

## EUTHANASIA LAWS AND THE AUSTRALIAN CONSTITUTION

GEORGE WILLIAMS\* and MATTHEW DARKE\*\*

### I. INTRODUCTION

Euthanasia remains the subject of vigorous public debate in Australia. Recently, this has focused on the *Rights of the Terminally Ill Act* 1995 (NT) ('the *RTI Act*')<sup>1</sup> and the *Euthanasia Laws Act* 1997 (Cth) ('the *Andrews Act*').<sup>2</sup> The *RTI Act* made a form of euthanasia lawful in strictly regulated circumstances in the Northern Territory. It was subsequently invalidated by the *Andrews Act*, which removed the power of the Northern Territory, the Australian Capital Territory and Norfolk Island legislatures<sup>3</sup> to make laws on the subject of euthanasia. This paper addresses the main constitutional issues that arise out of the *RTI Act* and the *Andrews Act*. Three issues are examined: (1) possible limits on the Commonwealth's power over the Territories under s 122 of the Commonwealth Constitution; (2) the discriminatory nature of the *Andrews Act*; and (3) the scope for the Commonwealth Parliament to enact a national euthanasia law.

There is no legally or ethically accepted definition of euthanasia. In common usage, 'euthanasia' refers to "the painless killing of a patient suffering from an incurable and painful disease".<sup>4</sup> Several different categories of euthanasia have been identified.<sup>5</sup> Three categories focus on the wishes of the patient.

---

\* BEc (Macq) LLB (Hons) (Macq) LLM (NSW), Barrister (ACT), Senior Lecturer, Faculty of Law, The Australian National University, Fellow, Law Program, Research School of Social Sciences, The Australian National University.

\*\* BA (Hons) (ANU), Research Assistant, Faculty of Law, The Australian National University  
The authors thank Natasha Cica and Michael Coper for their comments on an earlier draft.

1 The Rights of the Terminally Ill Bill is referred to as "the RTI Bill"

2 The Euthanasia Laws Bill is referred to as "the Andrews Bill"

3 The legislative power of these bodies is conferred by the *Northern Territory (Self-Government) Act* 1978 (Cth), *Australian Capital Territory (Self-Government) Act* 1988 (Cth) and *Norfolk Island Act* 1979 (Cth), respectively.

4 D Thompson (ed), *The Concise Oxford Dictionary*, Clarendon Press (9th ed, 1995) p 465.

5 G Zdenkowski, "The International Covenant on Civil and Political Rights and Euthanasia" (1997) 20 *UNSWLJ* 170 at 172-3

'Involuntary euthanasia' occurs when the patient is killed against his or her will. 'Non-voluntary euthanasia' refers to killing the patient without his or her consent or opposition. 'Voluntary euthanasia' is killing the patient at his or her request. Two further categories focus on the cause of death. 'Active euthanasia' occurs when a positive action brings about the patient's death. 'Passive euthanasia' occurs when the patient dies because of the omission or removal of life-sustaining medical assistance. The *RTI Act* permitted a doctor to perform active voluntary euthanasia in specified circumstances.

## II. EUTHANASIA LAWS IN AUSTRALIA

### A. *Rights of the Terminally Ill Act 1995* (NT)

#### (i) *Passage of the Legislation*

The *RTI Bill* was introduced into the Northern Territory Legislative Assembly as a private member's bill by then Chief Minister, Marshall Perron MLA, on 22 February 1995. The passage of the Bill through the Legislative Assembly was not easy. The vote to read the Bill a second time was won by 13 votes to 12 and the Bill was amended 49 times. The Legislative Assembly finally voted, by 15 votes to 10, to pass the Bill. The Administrator of the Northern Territory assented to the Bill on 16 June 1995.

The *RTI Act* did not come into force until 1 July 1996. In the interim, a working party met to advise on the implementation of the Act and to devise regulations. This included developing community and Aboriginal education programs. Technical defects in the Act were identified and led to the introduction of the Rights of the Terminally Ill Amendment Bill, which was passed on 20 February 1996. Regulations devised by the working party were made on 28 June 1996 after community consultation. During this period three attempts in the Legislative Assembly to repeal or significantly limit the operation of the *RTI Act* were unsuccessful.

#### (ii) *Terms and Operation of the Legislation*<sup>6</sup>

Section 4 of the *RTI Act* provides:

A patient who, in the course of a terminal illness, is experiencing pain, suffering and/or distress to an extent unacceptable to the patient, may request the patient's medical practitioner to assist the patient to terminate the patient's life.

The definition of "assist" in s 3 shows that the termination of the patient's life can be brought about by self-administration of a lethal substance or by the administration of the substance by a doctor. The Act permits active voluntary euthanasia only if the strict conditions set out in ss 7 and 8 of the Act are met. These conditions relate to matters such as the patient's competence to request euthanasia, the incurable nature of the patient's disease, the severity of the patient's pain and suffering and the palliative care options available to the

6 See N Cica, *The Euthanasia Debate in Australia - Legal and Political Issues*, Issues Paper No 2, Australian Institute of Health Law and Ethics, February 1997.

patient. Additionally, s 7 requires that three doctors, including a qualified psychiatrist and a specialist in the patient's terminal illness, are satisfied that certain conditions are met.

The *RTI Act* was relied upon in practicing active voluntary euthanasia prior to the enactment of the *Andrews Act*. On four occasions, the life of a patient was terminated after the procedure set out in the Act had been fulfilled. Earlier, another patient had sought to make use of the Act but was unable to find a specialist to meet the requirement under s 7. Consistent with the need to ensure patient privacy and confidentiality, there is no requirement that reliance on the Act be publicised.

In passing the *RTI Act*, the Northern Territory became the first jurisdiction in the world to permit active voluntary euthanasia.<sup>7</sup> However, the law of some jurisdictions is comparable to the *RTI Act*.<sup>8</sup> In the Netherlands, active voluntary euthanasia, although illegal, is allowed by a combination of prosecutorial policy and case law. Strict conditions apply, including that the patient repeatedly and competently request euthanasia, that the patient's suffering be unbearable and without possibility of improvement and that euthanasia be performed by a doctor, following consultation with another doctor. In addition, the *Death With Dignity Act 1994 (Oregon)*<sup>9</sup> provides that a patient can obtain a physician's prescription for drugs to end the patient's life. These drugs may only be administered by the patient. Medical practitioners may not assist in ending the patient's life. In Australia, Bills to legalise active voluntary euthanasia have been rejected by the Parliaments of South Australia and the Australian Capital Territory. Such a Bill has been discussed, but not introduced, in the New South Wales Parliament.

