the Netherlands and John Keown, who is a lawyer in England, and they said in their conclusion:

> ... the reality is that a clear majority of cases of euthanasia, both with and without request, go unreported and unchecked. In the face of the undisputed fact that in a clear majority of cases there is not even an opportunity for official scrutiny, Dutch claims of effective regulation ring hollow.

Why they do not get an opportunity to regulate it is because the doctors persist in falsifying the death certificate—having carried out euthanasia, they falsify it by recording the death as 'natural causes'. They have never been able to get over the fact there is a high level of unreporting. They have introduced a law to require it, but the doctors are slapped on the wrist with a feather and are virtually never prosecuted for breaking the law. They do not address life taking without consent. That is the situation in the Netherlands.

The situation in the Northern Territory only lasted eight months and the only report we have of that was what was published in the *Lancet* in 1999, I think, by David Kissane, who is a professor of psychiatry, Annette Street and Philip Nitschke. They chiefly concentrated on the four cases of death by lethal injection that took place in those eight months.

Senator FIELDING—Do you have any other comments on that, in particular?

Dr Pollard——The act did require a psychiatrist on each occasion and for one of the four cases a psychiatrist from New South Wales was used. Even though the act required all the doctors to be registrable in the Northern Territory and to have been practising there for five years, they got a psychiatrist from New South Wales. I have never been able to find out why. It may be that the local people were not available or were not prepared to provide the certificate. They were able to show that patients with treatable depression were allowed to have their lives taken, and in one case the psychiatrist was asked to see the patient on the day of his euthanasia. He saw the patient and 20 minutes later the psychiatrist phoned Philip Nitschke back to say that he would certify the patient as not having a mental illness. I can tell you that a survey of psychiatrists in the United States found that 94 per cent said that they could not possibly make such a determination in a single visit. These facts were recorded in that article.

CHAIR—If you have a look at the transcript of the committee hearing in Darwin, Dr Nitschke responds to the claims in that article. You might be interested in reading it.

Senator BARNETT—I will not ask any questions, but the chair is right. Have a look at the transcript. Dr Nitschke does confirm that it was a 20-minute consultation on the day of the euthanasia.

CHAIR—Thank you very much for appearing before the committee today and for your evidence. It is much appreciated.

Dr Pollard—Do I have time to talk about non-voluntary euthanasia?

CHAIR—We are running a little bit behind schedule. If you have something that you could table for us we could take it on board.

Dr Pollard—I think there is something that I should tell you. You have heard everybody talk about 'voluntary' euthanasia. It is always voluntary, and that is as it should be if you want euthanasia. But it comes about that not only in the Netherlands but also in Australia and in the United States, voluntary euthanasia tends to morph into non-voluntary euthanasia—that is, taking life without a patient's request. It is very difficult for people to understand that because that sounds like an evil progression—'How dare you abuse patients by doing that!' The reason for that is not evil; it is an understandable progression. In fact, the rationale for voluntary euthanasia contains the rationale for non-voluntary euthanasia also. The reason it happens is that when you regard euthanasia as providing those patients who request it with a benefit and you become accustomed to providing euthanasia as a benefit, when you come across other people who are perhaps comatose or for some reason are unable to make their request but who are suffering just as much, then it seems discriminatory to the doctor to withhold that benefit from that patient also.

So they get into the habit of providing the 'benefit' of euthanasia, and that has reached its nth degree in the Netherlands. Euthanasia in the Netherlands has gone from terminal illness, through depression, to no illness. Most recently—I think it was last year—an academic at the end of life requested and got euthanasia and he was not ill at all. He had nothing wrong with him. He was just tired of life. That is the progression that goes on, and it is all logical.

CHAIR—Thank you, Dr Pollard. Thank you for your time this afternoon.

Proceedings suspended from 4.11 pm to 4.26 pm

MENEY, Mr Christopher Laurence, Director, Life, Marriage and Family Centre, Catholic Archdiocese of Sydney

CHAIR—Welcome. You have lodged a submission with us which is numbered 360. Do you want to make any amendments or alterations to that submission?

