Opinion

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Australia is a Federation of 6 States. It is comprised of 6 States and two Territories. The Northern Territory (NT), at the time of Federation in 1901 was a Territory of the State of South Australia (SA). Responsibility for the government of the NT passed to the Commonwealth (the Federal Parliament) in 1910 by agreement between SA and the Commonwealth[1]. In 1978 the Commonwealth Parliament conferred self-government on the NT but with certain qualifications.[2]

The NT has a population of 173,878 people[3]. That is, the population of the NT is just under 1% of the total population of Australia[4]. In 1995, this very small jurisdiction passed the *Rights of the Terminally Ill Act 1995* (ROTTI) which was an Act "to confirm the right of a terminally ill person to request assistance from a medically qualified person to voluntarily terminate his or her life in a humane manner; to allow for such assistance to be given in certain circumstances without legal impediment to the person rendering the assistance; to provide procedural protection against the possibility of abuse of the rights recognised by this Act"[5].

ROTTI has attracted the attention of bioethicists, lawyers, medicos, and the media throughout the world. It has also led to a) a legal challenge as to its constitutional validity, b) an attempt to repeal it in the NT Parliament, and c) an attempt to repeal it in the Federal Parliament.

THE LEGAL CHALLENGE

In June 1996 a writ was lodged in the Supreme Court of the Northern Territory of Australia challenging the validity of ROTTI and injunctions were sought to prevent the new law from operating from the planned start-up date of 1 July 1996. The matter was heard on 21 June 1996. The plaintiffs were Dr Christopher John Wake, Northern Territory Branch President of the Australian Medical Association, and prominent Aboriginal leader and chairman of the Northern Land Council, the Reverend Dr Djiniyini Gondarra. The challenge was supported by the Australian Medical Association nationally. The euthanasia laws were challenged on four grounds:

- The *Rights of the Terminally Ill Act 1995* is unconstitutional because it offends against fundamental rights underlying the Australian Constitution.
- Euthanasia was not one of the powers given to the Northern Territory Government under the *Northern Territory (Self-Government) Act 1978*.

[1] *Northern Territory Acceptance Act 1910*
[2] *Northern Territory (Self-Government) Act 1978*
[3] Australian Bureau of Statistics, preliminary figures as at 30 June 1995
[4] Australian Bureau of Statistics, Australia's population is 18,053,989, preliminary figures as at 30 June 1995
[5] *Rights of the Terminally Ill Act 1995*, (assented to 16 June 1995)

- The Act is unconstitutional because it is inconsistent with the rule of law and the doctrine of the separation of powers in that it purports to bypass the Courts, and sanction the infliction of death without any form of judicial supervision or control.
- The Act is beyond the power of the Northern Territory Government and it has been invalidly assented to by the Administrator.

In its judgment of 24 July 1996 the Supreme Court of the Northern Territory of Australia found against the plaintiffs by a majority of two judges to one. The matter is now available to be heard in the High Court of Australia.

THE ATTEMPT TO REPEAL ROTTI

On the 21st and 22nd August 1996 the Legislative Assembly of the Northern Territory debated a Bill to repeal ROTTI. The repeal Bill was put forward by the Opposition spokesman on legal affairs and member of the Australian Labor Party, Mr Neil Bell. The Bill was defeated by 14 votes to 11 in the early hours of 22nd August after 4 hours debate.

The debate took place in the context of a promise by Federal Liberal backbencher, Kevin Andrews, to introduce a Bill into the Federal Parliament to overturn ROTTI. Some newspaper reports suggested that support for Mr Bell's repeal Bill was eroded in the Northern Territory Parliament because of a desire by some NT politicians not to be seen to be "kow-towing" to the Federal Parliament. In some parts of Australian any suggestion of the Federal Parliament overriding the legislative prerogatives of the States is bitterly resented. This is particularly so in the Northern Territory because it aspires to be a State (it is not yet a State), and because it has a long history of resentment about the way in which they used to be governed from Canberra before the passage of the *Northern Territory (Self-Government) Act 1978.*

THE FEDERAL PARLIAMENT

The Constitution of the Commonwealth of Australia, which appears in the *Commonwealth of Australia Constitution Act*, provides the basis upon which the States of New South Wales, Victoria, South Australia, Queensland and Tasmania agreed "to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland". This Act was proclaimed on the 1st January 1901.