### (iii) *Legal Challenge to the Legislation*

In *Wake v Northern Territory of Australia*,<sup>10</sup> the validity of the *RTI Act* was challenged before the Full Court of the Northern Territory Supreme Court by an Aboriginal Uniting Church minister and the head of the Northern Territory Branch of the Australian Medical Association.<sup>11</sup> The challenge was made on two grounds. First, it was argued that the Act was invalid because it violated an inalienable right to life that underlies the law. This right, it was argued, was a restriction on the power of the Northern Territory Legislative Assembly "to make laws for the peace, order and good government of the Territory".<sup>12</sup>

---

7 N Cica, *Euthanasia - the Australian Law in an International Context (Part 2. Active Voluntary Euthanasia)* Parliamentary Research Service, Research Paper No 4 (1996-7) at 15

8 *Ibid*, R Magnusson, "The Future of the Euthanasia Debate in Australia" (1996) 20 *Melbourne University Law Review* 1108 at 1126-34

9 See AB LaFrance, "Physician Assisted Death: A Comparison of the Oregon and Northern Territory Statutes" (1996) 1 *Newcastle Law Review* 33

10 (1996) 109 NTR 1.

11 The proceedings were referred to the Full Court by Martin CJ under s 21 of the *Supreme Court Act 1979 (NT)*. The plaintiffs also sought an interlocutory injunction before Martin CJ to prevent the proclamation of the Act and the making of regulations under the Act. Injunctive relief was not pursued before the Full Court.

12 *Northern Territory (Self-Government) Act*, s 6.

Second, the plaintiffs argued that no valid assent had been given to the *RTI Act* by the Administrator of the Northern Territory. Under s 7(2)(a) of the *Northern Territory (Self-Government) Act* the Administrator can give assent to a proposed law dealing with any matter specified under s 35, that is, matters listed in the regulations for which Ministers of the Northern Territory have executive authority. Alternatively, under s 7(2)(b) assent can be given “in any other case”. Assent was given to the *RTI Act* under s 7(2)(a). The plaintiffs argued that the *RTI Act* did not come within a list of matters in respect of which Ministers of the Territory have executive authority<sup>13</sup> and therefore that the Administrator had assented to the Act under the wrong subsection.

Both lines of argument were rejected by a majority of the Supreme Court (Martin CJ and Mildren J, with Angel J dissenting). As to the first, their Honours were not prepared to hold that the power of the Legislative Assembly “to make laws for the peace, order and good government of the Territory” was subject to fundamental rights, such as a right to life. In *Union Steamship Co of Australia v King*,<sup>14</sup> in the context of the power of the New South Wales Parliament “to make laws for the peace, welfare, and good government of New South Wales”, the High Court stated:

Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law... a view which Lord Reid firmly rejected in *Pickin v British Railways Board*, is another question which we need not explore.<sup>15</sup>

According to Angel J, “The plaintiffs’ submission calls for an answer to that question”.<sup>16</sup> However, Martin CJ and Mildren J were not prepared to address the issue that was, here, left open, finding that “absent authoritative guidance, the exercise of legislative power is not constrained in this case by reference to ‘rights deeply rooted in our democratic system of government and the common law’”.<sup>17</sup>

On the second line of argument, Martin CJ and Mildren J found that the *RTI Act* related to the “maintenance of law and order and the administration of justice”, “private law” and “the regulation of businesses and professions”.<sup>18</sup> Since these are matters over which Ministers of the Territory have executive authority under s 35 of the *Self-Government Act*, the Administrator’s assent to

13 These matters are set out in the *Northern Territory (Self-Government) Regulations*, (1978) reg 4(1). The regulations are made under the *Northern Territory (Self-Government) Act*, s 35

14 (1988) 166 CLR 1

15 *Ibid* at 10. See *Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372; TRS Allan, “The Common Law as Constitution: Fundamental Rights and First Principles” in C Saunders (ed), *Courts of Final Jurisdiction. The Mason Court in Australia*, Federation Press (1996) p 146; JJ Doyle, “Common Law Rights and Democratic Rights” in PD Finn (ed), *Essays on Law and Government. Principles and Values*, Law Book Co, vol 1 (1995) p 144; J Toohey, “A Government of Laws, and Not of Men” (1993) 4 *Public Law Review* 158; G Winterton, “Constitutionally Entrenched Common Law Rights Sacrificing Means to Ends?” in C Sampford, and K Preston (eds), *Interpreting Constitutions. Theories, Principles and Institutions*, Federation Press (1996) p 121.

16 Note 10 *supra* at 17.

17 *Ibid* at 8

18 *Ibid* at 11-12.

the Act was valid.

Justice Angel dissented. Like the majority, he did not answer the question left open by the High Court in *Union Steamship*. Although he was sympathetic to the plaintiffs' argument, he did not express a view on whether the *RTI Act* was invalid for violating an inalienable right to life. In any event, he did not need to do so as he held that, whether narrowly or broadly construed, the matters over which Ministers of the Territory have executive authority do not include the "institutional termination of human life other than as punishment".<sup>19</sup> Justice Angel accordingly found the *RTI Act* invalid for lack of valid assent by the Administrator of the Northern Territory.

The plaintiffs in *Wake v Northern Territory* sought special leave to appeal the decision of the Supreme Court to the High Court. The application was heard by Brennan CJ, Gaudron and Gummow JJ. The High Court adjourned the application until the Commonwealth Parliament had completed its deliberations on the Andrews Bill. In adopting this course, the High Court stated that it sought to avoid embarrassing or complicating the political process.<sup>20</sup> With the passage of the *Andrews Act*, the need for the appeal has lapsed.

## B. *Euthanasia Laws Act 1997 (Cth)*

### (i) *Passage of the Legislation*

The Andrews Bill was introduced into the Commonwealth Parliament to override the *RTI Act*. The Bill was named after Kevin Andrews MP, who moved the Bill as a private member's bill in the House of Representatives. The Andrews Bill was passed in that House, with amendments, by 88 votes to 35. The Bill was supported by the Prime Minister, the Deputy Prime Minister and the Leader of the Opposition.