Mr Meney—No, thank you.

CHAIR—I invite you to make a short opening statement; then we will go to questions.

Mr Meney—Thank you for the opportunity to appear before the committee. The issue under consideration is an important one. There are many interested parties who have contributed to date or who will do so soon, and the responsibility before you to consider the various inputs is significant. At this stage I would like to reserve the right for the bishops of Sydney to further clarify any comments which I make before the committee.

In the 1960s and 1970s, the ethicist Paul Ramsey commented at length about his concerns with regard to the dehumanisation of death, the portrayal of dying persons as objects with humane exits from life impeded by the modern hospital ethic of life at all costs. Ramsey's concerns later changed as he became more worried about the opposite problem—what has been described as 'terminating life-sustaining treatment too early, treating the debilitated as "better off dead" and defining as "futile" those who would never be restored to normal but whose lives were hardly over'. This was not a philosophical transformation but, rather, a reflection of what was now occurring in the medical institutions of the developed world.

Today the challenges to meet the needs of those who are terminally ill are no less significant. The Catholic tradition has always maintained the importance of respecting the dignity of the human person, especially those persons in vulnerable circumstances. Catholic agencies have long dedicated significant resources to care for the ill and dying and their families through hospices and quality palliative care, and we continued to be involved.

Caring for the terminally ill calls for a radical self-giving and a willingness to generously respond with support for those who are suffering. In such situations a proper response is one of solidarity which encompasses care for the sufferer. A key element of respecting human dignity is the need to respect and value human bodily life. Hence, the individual and social resolve to respect all human life and to never regard a life as lacking worth is essential for a society that wishes to protect and equally value all its citizens.

While respect for the inviolability of human life prohibits intentional killing, it does not follow that life must be preserved 'at all costs'. For example, burdensome or overly invasive treatment might reasonably be refused by a competent person, particularly where such treatment is likely to be futile. The refusal of such treatment by a patient in these circumstances is not the same as suicide. However, basic nutrition and hydration should always be provided, and such care should not be regarded as extraordinary or burdensome treatment. It may also be permissible to accept a foreseen but unintended side effect such as the possible shortening of life where the unintended side effect is balanced by the intended effect of relieving pain. This Catholic doctrine of 'double effect' is found within current law which gives legal immunity to doctors who administer pain relief that would be objectively

justified by a 'reasonable physician'. Every patient is entitled to adequate pain relief to enable them to attend to their spiritual, moral and family duties. However, the intention must always be to provide care for the patient, not to kill them. We maintain a fundamental distinction: seeing a life as having no value and killing someone is not equivalent to continuing to value a patient's life while foreseeing that their life may be shortened through changes to a treatment regime. As such, the current provisions within Australia under which proper palliative care can be administered to the suffering and dying are consistent with respect for their dignity as persons.

While the law respects the rights of patients to refuse treatment, it does not follow that this establishes a pretext for a right to die. The right to refuse treatment is generally founded in a person's right to inviolability—that is, their right not to have treatment imposed on them without their consent. This right is only of negative content and does not serve to establish a positive content such as a right to die. If our society accepts that doctors may now take human life in certain circumstances, medical practitioners will be deliberately engaged in killing. The easy death experience in the Netherlands has found a majority of surveyed doctors now think it appropriate to suggest euthanasia to patients. Legalised euthanasia significantly alters the nature of the doctor-patient relationship and greatly diminishes the level of trust so important for the effective practice of good medicine. Indeed, if euthanasia became legal, medical training would require that doctors be taught how to kill. Once the medical prohibition on deliberate killing was broken, it would become increasingly easy for doctors to euthanise the incapacitated, the emotionally distressed and the disabled newborn.