Section 122 of the Constitution provides that "the Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit."

Relying on this section Mr Andrews introduced his *Euthanasia Laws Bill 1996* which would amend the *Northern Territory (Self-Government) Act 1978*, the *Australian Capital*

Territory (Self-Government) Act 1988, and the *Norfolk Island Act 1979*. In this way the NT was not singled out, with the right to pass laws permitting euthanasia and assisted suicide being forbidden to all the territories. The essence of the Andrews' Bill is to amend the power to make laws of the various Legislative bodies in the territories by declaring that such power "does not extend to the making of laws which permit or have the effect of permitting (whether subject to conditions or not) the form of intentional killing of another called euthanasia (which includes mercy killing) or the assisting of a person to terminate his or her life".

The *Euthanasia Powers Bill* 1996 would allow the various legislative bodies of the territories to continue to "have power to make laws with respect to: (a) the withdrawal or withholding of medical or surgical measures for prolonging the life of a patient but not so as to permit the intentional killing of the patient; and (b) medical treatment in the provision of palliative care to a dying patient, but not so as to permit the intentional killing of the patient".

Political observers say that the Andrews Bill, which enjoys the support of the Prime Minister and the Leader of the Opposition, is likely to pass the Lower House fairly easily, but might find difficulty in attracting a majority of the Senate.

THE ABORIGINAL COMMUNITY

25% of the population of the Northern Territory is Aboriginal. There is a widespread perception that Aboriginal people are opposed to legalised euthanasia and are fearful of the implications, for them of ROTTI. Senator Bob Collins is a member of the Australian Labor Party, and represents the Northern Territory in the Senate (Commonwealth Parliament). He recently released to his fellow parliamentarians a copy of a report from Green Ant P/L, a local NT company commissioned by the NT Government to carry out an education programme in Aboriginal communities on the euthanasia legislation. The company is described as "a highly experienced research and communication organisation". The author of the report, which has not yet been officially released by the NT Government, is a supporter of voluntary euthanasia.

The report observes that "the level of fear and of hostility to the legislation is far more widespread than originally envisaged ... which makes one wonder about the public opinion polling that suggests high support among the NT public for the legislation. One imagines that phone polling doesn't get to too many Aboriginal people."[6] The Report identifies the philosophical problem that "is related to the widespread Aboriginal beliefs about cause of death and that deaths are caused by external agencies such as sorcery, payback, transgression of the Law etc. In simple terms this means that those things non-Aboriginal people may identify as "causes" such as cancer, HIVE-AIDS, car accidents etc are not seen as such - even by long term Aboriginal Health Workers."[7] Indeed, "the greatest fear and reluctance about the legislation would appear to be coming from Aboriginal Health Workers themselves. They are concerned that their

[6] *Report to Aboriginal Reference Group: Rights of the Terminally Ill Act Education Program 28 June 1996*, 1
[7] *Ibid.*, 3

position within their own communities has been or might be irreparably damaged by the existence of the legislation."[8]

COMMENT

The State has an obligation to protect the inalienable right to life of citizens. Inalienable rights are rights which cannot be taken away or even given up by an individual. Citizens are legally not permitted to give up their right to liberty because that would involve the legalisation of the slave trade. This would compromise the ability of the State to protect the right to freedom of the weak and the vulnerable.

So it is with the right to life. As I have argued in detail elsewhere[9], voluntary euthanasia cannot be quarantined from non-voluntary euthanasia. The Commonwealth Parliament of Australia is within its constitutional rights to eliminate ROTTI. If it chooses to do so, it will be having regard to the legitimate fears of those who believe that the state will be compromised in its obligation to protect the weak and the vulnerable.

The evidence from the NT is that Aboriginal people, perhaps the most disadvantaged and vulnerable group in Australia, clearly discern the risks to them of ROTTI. The pity of ROTTI is that Aboriginal people, whose access to the health care system is not equal to that of non-Aboriginal people, will come to further distrust the medical profession and the health care system. Which is why many Federal Parliamentarians have come to see that the issue of voluntary euthanasia cannot, and ought not, to be decided on the basis of personal autonomy alone.

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[8] *Report to Aboriginal Reference Group: Rights of the Terminally Ill Act Education Program 23 July 1996*, 1

[9] John I Fleming, *"Euthanasia: Human Rights & Inalienability", The Linacre Quarterly*, vol 63, No 1, Feb 1996, 44-56