The Andrews Bill was considered by the Senate Scrutiny of Bills Committee, which found that it may "trespass unduly on personal rights and liberties".<sup>21</sup> There were a number of bases for this conclusion, all connected with self-government rights. The Bill negated the valid exercise of the Northern Territory Legislative Assembly's legislative power. It also threatened the certainty of laws made by the Legislative Assembly by intruding on that body's law-making function on an ad hoc basis. The Bill treated Australian citizens unequally by limiting the self-government rights of some but not others. Moreover, it violated the reasonable expectation of Territorians that their legislature would not be deprived of a power that it had held since self-government. Finally, the Andrews Bill overrode the decision of the Territory legislature and the future legislative power of the Parliaments of the Australian Capital Territory and Norfolk Island, but not the legislatures of the States.

---

19 *Ibid* at 15.

20 *Wake v Northern Territory* (1996) 124 FLR 298; 109 NTR 1.

21 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No 7/96, 18 September 1996 at 6

The deliberations of the Senate were also informed by a report of its Legal and Constitutional Legislation Committee.<sup>22</sup> The Committee was asked to assess: (1) the desirability of the enactment of the Bill; (2) the constitutional implications for the Territories of its enactment; (3) the impact of the Bill's enactment on the Northern Territory criminal code; and (4) the impact on, and attitudes of, the Aboriginal community. The Committee received 12 577 submissions. It convened public hearings in Darwin, on 24 January 1997, and in Canberra, on 13 and 14 February 1997. One Committee Member, Senator Brown, strongly criticised the lack of time given to the Committee for its inquiry, describing the Committee as proceeding with "inordinate haste".<sup>23</sup> According to Senator Brown, this resulted in insufficient time for members of the public to prepare submissions and insufficient time for public hearings.

The Committee's Report started from the proposition that the Commonwealth Parliament did have the power to pass the Andrews Bill under s 122 of the Constitution.<sup>24</sup> Otherwise, its discussion of the constitutional issues raised by the Andrews Bill was inconclusive and superficial.<sup>25</sup> From its conclusion on s 122, the Report examined whether it was appropriate for the Commonwealth to pass the Bill. The Committee came to no conclusion on this question. Following the report, Committee members submitted additional comments expressing their views on whether or not the Senate should pass the Andrews Bill. A majority of Committee members supported the Bill.

In the early hours of 25 March 1997, the Senate passed the Andrews Bill by 38 votes to 33. The Bill now only required the formal assent of the Governor-General to become law. Two patients who sought to die under the *RTI Act* and had fulfilled its requirements, wrote to the Governor-General Sir William Deane asking him to delay assenting to the Andrews Bill so that their deaths would not be unduly hastened. However, in accordance with the normal law-making process, the Governor-General duly assented to the Bill.

### (ii) *Terms and Operation of the Legislation*

The *Andrews Act* amends the *Self-Government Acts* of the Northern Territory, the Australian Capital Territory and Norfolk Island and specifically overrides the *RTI Act*. The structure of the *Andrews Act* is that the operative provisions are set out in the schedules to the Act. Schedule 1 relates to the Northern Territory, Schedule 2 to the Australian Capital Territory and Schedule 3 to Norfolk Island. The *Andrews Act* removes the power of these Territories to enact laws:

22 The first of the authors of this article appeared before the Committee on 14 February 1997. See G Williams, *Submission No 3755 to the Senate Legal and Constitutional Legislation Committee on the Euthanasia Laws Bill 1996*, 3 December 1996.

23 Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Euthanasia Laws Bill 1996*, March 1997 at 146.

24 *Ibid* at 13 ("The Commonwealth Parliament has the power under s 122 of the Constitution to enact the Bill. Even opponents of the Bill conceded this").

25 See *ibid* at ch 3. Senator Brown described the Report generally as being "flawed in many ways. It contains inaccuracies and omits important information and arguments" (*ibid* at 148).

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.<sup>26</sup>

However, the *Andrews Act* provides that the Legislative Assemblies of the Territories do have the power to enact 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; and
- (c) the appointment of an agent by a patient who is authorised to make decisions about the withdrawal or withholding of treatment; and
- (d) the repealing of legal sanctions against attempted suicide.<sup>27</sup>

The *Andrews Act* also provides that the *RTI Act* "has no force or effect as a law of the Territory, except as regards the lawfulness or validity of anything done in accordance therewith prior to the commencement of this Act".<sup>28</sup> Hence, although the *RTI Act* was overridden, acts performed under the *RTI Act* prior to the enactment of the *Andrews Act* are not unlawful.

### III. CONSTITUTIONAL ISSUES<sup>29</sup>

#### A. Self-Government and Section 122

The first constitutional issue is whether the fact that the Territories have been granted self-government limits the Commonwealth Parliament's power to make laws for them under s 122 of the Constitution. In investigating this issue, three matters need to be considered. First, the nature of the Territories' legislative power under their respective Self-Government Acts. Second, the extent of the Commonwealth's power under s 122. Third, whether there exist one or more conventions that limit the exercise of power under s 122.

##### (i) *The Nature of Territorial Legislative Power*

The High Court considered the nature of Territorial legislative power in *Capital Duplicators Pty Ltd v Australian Capital Territory (No 1)*.<sup>30</sup> In that case, the Court found that under s 122 the Commonwealth could grant self-

<sup>26</sup> *Andrews Act*, Sch 1 cl 1, Sch 2 cl 1, Sch 3 cl 2. Note that in Sch 2 cl 1 the form of words is slightly different. "permitting or having 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"

<sup>27</sup> *Ibid*, Sch 1 cl 1, Sch 2 cl 1, Sch 3 cl 2.

<sup>28</sup> *Ibid*, Sch 1 cl 2

<sup>29</sup> See generally N Cica, *Constitutional Arguments in Favour of Removing the Territories' Power to Make Laws Permitting Euthanasia*, Research Note No 32, Parliamentary Research Service, March 1997, N Cica, *Constitutional Arguments Against Removing the Territories' Power to Make Laws Permitting Euthanasia*, Research Note No 33, Parliamentary Research Service, March 1997. See *Lee v Oregon* 891 7 Supp 1429 (District Court of Oregon, 1994) on the constitutionality of the *Death With Dignity Act 1994* (Oregon). See also note 9 *supra* at 50-3.