Suggesting that euthanasia is simply a part of quality palliative care also puts a medical cloak on euthanasia, while ignoring its philosophical and societal implications. As the Australian ethicist Margaret Somerville has suggested, this becomes clear if we imagine that specialised lawyers who could be trained to interpret and apply rules would be given responsibility for conducting euthanasia. The astonished response of many to such a proposal is: 'What? You would allow lawyers to kill people?'

The legal acceptance of euthanasia can serve as a platform for the cultural unacceptability of being a burden to others. In Oregon in 1998, physician-assisted suicide was legalised. Within two years, the proportion of persons who cited their desire not to be a burden to others as one of their reasons for requesting euthanasia increased fivefold. It is also easier and cheaper to kill a patient than to provide palliative care. Good palliative care can become a secondary concern and less likely to be able to be accessed by those patients not wanting to be euthanised. Legalisation over time affects hospital practice and societal expectations, ultimately resulting in undue pressure on patients to not overburden family, medical staff and/or resources. The subtle or not so subtle forms of persuasion ultimately diminish a person's freedom and personal choice. Irrespective of safeguards, voluntary euthanasia inevitably leads to non-voluntary euthanasia—the killing of human beings who have not consented or who are unable to do so.

A wish to die can often be an expression of depression, pain or poor symptom control rather than a sincere desire to be killed. The close relationship between depression and the wish to die led one American study in the *American Journal of Psychiatry* to conclude:

The desire for death in terminally ill patients is closely associated with clinical depression—a potentially treatable condition—and can also decrease over time. Informed debate about euthanasia should recognise the importance of psychiatric considerations as well as the inherent transience of many patients' expressed desire to die.

It is normal for vulnerable persons in challenging situations to seek a reduction in their level of pain and psychological distress. Society has a duty to protect them and to ensure that they receive the level of support that they need. It is not society's role to kill them or to assist in their killing.

The emphasis on a patient's wish to die rather than receive palliative care is often found in euthanasia legislation such as the Northern Territory Rights of the Terminally Ill Act 1995. In this act, the criterion of an expressed desire to be killed is combined with the requirement for the patient to be deemed terminally ill. However, if a patient's suffering is deemed unacceptable by the patient or by others, why does it matter whether or not this suffering is due to a terminal illness? If unacceptable suffering is sufficient, as euthanasia advocates appear to imply, there is a broad premise for an ever-widening range of individuals to be killed provided they satisfy this highly subjective criterion. Indeed, the argument which calls for the caring state to euthanise those unfortunate persons usually incapable of articulating a choice—such as the chronically ill, the elderly and the mentally handicapped—is given further momentum.

In conclusion, I recognise there are people of goodwill on both sides of this debate, including on this committee, in the parliament and in the general community. However, the legalisation of voluntary euthanasia would have damaging private and public effects. It would say that some patients' lives have no value. In addition, it would be corrupting of a profession traditionally oriented towards healing by involving doctors and nurses in the deliberate and intentional killing of their patients. Physician-assisted suicide would also undermine that trust so essential for the effective operation of the doctor-patient relationship in the wider community.

Legalised euthanasia would espouse the cultural unacceptability of being a burden to others and place vulnerable groups at particular risk. The functional drive for efficiency would inevitably give further momentum to pursue the quick fix by disposing of those patients who place significant demands on hospital resources. Euthanasia would become the cheaper and preferred option and, as overseas experience has shown, many patients would be killed without request or consent. The suicidal would be affirmed in their assessment of having a life not worth living, and increasing numbers of others would cease to see their own lives as worth while. When laws change, social perceptions and norms change with them, and the resultant effects are felt by us all. Thank you again for the opportunity to speak.

Senator BOB BROWN—Why is it that from your presentation we should entertain the idea of killing people by taking them off life support?

Mr Meney—I am not quite sure of the nature of your question; I am sorry.

Senator BOB BROWN—Is it not killing to take the life support from a person who is having their life prolonged by being on a life support machine when otherwise they would not persist?