<sup>30</sup> (1992) 177 CLR 248

government to the Australian Capital Territory. The dicta of Mason J in *Berwick Ltd v Gray*<sup>31</sup> was approved where he said that the power “is wide enough to enable Parliament to endow a Territory with separate political, representative and administrative institutions, having control of its own fiscus”.<sup>32</sup> Two views emerged on the nature of Territorial legislative power vested under s 122. Justices Brennan, Deane, and Toohey, with whom Gaudron J agreed on this point,<sup>33</sup> found that the Legislative Assembly of the Australian Capital Territory is a separate legislature that exercises its own legislative power and not that of the Commonwealth. This legislative power is “concurrent with, and of the same nature as, the powers of the [Commonwealth] Parliament”.<sup>34</sup> The minority consisting of Mason CJ, Dawson and McHugh JJ argued that the legislative power of the Australian Capital Territory is a delegated power of the Commonwealth Parliament.<sup>35</sup>

The view taken by the majority in *Capital Duplicators (No 1)* of the legislative power granted to the Australian Capital Territory means that the Commonwealth Parliament “has no power under the Self-Government Act to disallow any duty imposed by the Legislative Assembly”.<sup>36</sup> However, this does not preclude the federal Parliament from overriding a Territory law if it otherwise has the power to do so, such as by legislation. The approach of the majority merely means that “the Parliament must, if it wishes to override the enactment, pass a new law to achieve that result”.<sup>37</sup> This is exactly what the Federal Parliament sought to do in enacting the *Andrews Act*, and in specifically repealing the *RTI Act*, under s 122 of the Constitution.

### (ii) Commonwealth Power Under Section 122

Section 122 of the Constitution empowers the Commonwealth Parliament to “make laws for the government of any territory” and to “allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit”. In *Spratt v Hermes*,<sup>38</sup> Barwick CJ found that the power “is as large and universal a power of legislation as can be granted” and that it “is not only plenary but is unlimited by reference to subject matter”.<sup>39</sup>

This power obviously enables the Commonwealth to override Territory enactments and to withdraw power from Territory legislatures by amending the relevant *Self-Government Act*. The Commonwealth can override specific

---

31 (1976) 133 CLR 603.

32 *Ibid* at 607, Barwick CJ, McTiernan, Jacobs and Murphy JJ concurred on this point.

33 Note 30 *supra* at 284, per Gaudron J

34 Note 30 *supra* at 283, per Brennan, Deane and Toohey JJ.

35 Note 30 *supra* at 263, per Mason CJ, Dawson and McHugh JJ.

36 Note 30 *supra* at 283, per Brennan, Deane and Toohey JJ.

37 *Ibid*

38 (1965) 114 CLR 226

39 *Ibid* at 242, per Barwick CJ See *Teori Tau v Commonwealth* (1969) 119 CLR 564 at 570; *Northern Land Council v Commonwealth* (1986) 161 CLR 1 at 6; *Kruger v Commonwealth* (Unreported, High Court of Australia, Dawson, Gaudron, McHugh and Gummow JJ, 31 July 1997); *Newcrest Mining (WA) Ltd v Commonwealth* (Unreported, High Court of Australia, Full Court, 14 August 1997)



Territory legislation by the method achieved by the *Andrews Act*, that is, by repealing the *RTI Act* by name.

Alternatively, the Commonwealth Parliament could override Territory legislation in the same way that it can override State legislation, that is, by enacting a law that is inconsistent with that legislation. This would be the appropriate method of overriding the *RTI Act* if a national approach to euthanasia was to be implemented, as the Commonwealth is unable to legislate to withdraw power from the State legislatures in the same way that it can amend the *Self-Government Acts*.<sup>40</sup> State laws that are “inconsistent” with Commonwealth laws are rendered “invalid” under s 109 of the Constitution.<sup>41</sup> Thus, for example, the *Human Rights (Sexual Conduct) Act 1994 (Cth)* was effective<sup>42</sup> in overriding Tasmanian criminal laws that made consensual male homosexual sex a crime<sup>43</sup> by providing that:

Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.<sup>44</sup>

Commonwealth law can be similarly effective in rendering inconsistent Territory laws invalid even if the Act does not so expressly provide. In the case of the Australian Capital Territory, s 28 of the *Australian Capital Territory (Self-Government) Act 1988 (Cth)* has a similar effect to s 109 as between Federal and Australian Capital Territory legislation. Northern Territory legislation may also be invalid for inconsistency with Commonwealth legislation despite the *Self-Government Act* of that Territory being silent on the issue. In *Attorney-General (NT) v Minister for Aboriginal Affairs*,<sup>45</sup> Lockhart J stated:

It is beyond the power of the Northern Territory of Australia to make laws repugnant to or inconsistent with laws of the Commonwealth or to exercise powers conferred by Northern Territory laws in a manner inconsistent with, or repugnant to laws of the Commonwealth. It is not a question of inconsistency between the two

---

40 The Commonwealth cannot pass a law “aimed at preventing or controlling state legislative action rather than dealing with a subject matter assigned to the Commonwealth Parliament”. *Botany Municipal Council v Federal Airports Corporation (Third Runway Case)* (1992) 175 CLR 453 at 464-5, per the Court. See *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84 at 120, per Dixon J. *Western Australia v Commonwealth (Native Title Case)* (1995) 183 CLR 373 at 464-8, per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

41 It is clear that “invalid” in s 109 means in effect “inoperative” and not ultra vires. See *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at 573, per Latham CJ.

42 The challenge brought in the High Court in *Croome v Tasmania* (Matter No H004 of 1995) prevailed after the point was conceded by Tasmania. Tasmania had earlier lost on the preliminary question of whether the challenge gave rise to a “matter” under s 76 of the Constitution and s 30 of the *Judiciary Act 1903 (Cth)* that could be judicially determined by the High Court (*Croome v Tasmania* (1997) 142 ALR 397).

43 *Criminal Code Act 1924 (Tas)*, ss 122 and 123. These provisions have now been repealed. See *Criminal Code Amendment Act 1977 (Tas)*, ss 4, 5.

44 *Human Rights (Sexual Conduct) Act 1994 (Cth)*, s 4(1)

45 (1989) 90 ALR 59

sets of laws which may otherwise be valid, rather it is a question going to the competency of the subordinate legislature to enact laws or to cause laws to operate in a manner inconsistent with or repugnant to laws of the paramount legislature.<sup>46</sup>

(iii) *Convention and Section 122*

Constitutional conventions are the “unwritten maxims of the Constitution”<sup>47</sup> accepted with varying strength as obligatory by those people involved in the workings of the Constitution.<sup>48</sup> It might be argued that the power of the Commonwealth Parliament under s 122 is limited by a convention related to the self-government of the Territories. This convention might be that, having granted self-government to a Territory, the Commonwealth Parliament will not seek to derogate from that grant by revoking or interfering with the legislative power of the Territory. Such a convention could not impose a legally enforceable limit on the exercise of the Commonwealth Parliament’s power. As Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ of the Canadian Supreme Court stated in *Re Constitution of Canada*,<sup>49</sup> “In contradistinction to the laws of the Constitution, they are not enforced by the Courts ... unlike common-law rules, conventions are not judge-made rules”.<sup>50</sup> Dicey saw constitutional conventions as being:

conventions, understandings, habits, or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the courts.<sup>51</sup>

Accordingly, instead of acting as a legal restriction, conventions, including any possible convention concerning territorial self-government, would merely be (or constitute) an ethical constraint on the exercise of power under s 122. The efficacy of any such convention would depend upon political rather than legal considerations, and, as Cranston has suggested, conventions “wither in the inhospitable environment of Australian politics”.<sup>52</sup>

There are at least three arguments for the existence of a convention that the Commonwealth, having granted self-government to a Territory, should not seek to derogate from that power.<sup>53</sup> The first and most persuasive argument is that the convention is an intrinsic part of the Westminster system of government. This is

46 *Ibid* at 75. See *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* (1929) 42 CLR 582 at 588, per Dixon J.

47 JS Mill, *Utilitarianism, Liberty, Representative Government*, JM Dent & Sons (1972) p 228

48 O Hood Phillips, *Constitutional and Administrative Law*, Sweet & Maxwell (5th ed, 1973) p 77

49 (1982) 125 DLR (3d) 1.

50 *Ibid* at 84. See *ibid* at 111, per Laskin CJC, Estey and McIntyre JJ. Nevertheless, constitutional conventions can be influential in shaping the law. See, for example, *Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd* (1958) 100 CLR 597 at 612, per Dixon CJ. See also C Sampford, “Recognise and Declare: An Australian Experiment in Codifying Constitutional Conventions” (1987) 7 *Oxford Journal of Legal Studies* 369

51 AV Dicey, *An Introduction to the Study of the Law of the Constitution*, MacMillan (10th ed, 1962) p 24. Cf I Jennings, *The Law and the Constitution*, University of London Press (5th ed, 1959) p 74.

52 R Cranston, *Law, Government and Public Policy*, Oxford University Press (1987) p 97.

53 Northern Territory Government, *Submission No 3345 to the Senate Legal and Constitutional Legislation Committee on the Euthanasia Laws Bill 1996*, 12 December 1996

supported by the way that the British Parliament dealt with its colonies, including Australia, once they had been granted self-government. For example, the power of the Queen to disallow laws of the Commonwealth Parliament under s 59 of the Constitution has never been used. Nor was the power of the British Parliament to legislate to impose its will on the Commonwealth or the States applied before that power was removed by the *Statute of Westminster Adoption Act* 1942 (Cth) and the *Australia Acts* 1986.<sup>54</sup> Second, the convention might be supported by the fact that the Commonwealth Parliament has not previously legislated to remove a subject matter from the grant of self-government to the Northern Territory since that grant was made in 1978.<sup>55</sup> Third, it could be argued that the convention is necessary to preserve certainty in relation to the laws passed by Territory legislatures.

The common thread in each of these arguments is that the integrity of the democratic system established in the Territories requires that Commonwealth not undermine the power of self-government once given. Indeed, it is the basic object of constitutional conventions that effect should be given to the desires of a majority of the people of a political unit.<sup>56</sup> Thus, to find a convention that the Commonwealth, having granted self-government to a Territory, should not seek to derogate from that power is merely to respect the political sovereignty of Territorians within their own boundaries.

Even if a convention does exist, it is only of political or ethical weight. It has been argued that there are circumstances in which such a convention should not be observed. The most detailed description of these circumstances has been articulated by Frank Brennan, who stated that the Commonwealth should override a Territory law:

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.<sup>57</sup>

It is arguable that only two of these circumstances have been met in relation to the *RTI Act*. While the Act is unique, the state of the law in the Netherlands and Oregon does not make it a grave departure from the law "in all equivalent countries". In addition, the education program established for Aborigines in the Northern Territory may indicate that sufficient consideration had been given to those citizens.

The *Andrews Act* clearly derogates from the grant of self-government to the Northern Territory, the Australian Capital Territory and Norfolk Island. It seems arguable that in doing so the Commonwealth breached a convention that, having granted self-government to a Territory, it should not seek to derogate from that

---

54 See *Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd*, note 50 *supra* at 612

55 Note 53 *supra*

56 Note 51 *supra* p 429

57 F Brennan, *Submission No 7399 to the Senate Legal and Constitutional Legislation Committee on the Euthanasia Laws Bill 1996*, 10 December 1996 at 11.

power. This may make the *Andrews Act* a bad law, but it does not make it unconstitutional.

## B. Discrimination

It might be argued that the *Andrews Act* is invalid for singling out the territories. There are two bases for such an argument. The first is s 117 of the Constitution, which prohibits discrimination on the basis of State residence. The second is the constitutional right to equality found by Deane and Toohey JJ in *Leeth v Commonwealth*.<sup>58</sup> It is also important to consider the likely application of the *Andrews Act* in the event of the Northern Territory achieving statehood.

### (i) Section 117

Section 117 of the Constitution states:

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

The *Andrews Act* subjects residents of the Northern Territory, the Australian Capital Territory and Norfolk Island to a more limited form of self-government than that available to the residents of the States. This could amount to a “disability” under s 117. However, such a disability is arguably contemplated by s 122 of the Constitution, which is based on the notion that the Commonwealth has leeway in granting the Territories self-government and/or representation in the Federal Parliament. It is thus not clear that the *Andrews Act* imposes a “disability or discrimination” that would come within the terms of s 117.

There are two further problems with seeking to invoke s 117. First, s 117 only applies to a person “resident in any State” and it is thus not obvious that it could apply to a resident of a Territory. Secondly, even if the Territories could be considered States for the purposes of s 117, the disability or discrimination that Territorians might suffer occurs within the Territory, and not “in any other State”.