Mr Meney—There are many considerations in individual cases with respect to removing people from life support and varying levels of life support that are often applied to different patients. There might be good reasons why life support is continued—for example, for pastoral reasons or to enable family and so forth to come to the bedside—but, with respect to removing burdensome or extraordinary means of life support, you would need to address to specifics of individual cases. I am not saying that one should never, ever remove any machine but, by the same token, I think it would be difficult to have a broad statement which describes what would be applicable in all situations.

Senator BOB BROWN—What about the situation where pain relieving drugs are increased to the point where that brings forward the moment of death—is that killing a person?

Mr Meney—I think what we have got there is the double-effect principle, where what we are trying to do is to treat the patient. Our primary intention is to relieve pain. Our primary intention is to do what we can to make them more comfortable. The secondary effect may be the potential to reduce the longevity of their life but it is not the direct intent of the act.

Senator BOB BROWN—It is killing nevertheless, isn't it?

Mr Meney—No, I do not think it is.

Senator BOB BROWN—You do not think shortening a life is killing a person?

Mr Meney—In this particular situation, what you are trying to do is remove the distress of the patient by giving them a level of pain relief which is appropriate to their level of need at a given time.

Senator BOB BROWN—So, in that circumstance, shortening a person's life by a form of therapy is not killing?

Mr Meney—The deliberate intention is not to shorten the person's life. Whilst it is a potentially foreseeable consequence, it is not even guaranteed that that will automatically be the result.

Senator BOB BROWN—A competent doctor will know that that is going to be the effect of raising the level of that drug.

Mr Meney—Good palliative care physicians always try to balance the need for pain relief with possible long-term effects on a patient's situation.

Senator BOB BROWN—Do you think the Northern Territorians or the people in the ACT ought to have the right to legislate on the matter of abortion?

Mr Meney—I think that there are many reasons why the level of oversight, if you like, that is provided for states and territories is a part of the way in which our parliaments operate. I think that the right to life is a very important principle and that it is interpreted somewhat differently in different jurisdictions around Australia at the moment.

Senator BOB BROWN—But with respect to abortion?

Mr Meney—With respect to abortion, I would hope that it would be possible in the future for people to look at and value human life for what it is and realise that the best opportunity is

to provide support to mothers and people in difficulties—that should always be given to those in need.

Senator BOB BROWN—But do you agree that the people of the ACT and the Northern Territory ought to have the right to legislate on the matter of abortion?

Mr Meney—I understand that it is the right of the people in the Territory at the moment to make decisions in that way.

Senator BOB BROWN—On the matter of euthanasia, do you think that the people of the Northern Territory and the Australian Capital Territory should have more or fewer powers than the people of New South Wales or Tasmania?

Mr Meney—I think there are lots of safeguards that operate in larger states with bicameral houses. Larger numbers of people provide inputs into decision making. It is interesting the way the different checks and balances operate within our community at the moment. There are a number of reasons why different states have not gone down that euthanasia path, for whatever reason. The fact that it seems to be an issue which has arisen in one of the territories which has a comparatively smaller number of elected representatives is an interesting one. We have had a very prolonged debate, and a difficult one, in our parliament in recent years and I do not think the situation has changed substantially since then.

Senator BOB BROWN—But you have no objection to the parliament revisiting that debate in 2008 and looking at those same matters again?

Mr Meney—I do not think that would be a helpful thing for the Australian community to be doing.

Senator BOB BROWN—But you do not object to the parliament being able to take that course of action?

Mr Meney—I do not think that would be in the interests of the Australian people or the Australian parliament.

Senator BOB BROWN—But do you or do you not object to the—

Mr Meney—I do not think it would be in their interests.

Senator BOB BROWN—How about the Victorian parliament, which is currently looking at euthanasia legislation? Do you think it ought to have that ability?

Mr Meney—I do not control what parliaments within the various state jurisdictions around the country have as their rights and their scope of powers. These are things that operate within the statutory powers of the various state parliaments. If the parliaments decide to move down that path then that is a debate that the Victorian community may very well have, but at this stage they have not decided to go down that path.