Some support for the proposition that Territories are States for the purposes of s 117 can be gained from *Capital Duplicators (No 1)*.<sup>59</sup> In deciding that Territories, and not only States, are excluded from imposing excise duties under s 90, Brennan, Deane and Toohey JJ relied on the fact that one of the objectives of federation as expressed in s 90 was to create a “free trade area” over the Commonwealth.<sup>60</sup> They found that the Territories were to be treated in the same manner as the States for the purposes of s 90 despite accepting that, historically, “exclusive” in s 90 meant “exclusive of State Parliaments”.<sup>61</sup> In reaching this conclusion, Brennan, Deane and Toohey JJ gave weight to the fact that, at Federation, the Northern Territory and Australian Capital Territory were actually

58 (1992) 174 CLR 455

59 Note 30 *supra*.

60 Note 30 *supra* at 276

61 *Ibid* at 277. See *ibid* at 279 “If s 122 authorized the creation of a legislature for an internal territory with the powers referred to in s 90, it would be a Trojan horse available to destroy a central objective of the federal compact and to defeat the express requirements of s 51(iii)”

parts of States. Their Honours held that the free trade area, to which s 90 contributed, was established “for the protection of the people of the Commonwealth, including those who resided in an area of a State which was subsequently to become an internal Territory”.<sup>62</sup>

This reasoning affords some possibility that the High Court might consider the term “State” in s 117 to include the Territories. The argument is strengthened in the case of the Northern Territory because at the time of Federation the Northern Territory was part of the State of South Australia. Indeed, s 6 of the *Commonwealth of Australia Constitution Act* 1900 (63 and 64 Vict, Ch 12), the Act of the British Parliament that established the Commonwealth Constitution, defines “The States” to include “South Australia, including the northern territory of South Australia”. In *Street v Queensland Bar Association*,<sup>63</sup> Mason CJ said that the purpose of s 117 was “to enhance national unity and a real sense of national identity”.<sup>64</sup> This purpose is thwarted if s 117 protects State residents, but not Territorians, from a disability or discrimination on the basis of their residence. In addition, it can be asserted that, like the free trade area established by s 90, the freedom created by s 117 was intended to be for the benefit of all the people of the Commonwealth.

There is an important textual difference between ss 90 and 117 that would tell against counting the Territories as a “State” under s 117. While s 90 does not specifically refer to the States, s 117 is precise in its language in limiting its scope to the States. For this reason, it is unlikely that the High Court would accept that s 117 is able to protect Territorians. The text of s 117 is a barrier to any such conclusion. This was the result suggested by Higgins J in *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe*.<sup>65</sup> Similarly, in answers provided by the Solicitor-General of the Northern Territory to the Senate Legal and Constitutional Legislation Committee, the idea that s 117 might protect the Northern Territory as a consequence of s 6 of the *Commonwealth of Australia Constitution Act* was described as being “clearly wrong”.<sup>66</sup>

Even if the Territories were considered to be States under s 117, there remains the insurmountable difficulty that the disability created by the *Andrews Act* is suffered by Territorians in their Territory of residence and not outside of it as s 117 requires. It is clear that if, for example, Victoria subjected residents of Victoria to a disability or discrimination, s 117 would not be breached. It thus does not seem arguable that Territorians would be subject to a disability as a result of the *Andrews Act* “in any other State”.

---

62 *Ibid* at 279.

63 (1989) 168 CLR 461.

64 *Ibid* at 485, per Mason CJ

65 (1922) 31 CLR 290 at 330

66 Northern Territory Government, *Supplementary Information to the Senate Legal and Constitutional Legislation Committee*, 11 February 1997 at 4. Cf *Ex parte Veltmeyer* [1989] 1 Qd R 462 at 475-6, per Sheperdson J

*(ii) Constitutional Equality*

It might be argued that the *Andrews Act* is invalid because it breaches an implied constitutional right of equality under the law. Such a right was formulated by Deane and Toohey JJ in *Leeth v Commonwealth*.<sup>67</sup> They stated of the doctrine:

It has two distinct but related aspects. The first is the subjection of all persons to the law: "every man, whatever be his rank or condition, is subject to the ordinary law ... and amenable to the jurisdiction of the ordinary tribunals". The second involves the underlying or inherent theoretical equality of all persons under the law and before the courts.<sup>68</sup>

They went on to state that "the doctrine of legal equality is not infringed by a law which discriminates between people on grounds which are reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment".<sup>69</sup> Justices Deane and Toohey gained some support from Brennan and Gaudron JJ, although on different bases. The idea of a constitutional right of legal equality was rejected by Mason CJ, Dawson and McHugh JJ. Ultimately, the issue of whether the Constitution contains such an implication was left unresolved.

Even if a right of legal equality does exist, and recent decisions suggest that the Court is now very unlikely to find this,<sup>70</sup> such a right would be unlikely to invalidate the *Andrews Act*. The Act certainly singles out the Territories, and the people living in those areas, and treats them differently from the States. However, the Constitution provides the Commonwealth with a plenary power in s 122 to do just this. Section 122 is predicated on the notion that the Commonwealth has a special relationship with and responsibility for the Territories that must necessarily involve the Commonwealth passing special legislation for them. On the analysis of Deane and Toohey JJ, the *Andrews Act* would be valid because it discriminates on a "rational and relevant basis".<sup>71</sup>

*(iii) Northern Territory Statehood*

The Northern Territory is the closest of the Australian Territories to achieving statehood.<sup>72</sup> This raises the question of whether the *Andrews Act* will continue to operate if this occurs.<sup>73</sup> In its present form the *Andrews Act* would not be

67 Note 58 *supra*. See generally C Saunders, "Concepts of Equality in the Australian Constitution" in G Lindell (ed), *Future Directions in Australian Constitutional Law*, Federation Press (1994) p 209, G Winterton, "The Separation of Judicial Power as an Implied Bill of Rights" in G Lindell (ed), *Future Directions in Australian Constitutional Law* Federation Press (1994) p 185.

68 Note 58 *supra* at 485-6

69 Note 58 *supra* at 488.

70 Note 39 *supra*. See also D Rose, "Judicial Reasonings and Responsibilities in Constitutional Cases" (1994) 20 *Monash University Law Review* 195.

71 Note 58 *supra* at 488.

72 See Sessional Committee on Constitutional Development, *Final Draft Constitution for the Northern Territory* (Legislative Assembly of the Northern Territory, August 1996); P Loveday and P McNab (eds), *Australia's Seventh State*, Law Society of the Northern Territory and North Australia Research Unit (1988).

73 See Northern Territory Government, *Supplementary Information to the Senate Legal and Constitutional Legislation Committee* (11 February 1997).

likely to apply to the Northern Territory should it become a State. The Act limits the powers of the Territory's Legislative Assembly under the *Northern Territory (Self-Government) Act* and if it became a State it is likely that (1) the Territory Assembly would be replaced by a State Parliament, and (2) the powers of this new Parliament would be vested by a new State Constitution.<sup>74</sup> Accordingly, if it became a State, the Northern Territory would no longer be bound by the limitation as to euthanasia unless the Commonwealth were to take further steps.

The Northern Territory may become a State as a result of Commonwealth legislation under s 121 of the Constitution. That section provides that the Commonwealth Parliament "may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit". Under s 121 the Commonwealth could replicate the limitation imposed by the *Andrews Act* upon the legislative power of the new State. The new State might be admitted or established on the condition that its Constitution provides that the new legislature does not have the power to legislate to permit the practice of euthanasia.

It is arguable that s 121 would not support such a limitation being placed upon the new State. In a series of decisions beginning with *Melbourne Corporation v Commonwealth*,<sup>75</sup> the High Court has found that it can be implied from the Constitution that the Commonwealth cannot enact a law to (1) discriminate against a State, or (2) inhibit or impair the continued existence or capacity to function of a State. In *Queensland Electricity Commission v Commonwealth*<sup>76</sup> the first limb was applied to strike down federal legislation that singled out Queensland for a special burden by subjecting a dispute to federal arbitration that involved a Queensland agency as one of the parties. A similar argument might be put, should s 121 be used to place a special restriction upon a new State formed out of the Northern Territory. However, such an argument is unlikely to succeed.<sup>77</sup> Section 121 contemplates that the Commonwealth can make the entry of a new State into the Commonwealth subject to "terms and conditions ... as it thinks fit". It would frustrate this clause if it were subject to a requirement that new States not be singled out or treated differently from any other State. Moreover, the Constitution is based upon the fact that new States need not be

---

74 See note 23 *supra* at 21-2.

75 (1947) 74 CLR 31. See *Victoria v Commonwealth (Payroll Tax Case)* (1971) 122 CLR 353, *Re Australian Education Union. Ex parte Victoria* (1995) 184 CLR 188, *Victoria v Commonwealth (Industrial Relations Case)* (1996) 138 ALR 129.

76 (1985) 159 CLR 192.

77 This conclusion is consistent with findings in other cases that s 122 is not subject to certain constitutional limitations. See the cases listed in *Capital Duplicators Pty Ltd*, note 30 *supra* at 287-8, per Gaudron J. See also C Horan, "Section 122 of the Constitution A 'Disparate and Non-Federal' Power?" (1997) 25 *Federal Law Review* 97. Cf the developments with respect to Chapter III of the Constitution in *Kruger v Commonwealth*, note 39 *supra*; and as to s 51(xxxi) of the Constitution in *Newcrest Mining (WA) Ltd v Commonwealth*, note 39 *supra*.

given equality of treatment with the Original States.<sup>78</sup> For example, while s 24 requires that each of the Original States have at least five members of the House of Representatives, new States could have less than this number. Similarly, under s 7, the Senate representation of the Original States must be equal, while new States can be given less (or greater) representation in that House.<sup>79</sup>

While the Northern Territory and Norfolk Island might escape the effects of the *Andrews Act* by becoming States under s 121, it would appear that this option is not open to the Australian Capital Territory. There are considerable doubts as to whether that Territory, as currently constituted, could ever progress to Statehood. While Mason CJ, Dawson and McHugh JJ left this question open in *Capital Duplicators (No 1)*,<sup>80</sup> Brennan, Deane and Toohey JJ stated: “In our view, the Australian Capital Territory, unlike the Northern Territory, cannot become a new State. Section 52(i) precludes that possibility”.<sup>81</sup> Section 52(i) of the Constitution vests the power to legislate for the “seat of government of the Commonwealth” exclusively in the Commonwealth Parliament.

### C. A National Euthanasia Law?

In the House of Representatives and the Senate, motions were put that consideration of the *Andrews Bill* cease and an alternative Bill embodying a national approach to euthanasia be prepared and presented to the Parliament. In the Lower House, Ian Sinclair MP put this motion in arguing for a “uniform, national approach to the issue”.<sup>82</sup> Such an approach might have led to a law that made it an offence to practice or assist active voluntary euthanasia. This law would, like the *Human Rights (Sexual Conduct) Act* 1994 (Cth) in regard to sexual privacy, have had the effect of overriding inconsistent Territory and State laws. These motions arose out of concern over the discriminatory nature of the *Andrews Bill* in that it related only to the legislative powers of the Territories and not to the States. The motions were defeated. One reason for this was uncertainty over whether the Commonwealth possesses the power to enact such a law. This concern was well-founded.

The Commonwealth does not have a power that allows it to legislate over the subject matter of health, or, more specifically, euthanasia. There are three main heads of power under which the Commonwealth might seek to make such a law: the external affairs power, the corporations power and the races power. Other powers are potentially relevant. For example, the taxation power in s 51(ii) might be used to impose a tax on doctors assisting their patients to die. Also the Commonwealth might under its appropriations power in s 81 of the Constitution deny Medicare benefits to, and perhaps even withdraw the Medicare provider

---

78 “Original States” is defined in s 6 of the *Commonwealth of Australia Constitution Act* 1900 (63 and 64 Vict, ch 12) to mean “such States as are parts of the Commonwealth at its establishment”.

79 See J Quick and R Garran, *The Annotated Constitution of the Australian Commonwealth*, Legal Books (1901 ed, 1995) p 670.