Senator BOB BROWN—Well, they have. The matter is before the Victorian parliament. But the question I am putting is not whether or not that right is there; it is whether or not you think that right should be there.

Mr Meney—There are many things which I have strong moral concerns about, but not everything that I believe is morally wrong is something that should dictate what parliament should or should not do. It is up to parliaments, which is the way our constitutional

democracy works, to make decisions about how the society will operate. It is up to individuals and bodies to represent their views as best they can to say what they believe is in the best interests of the society.

Senator BOB BROWN—I agree with you—therefore, why not the ACT and the Northern Territory, which are properly constituted parliaments represented and elected by the people of those territories, which are analogous in size with Tasmania?

Mr Meney—The fact that none of the states to date has gone down that path is an indication of where society in Australia is situated at the moment. I think that it would not be in the interests of the Australian community for the territories to provide an opportunity for Australian citizens to kill themselves or to have themselves killed.

Senator BOB BROWN—I come back to my first question on that last matter: you do not agree that the shortening of the life of a person in certain circumstances is killing them.

Mr Meney—I think the intention of a person who is conducting palliative care whereby they are trying to ease pain and provide an appropriate level of pain relief is not the same as killing someone.

Senator BOB BROWN—Thank you.

Senator HOGG—I have just one question. The fundamental underlying principle that you espouse, I assume, is that the preservation of life is the basic and the most fundamental and important thing in terms of the common good of society. Is that correct?

Mr Meney—Having respect for the bodily life of individuals and of the citizens of a country is essential for the health of the society and the wellbeing of every citizen. I think that when we move away from that principle and say, 'Once you get to a certain level then that life is not worth living and, as such, we will facilitate opportunities and assist you in either killing yourself or doing it for you,' I think that fundamentally changes the way our society operates, and it changes our social norms.

Senator FIELDING—I draw your attention to part of your submission that I want to ask a question about. You mention that in Oregon nearly half of those initially requesting euthanasia changed their minds after treatment for pain or depression commenced, or referral to a hospice was undertaken. You go on to say that where there were no active symptom controls 15 per cent changed their minds. Can you elaborate on that? That is quite a scary number, really.

Mr Meney—It indicates to us that if we are prepared as a society to do whatever we can to help people in difficult and challenging circumstances and provide appropriate levels of pain relief and palliative care support people come to realise that what they are trying to rid themselves of is this terrible suffering, this pain. If that can be controlled then they are far more willing to embrace the value of the life they are living at the moment. I think that is the fundamental thing that we should be trying to do as a society. One of the reports that came out last year talking about carer health and wellbeing said:

Carers have the lowest wellbeing of any group discovered

More than one third of carers were found to be severely or extremely severely depressed

Carers are almost twice as likely to worry their income will be sufficient ...

Carers are almost twice as likely to experience chronic pain ...

et cetera. The whole social circumstance involving not just the individual but also the family needs support. It is not just a matter of simply saying, 'Let's give the trump of absolute autonomy and give this person whatever they want at a particular time.'

CHAIR—Thank you, Dr Meney. I do not think we have any other questions. Thank you for taking the time to appear before this committee today, and for providing this committee with your submission. It is much appreciated.

[4.49 pm]

ALDERSON, Dr Karl John Richard, Assistant Secretary, Criminal Law Branch, Attorney-General's Department

STEWART, Ms Karen Rebecca, Acting Assistant Secretary, Territories East Branch, Attorney-General's Department

CHAIR—I welcome representatives from the Attorney-General's Department. I understand that the Attorney-Generals Department has written to the committee, as opposed to lodging a submission.

Dr Alderson—That is correct.

CHAIR—Is the Territories East Branch part of AG's, as opposed to the department of territories?

Ms Stewart—Yes.

CHAIR—I am still coming to terms with the new arrangements under the new government. The Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted.

Officers are also reminded that any claim that it would be contrary to public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. I invite you to make a short opening statement, if you want to do that, and then we will go to questions.