80 Note 30 *supra* at 266

81 Note 30 *supra* at 273

82 *Hansard*, House of Representatives, No 16, 1996, p 7976. See also *Hansard*, Senate, No 17 1996, p 7256, per Senator Bob Collins



number of, doctors involved in active voluntary euthanasia. A final alternative is to extend Commonwealth power to cover the subject of euthanasia by holding a referendum under s 128 of the Constitution. To be successful, such a referendum must be passed by both houses of the Federal Parliament, or by one House twice, and then by a majority of the people and by a majority of the people in a majority of the States: that is, in at least four of the six States. Only eight out of 42 referendums under s 128 have been successfully passed.<sup>83</sup>

(i) *Section 51(xxix) - The External Affairs Power*

In *Commonwealth v Tasmania (Tasmanian Dam Case)*<sup>84</sup> and in subsequent decisions,<sup>85</sup> the High Court held that the Commonwealth's "external affairs" power enables it to pass legislation to implement obligations that it has incurred by becoming a party to international instruments such as treaties and covenants. It may do so to the extent that its laws are "capable of being reasonably considered to be appropriate and adapted" to meeting the treaty obligation.<sup>86</sup> If there is not sufficient conformity, or proportionality, between the law and the obligation, the law will be invalid. Parliament need not meet all of its obligations in a treaty, nor need it meet any particular obligation fully or exactly.<sup>87</sup> The Court has shown flexibility in leaving the scope and means of implementation to Parliament.

Under article 6(1) of the International Covenant on Civil and Political Rights 1966, the Commonwealth has incurred an obligation<sup>88</sup> to respect and give effect to the following: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".<sup>89</sup> This provision is a dubious basis for enacting a national code on active voluntary euthanasia. It is not clear whether a "right to life" is consistent with or in opposition to such a practice and thus whether article 6(1) might support a law outlawing (or even legalising) euthanasia. According to evidence given by the Attorney-General's Department to the Senate Legal and Constitutional Legislation Committee: "It is clear from the travaux preparatoires, the preparatory works, that it [article 6] was not intended at that time to cover euthanasia. It was regarded as too hard as issue for the international community to deal with".<sup>90</sup> Although other provisions of the International Covenant, such as articles 17 (right to privacy) and 18 (freedom of thought, conscience and religion), might also be put forward as a basis for federal legislation prohibiting

---

83 See T Blackshield, G Williams and B Fitzgerald, *Australian Constitutional Law and Theory Commentary and Materials*, Federation Press (1996) ch 25

84 (1983) 158 CLR 1.

85 *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Commonwealth (Tropical Rainforests Case)* (1989) 167 CLR 232; *Victoria v Commonwealth (Industrial Relations Case)* (1996) 138 ALR 129.

86 Note 84 *supra* at 259, per Deane J.

87 *Ibid* at 268, per Deane J; *Victoria v Commonwealth*, note 85 *supra* at 147, per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

88 International Covenant on Civil and Political Rights 1966, art 2.

89 See G Zdenkowski, note 5 *supra*

90 Note 23 *supra* at 23

the practice of euthanasia, they are also unlikely to confer the necessary power given the uncertain status of euthanasia in international law.

(ii) *Section 51(xx) - The Corporations Power*

Under the corporations power the Commonwealth is able to regulate certain activities of foreign, trading and financial corporations.<sup>91</sup> This power could be applied by the Commonwealth to prohibit such corporations from selling drugs to doctors who use those drugs to practice euthanasia. It may also empower the Commonwealth to prohibit corporations from allowing doctors in its employ to practice euthanasia in the course of their employment.

(iii) *Section 51(xxvi) - The Races Power*

The races power allows the Commonwealth Parliament to make laws with respect to “the people of any race for whom it is deemed necessary to make special laws”. One of the central concerns with the *RTI Act* was the argument that it would further alienate indigenous people from health care providers and services.<sup>92</sup> It may be possible under the races power to legislate that it is an offence to practice euthanasia on indigenous people. Alternatively, there have been suggestions that the races power can only be used for the benefit or advancement of Aboriginal people.<sup>93</sup> If this were the case, it might be argued that such a law was not valid under the races power because it denies indigenous people access to a right available to other Australians.

#### IV. CONCLUSION

Analysis of euthanasia laws in Australia through the lens of Australian constitutional law, reveals the following findings. First, the *Andrews Act* is a bad law in that it discriminates against the Territories and weakens self-government in those jurisdictions. In terms of its effect on democracy in the Territories, it may have the most serious long term impact on the Australian Capital Territory, which, unlike the Northern Territory, is apparently unable to escape the effects of the Act by becoming a State. Second, any attempt to challenge the constitutionality of the *Andrews Act* in the High Court on constitutional grounds is likely to fail. The *Andrews Act* is effective in both directly repealing the *RTI Act* and in removing the power of the Northern Territory, the Australian Capital Territory and Norfolk Island to legislate for active voluntary euthanasia. This is validly achieved under the Commonwealth’s power over the Territories in s 122 of the Constitution. Third, should the

---

91 Note 84 *supra*

92 Note 23 *supra* ch 5

93 See, for example, *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 242, per Murphy J, *Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 56, per Gaudron J *Kruger v Commonwealth*, note 23 *supra*, per Gaudron J See also AR Blackshield, “The Implied Freedom of Communication” in G Lindell (ed), *Future Directions in Australian Constitutional Law*, Federation Press (1994) pp 245-51.

Northern Territory become a State the *Andrews Act* is likely to cease to apply. Any similar restriction on the new State could be made under s 121 as a condition of the Territory being admitted to Statehood. Fourth, while the Commonwealth possesses various powers to deal with aspects of euthanasia, it does not possess the power to pass a national law directly outlawing the practice of active voluntary euthanasia.

These conclusions reveal structural flaws in Australia's federal system. The degree of autonomy granted by the Constitution to the States and recognised by the High Court has no correlation to the Territories. Yet it is not clear why this should be so today. The Territories, like the States, are self-governing, with the people of the Territories, like the States, participating in a system of representative government. However, the *Andrews Act* shows that democracy is a weaker institution in the Territories and that Territorians are less able to confidently shape their own future. Moreover, it is one thing to impose a standard Australia-wide, it is another to impose it on one set of self-governing people but not upon others within the same nation. It gives the impression that Territorians are somehow second-class citizens. Perhaps the lesson is that the constitutional distinction maintained between the States and those Territories that have been granted self-government is increasingly inappropriate.<sup>94</sup> For the Northern Territory, the sooner it is able to make the transition to Statehood, and thus that the people of that area are able to access the same rights as their State counterparts, the better.

---

<sup>94</sup> It is important that members of the High Court are also aware of the current inappropriateness of this distinction. See *Kruger v Commonwealth*, note 39 *supra*; *Newcrest Mining (WA) Ltd v Commonwealth*, note 39 *supra*.