Dr Alderson—I will make a brief opening statement. First of all, I thank the committee. We are always very pleased to be invited to appear before the committee. Secondly, one area of direct involvement that our department has in this area of policy is that we administer the offence provisions in the Criminal Code that relate to material on the internet that promotes or instructs in matters of suicide. The third thing I want to say by way of opening is to draw attention to the letter that you have mentioned. There may be some areas that the committee would have liked to explore with the department where we will not be able to assist. For example, we are not in a position to provide legal advice to the committee. There are, nonetheless, some areas where we may be able to assist. I will stop there so you can ask your questions.

Senator BOB BROWN—Thank you. Have you formulated any opinion on the validity of the bill that is under the consideration of this committee?

Dr Alderson—We have not. We have read with interest the analysis of Professor Williams, but we do not have a view on the constitutionality or the legal effectiveness of the bill.

Senator BOB BROWN—Do you have a contrary view to that of Professor Williams?

Dr Alderson—No, we have no contrary view to put. It is not a matter on which we are in a position to put a view.

Senator BOB BROWN—There was a submission from the Northern Territory Chief Minister which criticised the bill and there has been other evidence that the bill has not been well drafted and is faulty. Have you got any comment on that, because we obviously have Professor Williams and other people putting the view that it is a valid bill and it achieves its intentions?

Dr Alderson—On that point, there is nothing I can add. For example, if we looked at the bill and saw there was a cross-referencing error or something of that nature we would of course draw it to your attention, but in terms of the legal effect of the bill there is nothing more I can add.

Senator BOB BROWN—And there is really not much more that you can give to this committee that is going to help in the matter of its constitutionality or its suitability to achieve its purpose if it went before the parliament and were adopted.

Dr Alderson—Yes.

Senator BARNETT—You are using as many polite and sensitive words as possible to say that you cannot assist the committee. I can understand your view and I am not having a go at you personally, but the department has written a letter which says very little in terms of informing the committee about the bill before us and now you and Ms Stewart have taken the time out of your day, at our request and our invitation, to be here. You have opened your submission to this committee in a polite and professional way by saying that you cannot assist the committee. Why is that?

Dr Alderson—I think there are two comments I can make about that. There are of course many occasions when there is a vast wealth of material we can provide to a Senate committee inquiry, and I have been involved on many occasion where we have been able to answer questions for a couple of hours. This is a situation where it may be that the principal interest of the committee is in a particular area concerning the constitutional basis and legal effectiveness of the bill. That runs into the longstanding position that we do not provide legal advice or comment on legal advice so, unfortunately, you cannot separate this: the question about the effectiveness from the legal advice question. We have nonetheless come along because the committee's secretariat had indicated that it was impossible to close the categories of issue in which the committee might be interested, and so we are here both to articulate the position on the legal issue and to answer any questions that we can.

Senator BARNETT—Dr Alderson, have you been advised by the minister to be mute and to not inform the committee?

CHAIR—Senator Barnett, I think 'mute' is a bit strong. I think Dr Alderson is trying to assist where he can, given instructions he may have had from either his supervisor—

Senator BARNETT—Have you received instructions from the minister accordingly?

Dr Alderson—No, I can say that I have not received such instruction. I am operating in accordance with a longstanding position that has been held under governments of both persuasions.

Senator BARNETT—If the bill were passed in its current form, what would be the impact and the consequences for the Commonwealth and for the people of Australia? I am not asking for a legal opinion, Dr Alderson.

Dr Alderson—I suppose what I can say is that the policy intent behind the bill is to restore the ability of the territories to legislate with respect to assisted suicide, and if the legislation were passed by the parliament that would be the intended effect. As to the implications for government in Australia and the Australian community, I suppose one of the things that the vast number of submissions to this inquiry and the hearings you have held illustrates is that there is a wide range of views on the impact on the community.

Senator BARNETT—Have you perused some of the submissions and are you aware of the Northern Territory government's view that the bill is poorly drafted and creates confusion and uncertainty with respect to the application of the law in the Northern Territory? Are you aware of their view?

Dr Alderson—Yes. Our department has looked at the submissions that have been received in preparation for the appearance today, and I am aware of that view having been expressed.

Senator BARNETT—Do you concur?

Dr Alderson—Unfortunately, I think that is coming back to the same point: I am not in a position to concur or not concur on that.

Senator BARNETT—So you cannot provide any legal advice but you can respond to other questions, even though you are from the Attorney-General's Department. Let me ask you another question in another way: are you aware that the Northern Territory rights for the terminally ill legislation does not have a residency requirement?

Dr Alderson—I am aware of that.

Senator BARNETT—Okay. So in your view one of the implications if that legislation were revived, and there is clear doubt as to whether that would be possible, and if the regulations under that legislation were also revived, and there is clear doubt about that as well, could you see the possibility of Australians outside of the Northern Territory moving to the Northern Territory to access the euthanasia possibilities there?

Dr Alderson—I am not in a position to comment on how likely that would be or what formulation of legislation would bring that about. I suppose I can say that if legislation allowed for that possibility—allowed for a person to go to the Northern Territory in order to make use of that legislation—then it must be possible that that would occur in practice, if that legislation were in effect and were not overridden by any Commonwealth law.

Senator BARNETT—Are you aware that when it was operating back in 1996-97 or thereabouts that people from New South Wales and Victoria did move to the Northern Territory and died there under that legislation.

Dr Alderson—That is not an area that I know a lot about.

Senator BARNETT—I will leave it there in light of the discussions we have had. Thank you.

Senator FIELDING—Out of curiosity, given that the statements are not lengthy, why did you leave it to the last minute—it is stated here that it was 15 April—to submit? There is not a lot in here.

Dr Alderson—There have been many occasions in my experience as a public servant where a committee has been interested in the department's view on a legal question and the department has been unable to provide that legal view. In fact, I would say that in most of those cases, the departmental representatives would appear and then explain their position in response to questioning. On this occasion we thought it would be helpful to alert the committee ahead of time. That is probably the unusual step here.

Senator FIELDING—Thank you.

Senator HOGG—I dare not ask a question because I do not know if I can get an answer! Are you able to tell us of the major differences in the self-government powers between the Northern Territory, Norfolk Island and the ACT? Just let me say that it has been mentioned here during this hearing that the provisions are pretty much the same, whereas I believe they are not. The powers that, for example, operate on Norfolk Island are different from the powers that are given under the self-government acts to the ACT and the NT. I am not after everything, but the significant differences. If you cannot give it to us now, if you would take it on notice and supply it to the committee I would be pleased indeed.

Ms Stewart—The major differences are between Norfolk Island, and the ACT and the Northern Territory, in that Norfolk Island has legislative powers for a range of what we would consider to be federal type powers, such as immigration, quarantine, welfare and the like. We can give you a list of the specific powers that are identified in the Norfolk Island self-government act that go beyond the ACT and the Northern Territory legislative powers.

Senator HOGG—Thank you.

CHAIR—There is a threshold issue here. I think Minister Corbell from the ACT today and Chief Minister Paul Henderson this morning on radio have reiterated that, for them, this legislation is about reinstating the rights of the legislative assemblies to determine their own legislation programs. That is one issue. There are submissions that have come before us that have said that we should remove section 50A from the Northern Territory (Self-Government) Act and reinstate the right of the Territory to determine what legislation it puts through its own parliament. Does the government have a view about the right of the territories to be self-determining?

Ms Stewart—Senator, that would be a policy matter for the government—to consider whether it wished to maintain the distinctions in the self-government acts.

CHAIR—Yes. I am able to ask you questions about policy too, so can you answer it?

Dr Alderson—I think what we can say is that the government has not made any decision to move away from the current situation reflected in the legislation.

CHAIR—I do not have any other questions. Thank you very much for your appearance before us this afternoon. I want to thank all the witnesses that have given evidence to the committee today on both pieces of legislation we have been considering.

Committee adjourned at 5.06 pm